SOCIO-LEGAL IMPACT OF THE INDIAN CIVIL RIGHTS ACT: DEVELOPMENTAL AND DISJUNCTIVE INCORPORATION OF INDIGENOUS PEOPLES UNDER COLOR OF LAW

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ABSTRACT

SOCIO-LEGAL IMPACT OF THE INDIAN CIVIL RIGHTS ACT:
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Against a backdrop of the historical incorporation of indigenous peoples into Western development, including the socio-historical contours of international law and federal Indian law and policy, an analysis of the 1968 Indian Civil Rights Act (ICRA) is presented. Through analysis of historical materials and federal ICRA court cases for the period 1968-1978, the socio-legal impact of the Act is proposed.

The case analysis addresses several themes of socio-legal interdependence which bear upon the historical and contemporary relations between indigenous peoples, and tribal and extra-tribal social matrices:

1) The accelerated development of European ethnic colonial peoples, and the concomitant underdevelopment of indigenous peoples in the territorial United States is aptly chronicled in the elaboration of the legal system;

2) The historical incorporation of indigenous peoples into U.S. development has subverted a broad spectrum of interests, values and behaviors adjudged inconsistent with national development strategies;

3) The elaboration and impact of imposed federal Indian law and policy is the delegitimation of forms of indigenous authority and control (sovereignty and jurisdiction) which threaten to encumber the preferred status quo or trajectory of societal development;

4) The proliferation of externally sanctioned law and legal institutions undermines tribal self-governance by imposing exogenous

prescriptions of social order that create prevalent disorder in tribal life and maintain the marginal socio-legal status of indigenous peoples in national development;

5) The inequality of indigenous peoples in U.S. society is a manifestation of a system of law, where the interests of indigenous peoples in aspects of their own survival (physical, cultural, etc.) extend beyond the parameters of sanctioned conduct and goals; and

6) The ICRA, pursuing a general theme of federal incursion into the affairs of tribal self-governance, stipulates the diminuations in the exercise of tribal sovereignty and jurisdiction, and regulates a wide arc of tribal and extra-tribal relations.

The emancipatory and repressive impacts of the ICRA are causally linked: within a logic of societal development and underdevelopment, the Act protects some interests at the expense of other interests, and sanctions and regulates the opportunity structure within which human interdependence takes its course.

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In spite of these many and outstanding contributions, the limitations of the final product are my responsibility alone.

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INTRODUCTION

The following analysis is first and foremost an inquiry in contemporary institutional performance of both Native American tribes and federal government through their respective instrumentalities. An episode of federal Indian law, the 1968 Indian Civil Rights Act, becomes the focus of attention and its socio-legal impact in the tribal setting is proposed.

The selection of civil rights as a subject of investigation is not fortuitous. In general, civil rights legislation is felt to be exempt from evaluation. This line of reasoning is predicated upon an assumption that civil rights evolve and are made explicit as a society is enlightened to the sanctity of its individual members, and that any standard evaluative criteria pale with respect to the assumed immutable character of these rights. Such a hands-off posture has unfortunate ramifications, not the least of which is the relative absence of attempts to scrutinize the impact of civil rights legislation. The present study, no matter how tentatively its proceeds, is not encumbered by the supposed sanctity of civil rights. Simply put, civil rights are mechanisms of sanctioned regulation. That they have come to be reified and held beyond reproach is the more reason to anchor their development to historical, concrete manipulation. Within the arena of federal Indian law, itself a complicated web of rights and relations spun from the clash of

European ethnic groups and indigenous populations, the imposition of federal civil rights legislation highlights their blatant regulatory function.

Drawing principally from federal court cases which developed during the initial decade of adjudication of the 1968 Indian Civil Rights Act, the examination of institutional performance is designed to indicate, in part, the dimensions and terms of contemporary legal integration of indigenous peoples in the United States. The analysis is situated with ever-larger concentric spheres of interest and application:

1) the nature of tribal sovereignty and jurisdiction in contemporary U. S. society;

2) the socio-legal incorporation of indigenous groups into modern dominant societies as well as their status in international law;

3) the relationship between "traditional" and "modern" systems of social order and control; and

4) the place of law -- its development and function -- within contemporary social structural and cultural formations.

The present study proposes to illuminate a portion of a larger phenomenon, specifically, the dynamic structuring and restructuring of <u>interests</u> and their attendant ideologies and manifestations in the development and nurturing of systems of domination and control. These issues are subsumed within a macroscopic tradition in the sociology of law which speaks to the relationship of law and society.

From the onset, two perplexing limitations of the research should be noted in order to temper the unintentioned rigidity or certainty of the analysis. Both are recurrent themes in the text. First, the use of "tribe" as a generic label for Indian communities

is impotent, capturing neither the objective nor subjective diversity of Indian peoples. The designation, nonetheless, is in wide usage to suggest the distinctiveness of "tribe" from an equally ambiguous entity, the American "mainstream." Despite the lack of empirical bases and the effort here to establish them, it is proposed that if indicators or characteristics of social, economic and political institutions are considered alone, there is more variability between Indian tribes in the territorial United States than exists between the modal tribal structure and the modal structure of the dominant society. A task of this study is to substantiate the significance of the variability among Indian tribes when federal law is universally imposed.

A second caveat concerns the mode of inquiry. Whether case files of federal litigation, a primary source of data for a portion of the analysis, are even approximate representations of the substance of negotiating conflict, is a completely open question. This issue will be evident in the text, but until other avenues of inquiry are explored -- such as ethnographic strategies for assessing institutional performance -- a judgment of the fitness of methodological technique is premature. The present analysis is preliminary, and cannot draw from the security of conventional perspectives. The thesis purports to assess socio-legal impact, drawing from representations made in case files as to the nature of conflicting claims to justice, <u>but does not turn on points of law</u> (as is the conventional wisdom), but rather seeks to uncover the so-called tangential issues to give substance to fluid human interdependence and institutional animation.

CHAPTER ONE

THEMATIC PROSPECTUS: THE RANGE AND METHOD OF INQUIRY

A powerful rationale for passage of the 1968 Indian Civil Rights Act was the supposed absence of a full range of civil and human rights to individual Native Americans in tribal settings. It was alleged that these rights, the birthrights of U. S. citizens, had been selectively denied by tribal governments to tribal individuals. As the Indian Civil Rights Act is assessed, however, the stated purposes become largely subverted: despite a prescription to order conflicting claims to justice, disparate conceptualizations of "social good" and "social harmony" emerge as the fundamental bases of conflict. Further, as the terms of socio-legal integration become more explicit in litigation in federal courts, the Act assumes a regulatory character which is consistent with the body of federal Indian law.

Research Themes

An analysis of short and long term impacts of the Indian Civil Rights Act is attempted here to ferret out the dynamics of this legal development and its implications in the face of changing intranational racial and ethnic relations, the intersection of systems of social control, and evolving conceptions of sovereignty, jurisdiction, and civil and human rights. An understanding of the

broad function of law in society entails a rigorous inquiry into the substance, generation, and exposition of a constellation of complementary, competing, and conflicting interests within an arena of human interdependence. The present study, confined to a much more limited scale, attempts to underscore the impact of these same substantive components of interests on intersecting systems of order and control which typify both the historical and contemporary relationship between indigenous Native American tribes and the dominant society. In order to situate the analysis of the Indian Civil Rights Act within such larger domain concerns, six research themes are pursued:

1) the projection of interests in the legal system;
2) the salience of interests in the legal system;
3) the relation of interests and legitimate authority;
4) the relation of law to social order;
5) the relation of law to racial and ethnic inequality; and
6) the relation of civil rights to regulation.

These themes structure the agenda of inquiry. Each is considered in turn below within a generalized statement of research findings.

1) The Projection of Interests in the Legal System

A legal system, involving the complex of law making, law finding, sanction, and legitimation is not a neutral entity beyond the construction, control, and comprehension of social actors. It is precisely a product of human interaction, and embodies relations between socially-defined human aggregates on the basis of the

historical development of material conditions. Interests, the implicit or explicit specifications of preference which are articulated in the anticipated or executed avenues of social action,[1/] are diverse and variably salient within any particular legal system. The so-called structural inadequacies of a legal system are more correctly the projection of interests in a functioning legal system, a system adequate for some interests and less adequate for other interests. The motives of those who make or administer laws are but a single element of the range of interests which congeal at any one moment to constitute status quo.

2. The Salience of Interests in the Legal System

Within a framework of relative stability and continuity, a legal system rests upon a subset of possible orderings of human conduct, and actively attempts to preclude the ascension of competing or incompatible prescriptions of social order. The naked adage "order or disorder" obscures a fundamental feature of the rule of law, namely, that some interests are dominant and other interests are less dominant. Further, to suggest that the status quo must prevail because inherent disorder is the only alternative is to ignore a particularly dynamic requisite of the rule of law: a subset of interests in a legal system are buoyed at the expense and exclusion of other interests. Baldly stated, the range of human conduct in pursuit of some interests is sanctioned and prescribed, while other types of human conduct in pursuit of other interests are proscribed.

3. The Relation of Interests and Legitimate Authority

Definitions of legitimate and illegitimate forms of political authority are grounded in the concrete interests of particular social groups. The legitimacy of authority involves processes of legitimation whereby mechanisms for ensuring compliant behavior, for restricting the universe of possible human action (and its very definition) in order to prescribe human conduct and alternatives, and the like, are institutionalized to present a reasonable, natural, and functioning social environ. Other forms and manifestations of authority, in as much as their existence threatens the status quo, are deemed illegitimate. The distribution of power between competing authorities, as between competing interests, is determinant.

4. The Relation of Law to Social Order

A penchant of the rule of law is the production of law in its broadest sense, including rules, regulations, rights, the administration of coercion and the particulate aspects of a legal system, including law makers and law finders (e.g., lawyers). Another penchant of the rule of law is the assumptive assertion that more law creates better order in society. However, the proliferation of laws and legal institutions is neither the necessary nor sufficient test that order prevails. On the contrary, the rule of law is symptomatic of prevalent disorder. Intensification of law making and law finding generally consolidates narrow interests, mitigates against or frustrates the salience of competing interests, creates or exacerbates cleavages, and the like.

5. The Relation of Law to Racial and Ethnic Inequality

The presence of racial and ethnic inequality in a society which functions through a complex legal framework should not be dismissed as merely an aberrant social form, but rather understood as a manifestation of that system of law. The specific terms of incorporation into the mainstream of social, economic, political and cultural life are fashioned from prevalent definitions of social good, social harmony, and the prescribed and proscribed behaviors consistent with functioning status quo. Racial and ethnic minority peoples,* who define their interests beyond the parameters of sanctioned conduct and goals, are at once removed from the arena of effective determination and execution of their interests. Historically, the incorporation of racial and ethnic minorities in all aspects of the development of those other groups whose interests have been in relative ascendancy has been assured and facilitated in the legal system. The ensuing inequality is endemic to such a system.

6. The Relation of Civil Rights to Regulation

The legislation of civil rights is delimited by the social system that generates discontent, struggle, and the eventual application of marginal change appropriate to dominant notions of social order and control: explicit and formalized statements of "rights" may actually curb previously enjoyed, though unformalized rights. Civil

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*who themselves represent a wide arc of interests, both compatible and conflicting

rights are not epiphenomenal to the regulation of human interdependence. In the larger view, civil rights are arbitrary to the extent they legislate the preferred boundaries of sanctioned human conduct.

Methodology

The task of the analysis is to critically dissect the configuration of interests related to the federal imposition of civil rights over tribal structures. The social form of these interests easily obscures social processes which make some interests more salient than other interests, despite nominal conferment of "rights" by interests in ascendency to competing interests in relative decline. To achieve an integrated statement of impact, the analysis is carefully woven through the research themes presented above.

It is suggested in Chapter Two that efforts of social science to investigate the broad relationship of law and society are traditional concerns. With respect to such a tradition, research on law by scholars in the United States has been somewhat retarded:

> . . .recent scholarship [of issues in law and social science] often seems stagnant, further documentation (or falsification) or a well-established (or generally discredited) hypothesis, one more entry in a sterile, and ultimately unresolved theoretical debate -- a by product of the demands of tenure-review committees rather than the expression of any real intellectual engagement. . .
>
> . . .we are both blessed and cursed with a proliferation of empirical research, the value of which is seriously impaired, if not lost altogether, because too little effort is expended on synthesis. . . (Abel, 1980)

The lack of synthetic consonance of this body of scholarship should not deter us here, however. A most basic endeavor of social scientists is to relate social phenomena within situational and institutional contexts uncovered through strategic methodologies molded from a selection of epistemological assumptions. The present study, a socio-legal impact analysis, is part and parcel of this tradition of inquiry.

Socio-Legal Impact

Impact assessments are as diverse as the range of human values which endorse a subset of outcomes as positive and others as negative. The rules for conducting impact analysis cannot avoid the tincture of preference, and the analysis here is no exception. From the onset it should be noted that "socio-legal impact" is a misnomer if it is construed as balanced assessment of the legal ramifications of the Indian Civil Rights Act and the social outcomes of enactment and adjudication. While divisions as artificial as "social" and "legal" are counterproductive from the macroscopic position advocated in Chapter Two, there remain relatively distinct methodological strategies which are better suited to various subsystems of social life. In this respect, the analysis is decidely skewed to a "legal" framework and its attendant epistemological and methodological character. A social impact assessment (in the narrow construction of the term) would entail more diverse and creative mechanisms of analysis in addition to, for example, a review of case law. None of the above is to suggest, however, that "legal impact" is either an

obvious or cogent concept. Often construed within economic approaches to law, legal impact analysis is generally not a social science of legislation. In very general terms, the economic approach to law proposes models (fashioned around a market paradigm) designed for predictive capacities, based upon quantifiable data and empirical analysis. The socio-legal impact analysis of the Indian Civil Rights Act is largely descriptive, and utilizes a broadly institutionalist perspective derivative of early analytical jurisprudence (Terry, 1884; Hohfeld, 1913, 1917), and the institutional economics of John Commons (1924, 1934), and more recent formulations such as Schmid (1972, 1978) and Samuels and Schmid (1981). The perspective is decidely historical and does not labor within a restricted sphere of facts (such as only those which are monetary, or immediately amenable to quantification, or direct). While the institutional approach shall receive further elaboration in Chapter Two, its intent is characterized as follows: an effort to understand specific legal/institutional phenomena through transactional, micro-level analysis of the component aspects -- their genesis and evolution -- of institutional development. As noted above, an institutional approach, and <u>any</u> framework, projects both purpose and rationale. Nonet (1966), with specific reference to a complimentary perspective, jurisprudential sociology, indicates an optimal trajectory against which the present study shall be measured (see Chapter Seven):

> . . .a social science of law that speaks to the problems, and is informed by the ideas of jurisprudence. . .a sociology that recognizes that continuities of analytical, descriptive and evaluative theory. . . which should contribute to formulating principles of institutional design, and guides for the diagnosis of institutional troubles.

Case Analysis

The core of data for the socio-legal impact analysis is legal doctrine, formulated and given expression in judicial opinions. It is assumed that the legal system (as a conduit to either resolve and accommodate conflict, or to engender and exacerbate conflict), through litigated controversy (case law), can reveal the ordering of human interdependencies, and further, the emergent configuration of interests and impacts. The institutional performance of the Indian Civil Rights Act will be guaged through case analysis of federal court case files for the period 1968-1978.

The notion of "case analysis" requires clarification. All of social science can be said to be comparative case analysis, in that our knowledge of any facet of the social system is derivate of what we portend to know of other facets of the system or structure. While it is unlikely or unmanageable that all manifestations of a phenomenon can be exhaustively studied, we attempt to extrapolate from one observation to another, and build a knowledge base accordingly. Hence, a set of circumstances that constitute a problem focus, in as much as they are felt to correspond or represent like elements in a comparable situation (within an acceptable degree of variance) are said to be a case.[2/] The concept of "case" within legal study is much more narrow, referring to the aggregation of facts upon which the court exercises jurisdiction and arbitrates disputes. The "case" may describe the collection of facts (case file), or the strategic presentation of facts according to the corpus of jurisprudence (case law). The social scientific and legal usages of case may be combined, such as they are when the present study is characterized as a "case within a case:"

1) it is a case study of socio-legal integration of indigenous peoples (the case refers to Native American tribes as a subset of indigenous peoples);

2) it is a case study of federal Indian Law (the case refers to the Indian Civil Rights Act as only one episode of federal Indian law from among many others that could demonstrate the terms of socio-legal integration); and

3) it utilizes a case system[3] (a case system refers to a method of studying the law through analysis of the body of jurisprudence, or judicial precedents based upon litigated controversy, or court cases).

Within social science, a tradition of seminal research so construed is emerging, including Llewellyn and Hoebels' (1941) exposition of the legal culture of the Great Plains Cheyenne, Hoebel's (1954) comparative analysis of primitive law in five societies, Gluckman's (1955, 1965) analysis of judicial process and jurisprudence among the Borotse of Northern Rhodesia, and Bohannan's (1957) treatise on adjudication in Tivland in Northern Nigeria. Recent work of this genre is appearing more frequently in specialized journals such as Law and Society Review, British Journal of Law and Society, International Journal for the Sociology of Law, Journal of Legal Pluralism, and the like.

With respect to its legal usage, the case system or case approach has recognized merit in the breadth of subject matter that cases yield. In addition, the manageable and consistent format of case files are positive inducements to their use. The limitations of case analysis are less often proposed. Any "statement of facts" must be interpreted to mean facts that adhere to a set of legal questions that "make the case." Regardless of whether principle litigants stipuate to "facts," a goodly portion of the social terrain can be obscured in narrowly constructed statements of fact situations assembled around

procedural, jurisdictional, etc. issues. Cases as "facts" are products of specific interests, not the least of which are those of lawyers and judges (cf. Medcalf, 1978). In other words, a shortcoming of analysis that depends largely on legal case files is that too much time is spent in courtrooms (figuratively), and too little time with litigants. These environs, it is suggested, are separate and their interface is contrived. A further constriction in the sphere of applicability of case files is that they are not representative of the majority of Native peoples in the United States who are denied federal recognition (i.e., they are not enrolled members of federally recognized tribes). The Indian Civil Rights Act applies only to federally recognized tribes, or to those contested matters involving the alleged jurisdiction of such tribes. The case analysis proceeds, encumbered by these and other limitations.

A Note on Data

In addition to the relatively micro case analysis (a component of a transactional, institutional approach -- see Chapter Six) a macro socio-historical context is proposed through historical documentary analysis in several areas. Action and research on behalf of indigenous populations by selected U.S. government agencies, and sponsored activities of the Organization of American States, the International Labour Organisation, and the United Nations is reviewed. An overview of tribal sovereignty and jurisdiction, including precedents in international law and the historical development of federal incursion into tribal affairs, is presented. Finally, the legislative history and enactment of the Indian Civil Rights Act is charted.

The study draws from several different types of data whose quality is uneven. The case data is unusual, in the sense that most case files (consisting of briefs, memoranda, motions, judgments, opinions, and the like) have been assembled in a central location at the National Indian Law Library of the Native American Rights Fund in Boulder, Colorado. Review of 100 federal court case files, some 700 items and 7300 pages representing litigation from eighteen states and involving forty-five tribes over a ten year period, would be unmanageable except for the existing depository. Some case files are not as complete as others, either because proceedings are continuing, or because items (briefs,etc.) are not included in the case file. While there exists the possibility of overlooking shielded or minor legal points of significance to the study because of incomplete case files, in most instances missing materials can be reconstructed from existing items of the file.

Two general limitations of the case files are obvious. First, there is only minimal transcript material of court proceedings. What transcripts were available are attached to file items as appendices. These bits and pieces provide very little insight to court proceedings. Second, it may well be that most disputes involving the Indian Civil Rights Act are settled in tribal courts. Federal court cases are used in this study, as there does not exist a depository for tribal court case files. As a sanctioned ordering of rights, a reasonable hypothesis is that the Indian Civil Rights Act has impact in tribal courts where litigants measure their odds -- and contest within these parameters -- against their perceptions of the Act's sanction in the federal courts. Beyond the courts entirely, the Act may have an impact on human

conduct where persons -- not litigants -- solve or avoid conflicts on the basis of these same perceptions. It would be difficult to maintain that it is only the sanction of the Indian Civil Rights Act (manifest in judicial decisions) which induces compliant conduct. The license given to federal courts, regardless of the accuracy of the perceived "license" (i.e., federal courts awarded themselves the license -- see Chapter Five), to intervene in tribal affairs may also regulate conduct. Such issues speak to the complexity of legal assessment generally, and specific limitations of utilizing federal court case files exclusively.

Documents produced by the sponsored activities of major international organs vary considerably. Materials of the Organization of American States and the International Labour Organisation are accessible, and though often lacking in substantive quality, they accurately reflect international efforts on behalf of indigneous peoples of their time. United Nations materials are far more problematic, particularly regarding the current "Study of the Problem of Discrimination Against Indigenous Peoples" reviewed in Chapter Four. Difficulties related to access to the data and debilitating deficiencies in information flow in some areas of United Nations research are chronic and a sizeable obstruction to research and dissemination. In general, however, most data have proved adequate to their intended utilization in the analysis. In many instances, these are not merely sets of representative data, but rather exhaust available information in specific areas.

Notes

1. This represents only a subset of interests. Implicit and explicit specifications of preference may never be acted upon, may be prevented from realization in a course of human action (through coercion, etc.), or may be misrepresented as a preference (e.g., false consciousness). Obviously, social action may also embody a second-best preference in the case where one's first preference is subverted, for whatever reason.

2. Other senses of "case" are applicable to social scientific inquiry. For example, the act of "casing" is suggestive of a type of ethnomethodology which Douglas (1976) chooses to call investigative social research. The case approach of social and cultural anthropology is fundamental to the discipline, and has since Boas commanded center stage in the ongoing epistemological and methodological controversies regarding its conceptualization and operationalization (relativism versus relationism/comparison; emic and etic approaches, etc.).

3. The case system was begun at Harvard in 1868-70 by Christopher C. Langdell as a method of studying the law. It is the most widely used method in legal education in the United States.

CHAPTER TWO

THE CONCOMITANTS OF IMPOSED LAW

The intent of this chapter is to propose the substantive framework from which a performance assessment of the Indian Civil Rights Act can be cast. The discussion is developed in three areas. First, a portion of the intellectual heritage of macro considerations of law and society[1/] is reviewed in the works of Marx and Engels, and Weber. It is suggested that their selective integration is both feasible and requisite in terms of addressing the scope and breadth of legal issues which are too often sidestepped in the U. S. varient of the sociology of law. Second, an institutional perspective is outlined, drawing from Commons and Schmid. While decidely micro and transactional, this approach is rooted to macro concerns, and owes a particular debt to the earlier work of Weber. Third, a type of law, imposed law, is distilled from the previous discussions, largely on the basis of loci of power and legitimation. The character of imposed law, its development and impact, is the underlying theme of the ensuing chapters.

Macroscopic Perspectives on Law and Society

Commenting on the micro-level analyses so prevalent in the American sociology of law, Gibbs (1966) bemoans the deflection from

a "grand tradition" in the study of law and society, a tradition which was more attendant to law as a constituent whole than as fractional elements divorced from their rootedness to social order. A partial clue to Gibb's dilemma is contained within disparate conceptualizations of the sociological domain. As Rheinstein(1954) notes, European sociology has defined as its proper realm of inquiry "what there is in common in all those social activities which constitute the subject-matter of the specialized sciences, and how they influence and interact upon each other, in our society as well as in societies of other cultures, past and present, developed or primitive." American sociology, caught up with intellectual and professional boundary maintenance issues, studies the terrain of social life which is not preempted by other social sciences and is hence limited in attaining a panoramic view of social relationships. Though glib, these characterizations of discrepant purview are not easily reconciled, and the impact of disciplinary parochialism is evident in the American study of law and society during the past thirty years. The preponderance of this research has been limited to a narrow range of issues -- courts, juries, legal profession, etc.[2/] -- while needed synthesis of these manifestations of law, as well as the larger questions of the relationship of law and political economy and the like have gone begging.

Of the few macroscopic considerations of law and society, Max Weber's Wirschaft und Gesellschaft (Chapter VIII) remains a basic text in the sociology of law. Weber's examination of the law is fully subsumed within his broad inquiry of the social bases of modern capitalist society. Contemporaries (e.g., Dilthey, Troeltsch) and predecessors --

in particular, Marx and Engels -- were similarly engaged. Gerth and Mills (1946), Zeitin (1968), Giddens (1974) and Balbus (1977) have all presented reasoned arguments that lessen the popular "distance" between Marx/Engels and Weber and constructively suggest phantom dialogues. There are obvious disparities in thought that mitigate the concert of Marx/Engels and Weber. For example, Weber attributes the development and movement of the law in contemporary society to an evolution of capitalist spirit: Marx/Engels tie law to the material conditions which require it. However, both Marx/Engels and Weber isolate power as the causal variable which affects environment and socio-economic conditions from which law results. On this basis, these theorists and their "schools" of thought make valuable contributions to an understanding of law. A brief sketch of their perceptions of law establishes the bases of their division, but more importantly, the substance of their compatability.

Marx and Engels on Law

One should pause to consider, before attempting to expound a Marxist theory of law, that neither Marx nor Engels were very neat or concise with legal issues in the body of their work. The particulate elements of such a theory of law must be assembled from many diverse sources. An impatience has prevailed among intellectuals, however, for what is commonly represented as a Marxist theory of law in overwhelmingly reductionist: the Marxist position is said to only speak to law as coercion, to only advance an economic theory of law, and to be essentially utopian i.e., law will wither with the state. There

have been exceptional attempts to avoid such reductionism, such as Pashukanis (1978), Renner[3] (1948), and Gramsci (1971, 1977) and the more recent work of Althusser (e.g., 1971), and Poulantzas (e.g., 1975). Drawing from primary sources,[4] some elements of Marx and Engels' considerations of law are proposed, less to obviate the reductionism than to sample from their range of analysis.

Marx and Engels focused on the relations between law and the institutions of society which law maintained. Their attention to law was primarily to uncover its class character and to situate the law within class struggle engendered by relations of production under capitalism. The origins of the state lie with the emergence of private property, the increasing division of labor, and the subsequent division of the collectivity into classes where functions (e.g., the administration of justice) are exercised by a minority of individuals. Law derives from the origins of the state:

> The material life of individuals, which by no means depends merely on their "will," their mode of production and form of intercourse, which mutually determine each other -- this is the real basis of the state and remains so at all the stages at which division of labour and private property are still necessary, quite independently of the <u>will</u> of individuals. These actual relations are in no way created by the state power; on the contrary they are the power creating it. The individuals who rule in these conditions -- leaving aside the fact that their power must assume the form of the <u>state</u> -- have to give their will, which is determined by these definite conditions, a universal expression as the will of the state . . . The expression of this will, which is determined by their common interests, is the law . . .[5]

Despite the size of a society and its functions (e.g., feudalism, capitalism) the role of the state remains the same, namely, to <u>maintain</u> the domination of one class over other classes.

> The state present itself to us as the first ideological power over man. Society creates for itself an organ for the safeguard of its common interests against internal and external attacks. This organ is the state power. Hardly come into being, this organ makes itself independent vis-a-vis society; and, indeed, the more so, the more it becomes the organ of a particular class, the more it directly enforces the supremacy of that class.6/

The state, then, refers to the organization of authority in a class society: law is the will of this authority -- not free will -- defined by the material conditions condusive for the maintenance of class privilege. Law consists of rules of conduct, affirmed by the coercive powers of the state authority, which define and secure the ordering of property rights and relations to ensure the class configuration of society. Justice is reduced to statute law and derives from the common interests and will of a ruling class.

For Engels and Marx, law does not determine relationships, but rather emerges from economic relationships based upon private property. As the factors of production become private property (which does not happen as private property emerges, only when it reaches certain proportions) the conflict between "have" and "have nots" becomes apparent: law governing private property ensures the protection of ownership and ostensibily protection of class relationships. While production relationships are formed independently of the human will (discounting the will to survive) law is consciously formed to direct and solidify a valued ordering and flow of interdependencies. As such, law is an ideological form:

> The individuals composing the ruling class possess among other things consciousness, and therefore think. Insofar, therefore, as they rule as a class and determine the extent and compass of an historical epoch, it is self-evident that they do this in its whole range, hence among other things rule also as thinkers, as producers of ideas, and regulate the production and distribution of the ideas of their age: thus their ideas are the ruling ideas of the epoch. For instance, in an age and in a country where royal power, aristocracy and bourgeoisie are contending for domination and there, therefore domination is shared, the doctrine of the separation of powers proves to be the dominant idea and is expressed as an "eternal law."

The superstructure of society (including law) determined by material conditions, the system of production and exchange (which control the flow of interdependencies) and resulting social relations, react upon the economic order which in turn confirms and develops the economic system further:

> In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic and structure of society, the real foundations, on which rises a legal and political super-structure and to which correspond definite forms of social consciousness.[8]

In addition to law, moral norms and custom have an impact on human conduct. Moral norms are not, as is the case with legal norms, enforced by the state though they are a critical part of human relationships. The force of moral norms rests with the opinion of the social class, rooted to material conditions. While moral

norms can deviate from dominant morality, legal norms assume a "universal value:"

> With further social development, law develops into a more or less comprehensive legal system. The more intricate this legal system becomes, the more is its mode of expression removed from that in which the usual economic conditions of the life of society are expressed. It appears as an independent element which derives the justification for its existence and the substantiation of its further development not from the economic relations but from its own inner foundations . . .[9/]

As is true of moral norms, custom is not guaranteed by the coercive force of the state though it differs from morality in that it does not appraise good or bad conduct, but only asserts tradition. Custom predates legal norms and has historically played into different interests: resisting law, becoming law, or flowing from law.[10/]

Marx and Engels rejected the notion that law could be understood by itself, as purely autonomous, or through an evolution of "spirit:" "It is above all this appearance of an independent history of state constitutions, of systems of law, of ideological conceptions in every separate domain, which dazzles most people."[11/] Law had to be analyzed in terms of the material conditions which required it. It is the economic base of society, expressing both the development of material productive forces and the social relations of production which causes law to appear. Fundamental change in the economic base would also require a fundamental change in legal norms:

> But what do you understand by maintaining the legal basis? To maintain laws belonging to a bygone era and framed by representatives of vanished or vanishing social interests, who

> consequently give the force of law only to these interests, which run counter to the public needs. Society is not founded upon the law; this is a legal fiction. On the contrary, the law must be founded upon society, it must express the common interests and needs of society -- as distinct from the caprice of the individuals -- which arise from the material mode of production prevailing at a given time.12/

The common interests and needs of bourgeois society prevailed, and law became a tool used to exploit labor, both directly and indirectly. Workers, due to their dispersement and division into different types of work, are slow to realize their common interests and are therefore slow to become one class. They see their interests and their employer's interests intertwined, and hence when the interests of employers conflict, the interests of their workers conflict. A social system which rejects such intra- and inter-class conflict, and opts for a return to cooperative living (non-exploitive relations) would in turn cause the state to "wither away:"

> The first act by virtue of which the state really constitutes itself the representatives of the whole of society -- the taking possession of the means of production in the name of society -- this is, at the same time, its last independent act as a state. State interference in social relations becomes, in one domain after another, superfluous, and then withers away of itself; the government of persons is replaced by the administration of things, and by the conduct of processes of production. The state is not "abolished." It withers away.13/

As the state apparatus is slowly dismantled (during the revolutionary dictatorship fo the proletariat) and the bases of bourgeois society dissolve as class distinctions dissolve, law -- whose function is

protection of an inequitable ordering of property relations -- will in its turn become obsolete.

A doctrinaire interpretation of Marx and Engels' discussion of law, focusing as it might upon the eradication of class relationships and their appropriate superstructure -- including law -- does little to encourage sustained and systematic study of law in modern society. Critics who dwell on such interpretations, however, are oblivious to attempts to incorporate a Marxist framework, ranging from Renner (1949) to Tigar and Levy (1977). The complexion of substantive foci subsumed under a Marxist analysis of law and society is variable (Tushnet, 1977, speaks most directly to this point). Contra Schur (1968) and others who insist that a Marxist analysis of contemporary law is fruitless, these and other works detail the parameters and agenda of a Marxist trajectory in the study of law and society. However, it should be noted that the revival of interest in Marxist analysis of law underscores yet another deficiency in resulting analyses. Those who acknowledge the limitations of parochialism or orthodoxy in Marxist analysis, and go on to embark on varied and innovative approaches to the study of law, have nonetheless largely failed to come to terms with the sociology of law. The costs of such an "oversight" seem at once obvious and conspicuous.[14] The work of Weber, as noted above, remains a basic foundation of the sociological school, and is largely amenable to Marxist analysis for the purposes of the present study.

Weber on Law

Weber's focus on law,[15] specifically the features of law which were factors in the development of modern capitalism, expands several

dimensions beyond Marx and Engels' formulation. While Marx and Engels treat law as a device to legitimate and solidify class relations within a "monocausal" conception of history, Weber extends his analysis to include other social institutions whose proportional influence on the law of capitalist society he considers significant. As the following passage suggests, Weber seeks to shift the emphasis on the linkage between law, economic activity, and revolution so crucial to Marx/Engels:

> Under certain conditions a "legal order" can remain unchanged while economic relations are undergoing a radical transformation. In theory, a socialist system of production could be brought about without the change of even a single paragraph of our laws, simply by the gradual, free contractual acquisition of all the means of production by the political authority. This example is extreme; but, for the purpose of theoretical speculation, extreme examples are most useful. Should such a situation ever come about -- which is most unlikely, though theoretically not unthinkable -- the legal order would still be bound to apply its coercive machinery in case its aid were invoked for the enforcement of those obligations which are characteristic of a productive system based on private property. Only, this case would never occur in fact. (emphasis added), 35-36

Weber's theoretical argument, though consistent with his ideas on legal rational change, is a labored effort to engage the so-called Marxian presumption that it is only law and the state that are inextricably intertwined in capitalist society.

A salient feature of Weber's treatise on law for the present study is the specification of interests -- including but not limited to political authority -- which have bearing on social order. The

character of these interests -- a constellation of interests -- their genesis and interface (conflict and accommodation) underscore many crucial features of Weber's understanding of the rise of modern capitalism.

For Weber, social relations imply conduct oriented between persons -- regardless of the affectivity of such relations (e.g., struggle) -- which can either take place through force of habit (custom) or in the pursuit of interests (aim-rationality). When social actors contemplate conduct because of obligation or interests, and social relationships assume regularity, an order of conduct exists. The legitimacy of such an order can be guaranteed internally (emotions, values, religion) or externally, through an expectation of disapproval (convention) or the probability of physical/phsychological coercion (law) should conduct violate the order. Hence belief in legality, self interest or tradition (usage) ascribe validity to a social order. [See Figure 1 for summarization of types of legal thought, and their "evolution" to uniquely Western "jurisprudence of concepts."]

The order of law derives empirical validity through its guarantees, ranging from unreflective habituation (approximately, custom) to the probability of approval/disapproval, to the lack of presence of psychological/physical coercion. Individual interests are affected by the empirical validity of legal norms: opportunities, present and future, can be created or denied, protected or exposed (chance) through state or extra-state guarantees. State guarantees may not be superior to all others and may conflict with extra-state guarantees. The coercive apparatus of extra-state guarantees can be formidable: churches, corporate groups, clubs, etc. can formulate

Figure 1

Weber's Jurisprudence of Concepts

Types of Law Making and Law Finding		Mental Attitudes in Social Conduct*
I. Irrational: conclusions are not guided by general rules (inconsistent and contradictory)		
A. Formal Irrationality: conclusions guided by means beyond reason (oracles, revelations)	← / ——	Traditionalistic: usage/unreflective habituation
B. Substantive Irrationality: arbitrary conclusions, based on emotional reaction to individual cases	← / ——	Emotional: determined by feelings and emotions
II. Rational: conclusions are guided by general rules (consistent)		
A. Substantive Rationality: conclusions based upon the general principles of an ideological system -- exclusive of law -- such as religion, ethics, or power policy	← / ——	Value Rational: conduct is oriented to a value system, regarded as proper without consideration of practical consequences
B. Formal Rationality: conclusions drawn from operative facts which are generically determined (not on a case to case basis)	← / ——	Purpose Rational: conduct is oriented to practical purpose and is determined by rational choice
1. Extrinsically Formal: legal relationships draw significance from their extrinsic manifestations -- conclusions based upon form (versus content)		
2. Logically Formal: jurisprudence of concepts -- conclusions follow from the use of abstract concepts of the law itself		

↓

Postulates of a Logically Formal Rational System of Law

a) abstract rules of law are applied to concrete fact situations

b) logic yields the decision

c) positive law is a contained, complete system of rules (or is treated as such)

d) social conduct is either obedience, violation or application of the rules of law

Max Weber, Wirtschaft und Gesellschaft (1925)

*There is a strong temptation to link mental attitudes in social conduct to types of law making and law finding: "The categories of legal thought are obviously conceived along lines parallel to the categories of economic conduct." (Rheinstein, lviii) A possible flow chart is indicated by the broken arrows above. Its logical inconsistencies, however, are formidable. A logically formal rational system of law need not be purpose rational. Conduct oriented to profit and the means condusive to the generation and accumulation of capital (modern capitalism) may be related to logically formal rationality, though Weber himself points to instances -- e.g., England -- where this type of legal system was not yet dominant during the rise of capitalism (Rheinstein, lviii-lx). Similar problems are apparent in the "fit" of types of law and mental attitudes.

"law" which is not limited to norms enforced by the state. Hence " 'legal order' shall rather be said to exist whenever coercive means, of a physical or psychological kind, are available; i.e., wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events . . ." (17) While coercion by physical violence is the monopoly of the state, no such monopoly lies with the state for non-physical coercion. Coercive intervention can represent a concert or conflict of interests, including the state, the state reinforced by pressure groups (corporate groups, kin groups, etc.), the state limited by pressure groups, or pressure groups limited by the state. The outcome of the struggle over means of coercion is variable.

Human conduct ranges from habitual (usage) to consensual (convention) to obligation (law), with transitions from one stage to another unclear. That human conduct comes in time to represent "ought" behavior implies that innovation -- whether externally or internally induced -- is inhibiting. Where an innovation arises from "inspiration" (and the inspiration is shared) consensus and law will likely result. Law, as has been noted, is one orientation for consensual action; it is not, however, the only orientation. A "collective order" (e.g., communal action) describes the regularities of conduct which may be oriented to law, or what may instead reflect compatible self interests which, though lacking legal guarantees, are essential to collective action and consensus. Recurrence of conduct, in that it assumes an ought character in a social group, becomes a powerful influence over social conduct, whether it is unreflective habituation or conscious choice and whether its violation is disapproval or the probability of coercion.

The fact that "norms" may guide interaction because of anticipated adherence to their "ought" character does not negate the impact of guarantees of the "ought" behavior (wide consensus or probability of coercion). These conventional guarantees are prevalent in the economy, where economic exchange is often regulated by the probability of legal coercion ("the interference of legal guarantees merely increases the degree of certainty with which an economically relevant action can be calculated in advance") though not exclusively. Many conflicts of interests -- whose permutations are infinite -- cannot possibly be covered by "the law" and hence a rational legal order (this also applies to convention) in this case is not guaranteed by legal coercion, but will respond to perceived self interests. The regulation of behavior by coercive means is not a prerequisite for rational social order: "While the orientation of communal action to a norm is constitutive of consociation in any and every case, the coercive apparatus does not have this function with regard to the totality of all stable and institutionally organized corporate action." (33) Law guarantees broad interests (such as authority - church, family, state) which are not economic in and of themselves, though material interests "are among the strongest factors influencing the creation of law." Legal coercion in the economic sphere is limited to the capacities of individuals in the market (the market assumes a life of its own as individuals become increasingly interdependent) and to the relative strengths of interests promoting law and interests in the economy: "the inclination to forego economic opportunity in order to act legally is obviously slight . . ." Disparate class interests, breakdown of tradition and sacred usages, disintegration of

alternative associations to guarantee the legal order, etc. have meant the development of a legal order for the economic system guaranteed by the state.

> The universal predominance of the market consociation requires on the one hand a legal system and the functioning of which is calculable in accordance with rational rules. On the other hand, the constant expansion of the market consociation has favored the monopolization and regulation of all 'legitimate' coercive power by one universal coercive institution through the disintegration of all particular status-determined and other coercive structures, which have been resting mainly on economic monopolies. (40)

That a host of factors temper and influence law is clear. Economic factors are but a subset of these: the rational approach (i.e., legal) to complex claims in the market, for instance, has lead to legal sophistication and increasing reliance on political authority to contend with competing interests. These developments have in turn affected economic organization.

Law serves the interests, especially the economic interests, of organizations fused into the "state." The power to control a person or thing is durable and predictable if the power is guaranteed by law. A right is a source of power (to prescribe or prohibit). Privileges are guaranteed expectations, such as freedom from interference (e.g., from the state) and freedom to regulate interdependencies (e.g., contract). While in an economy lacking market exchange law governs noneconomic relations and privileges -- based on status, origin and education -- economic privileges (such as regulating exchange by contract) have been expanded as the marked expands.

The modern market is typified by complex orderings of legal transactions based on exchange. Interests, particularly market interests, influence this ordering of guarantees. The predominance of contractual freedom generally in evidence today has not always existed. However, "the most essential feature of modern substantive law, especially private law, is the greatly increased significance of legal transactions, particularly contracts, as a source of claims guaranteed by legal coercion." (101)

The legal foundations of the rights and obligations of individuals or the "public" (e.g., the state) lie with "contracts," though the tenor of contracts has changed from predominantly voluntary (status contracts) -- even as a device of economic acquisition -- to a reflex of the market (purposive contracts). This transformation ranges from primitive contracts (acts of magical significance with magical guaranty) to barter, to obligation, to actionable contractual claims. Contractual freedoms are limited by the lack of legal institutions (to lend legal recognition to a contract), sacred, ethical or political interests (as in freedom of sexual conduct or in freedom of voluntary submission to slavery) as well as the social and economic interest of the powerful classes (e.g., bourgeoisie). The monopolization of law by the modern political organization facilitates, through special law, the extension of effects of a contract beyond its immediately interested parties. This modern development occurred with expansion of the market economy and consolidation/bureaucratization of the activities of consensual communities. As a result, "the general transformation and mediatization of the legally autonomous organizations of the age of personal laws into the state's monopoly of law creation

found its expression in the change of the forms in which such organizations were legally treated as the bearers of rights." (154)

The modern legal development of contractual association and freedom of contract is assumed to decrease constraint and increase freedom of individuals. However, such a contention is limited with respect to the legally guaranteed distribution of power and goods: specific interests -- those who enjoy relative power in the market -- can effectively utilize contractual freedom to increase their power over others. Particular constellations of law variably affect interests in the market: some are powerless to avoid the consequences of those whose interests are enhanced. While mandatory and prohibitory norms may decrease with the growing "freedom" of contract, the established property distribution impacts the genre of "coercion." Hence, "in an order of private economy . . . coercion is exercised to a considerable extent by the private owners of the means of production and acquisition, to whom the law guarantees their property and whose power can thus manifest itself in the competitive struggle of the market." (189) The salience of this form of coercion, despite its lack of overt authoritarian forms (couched within "free" contract), is guaranteed in the "laws" of the market place which are guaranteed by prospects of decrease or loss of economic power and viability in the market. "A legal order which contains ever so few mandatory and prohibitory norms and even so many "freedoms" and "empowerments" can nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion." (191)

As the use of administrative "officials" to exercise power became more pervasive (i.e., the more rational authority became) the more rational both the form and content of law became. This increasing rationality of law corresponded to the increasing rationality of administration, which in turn was prodded by the relative advantage which this rationality afforded particular interest groups. Judicial formalism guarantees to interests predictable legal consequences for actions and delineates "rules of the game" which (1) mitigate "freedom" because inequitable distributions of economic power are legalized, (2) are adverse to the interests of authoritarian powers because the individual is less dependent upon the "grace" and power of authorities, and (3) undermine democracy as they effectively reduce the impact of the citizenry on legal practice. Formal justice is well suited to political and economic interest groups who value stability and predictability in the legal system. The abstract (versus substantive) nature of formal justice is the "decisive merit . . . to those who wield the economic power at any given time and who are therefore interested in its unhampered operation, and also to those who on ideological grounds attempt to break down authoritarian control or to restrain irrational mass emotions for the purpose of opening up individual opportunities and liberating capacities." (229)

It is likely that any attempt to eclectically amalgamate Marxian and Weberian views on law and society will run the risk of diminishing the energy of specific strengths of each perspective. Fundamental discrepancies are evident, but should not completely overshadow bases of similarities. For instance, despite the breadth of his treatise, Weber considers all interests -- <u>except</u> for the state's -- to be functionally equivalent. Weber does not expound on the <u>autonomy</u> of

law, which would follow logically from complete functional equivalence of interests. Instead he emerges, as Marx before him, tying law to those who manipulate environment and socio-economic conditions in order to engender inequalities in power (from which law and the tenor of law results). Marx and Weber remain strange bedfellows, however, for their definitions of state, state function, and state interests remain disparate. Their conceptualizations of modern capitalism are discordant. Marx, who methodically points to the subversion of rational and beneficial technological advances within an environment dominated by competition, profit and private property, underscores the irrationality of a system characterized by class struggle. Weber, on the other hand, insists that modern bureaucracy, as expressed in modern capitalism, is the embodiment of efficiency and calculation, and hence, rationality. While Marx focuses on the crisis proportions of class conflict which will ultimately transform the very nature of society, Weber eyes conflict as simply one problem in the bureaucratic management of the state: the accommodation of conflicting interests is a penchant of rational bureaucracy. Such discrepancies are immeasureably amplified as we consider fundamental issues in the relationship of law to the social system it regulates. By relegating law to bureaucratic administration, Weber obscures the place of law within the social change engendered by conflicting interests.

It is within this tradition of macroscopic perspectives on law and society, of which Marx/Engels and Weber are but representative,[16/] that the substantive agenda of an institutional perspective emerges. Despite seemingly divergent Marxian and Weberian perspectives on the character of law, the immediate task is to fashion a reasonably

eclectic framework from which to proceed with an analysis of imposed law. Some elementary themes of an institutional perspective are suggested, which when combined with elements of the foregoing discussion, will suggest a framework for performance analysis of imposed law.

An Institutional Approach

What shall be characterized as an institutional perspective is derivative of institutional economics, particularly the recent contribution of Schmid (1978). Discourse on the intersection of law and economics, a recurrent theme of institutional economics, is exemplified in the work of Henry Carter Adams (1896) on the role of jurisprudence in industrial administration, Richard T. Ely (1914) on the distributive consequence and function of property and contract, and John R. Commons (1924) on the legal foundations of capitalism. Commons' thesis in particular displays a readiness to dissect the most basic terms of human interaction (reflected in part by his liberal use of analytical jurisprudence, such as Hohfeld, 1913, 1917) within a diagnosis of institutional problems. In his Legal Foundations of Capitalism, Commons attempts to plot an evolutionary theory of value (or as he calls it, a theory of Reasonable Value) much as Veblen had indicated in his earlier social criticisms. Commons' specifications of conflicting interests, emphasis on the role of power in provision of the public good, and attempts to analyze the social framework of the economy are included among the central themes of the subsequent development of institutional economics.

> . . .in a science of human transaction there is no clear dividing line between utility, sympathy and duty, between economics, ethics and law. The law, or working rules of society, take over, as best they can, the inducements of violence and thereby eliminate, as best they can, other unethical inducements. But ethical and unethnical elements remain, simply because exchanges are transactions between persons, official and private. Hence a behavioristic definition of political economy as the subject-matter jointly of the science of law, ethics and economics, would not be limited to the traditional mechanics of "production, exchange, distribution and consumption of wealth" which are relations of man to nature, but would include them as secondary, and would be defined as primarily a set of relations of man to man, both national and international which might be formulated somewhat as follows: Political Economy and Political Expansion are the proportioning, by means of the working rules of going concerns, of persuasive, coercive, corrupt, misleading, deceptive and violent inducements and their opposites, to willing, unwilling and indifferent persons, in a world of scarcity and mechnical forces, for purposes which the public and private participants deem to be, at the time, probably conducive to private, public or world benefit. (1924: 387)

Schmid (1978) proposes linkages between law and the production and distribution of wealth and focuses on a range of malleable institutional variables which affect institutional performance. A particularly salient theme of his treatise (one of several) to the present study is the distributional impact of choice. Briefly, some elementary notions regarding transaction and choice are proposed.

Interdependence

The direction of human interdependence, whether it is to mean cooperation or conflict, and its distributive consequences, will depend upon the structure of power, animated through the distribution

of rights. Individual choice or a course of action proceeds within this context, and is related to a number of factors. The first is whether the opportunity exists for an actor:

1) Can the actor afford it -- are the "costs" beyond what the actor is willing to pay?

2) Does the actor have a right -- is the actor allowed -- to pursue the opportunity, or conversely, is there a sanctioned impediment to this course of action for the actor?

3) Does the actor, despite having the right to choose the opportunity, have the requisite power to assert that right or desire in the face of scarcity (i.e., where a limited number of actors can have or pursue the same good or goal)?

A second factor is whether the opportunity is pursued by an actor:

1) Does the actor have knowledge -- information -- that the opportunity either exists or that it is within the actor's means (given that conditions of power, availability, and affordability of information are satisfied)? Without such information, an opportunity may exist hypothetically, but cannot be pursued practically because of ignorance.

2) Does the actor choose this opportunity in the face of alternative courses of action that variably affect the actor's welfare? Factors, such as the relative costs of opportunities, the motivational investment of the actor, and power (e.g., a decision not to pursue an opportunity may be evidence of an actor's power) are relevant here.

A third factor, related to the previous two, is whether the opportunity is attainable. Any actor's ability to attain a good or goal will depend upon the distribution of opportunities. A choice by one actor may mitigate the possibility of a like choice by another actor and affect the remaining opportunities. Hence, Samuels (1972) concludes the economic system is a "system of mutual coercion in which the choices of each individual have eventual impact upon the opportunity sets and choices of others." Choice, he points out, is both a

a dependent and independent variable: an actor can affect the terms of social action and alternatives available to others, and others can affect the terms of social action and alternatives available to the actor. Individual choice, then, is subsumed within the collectivity and the expression of interdependence, institutions.[17/]

Human interdependence is transacted in the sense that choice generally take place within a system of coercion where rights of one actor stand in relationship (complementary or conflicting) to the rights of another: the outcome of interdependence derives from this relationship.[18/] A transaction, or the transactional components of choice, may be of several types. In a bargained transaction, both parties mutually coerce and consent to transfer rights. Administrative transactions imply one-way coercion, where an actor may relinquish rights to a superior and receive nothing (benefits may, in fact, accrue to a third party). In status transactions the one-way movement of rights results from prescribed social obligations, and not stark coercion (unless one chooses to view culture and tradition as essentially coercive in the context of human growth, development, and potential). Grant transactions involve the will of the grantor, whose transfer of rights is not coerced but based upon the grantor's benevolence (i.e., consensual rather than dependent reciprocity).[19/]

Processes of choice and transaction are relative to the structure and pattern of power and rights. An understanding of human interdependence requires elucidation of the driving forces and logic of the status quo to determine whose interests count within an arrangement (not the arrangement) of property rights. The possibilities for allocating rights are endless, and each will attend

to the welfare of particular interests more completely than other formulations. Power is a pivotal factor here: which interests are to count will depend greatly upon the ability of some actors to structure the direction of interdependence so their interests become their rights. In this sense, power is reflected in the structure of rights and rules for creating such rights.

Benefits and costs accrue to interdependent actors in a system of coercion. The distribution of these benefits and costs (including externalities) are again a function of the distribution of power and rights. Some persons may have a right to pass along the various costs of their choices to others who conversely do not have a right, or do not have the power, to avoid such consequences. As a power structure changes, the substance and distribution of externalities will change. Decisions on how to parcel out externalities, costs and benefits, include specification of preferences (regardless of the consciousness of decision makers to these factors) as to how power is to be arranged, who shall do the deciding and who shall not be deciding, whose choices are salient and whose are encumbered, which costs are acceptable and which are not related to the public good (which public?), and how conflict is to be resolved (whose interests will count?).

Drawing from both the macro considerations of law and society, and their micro-transactional expression in institutional theory, a delineation of a type of law, imposed law, is made.

Imposed Law

Though use of the concept "imposed law" has gained some recent momentum (e.g., Burman and Harrell-Bond, 1979), its use in socio-legal analysis remains somewhat contrived due to a lack of specification of why imposed law is exceptional law. Clearly, if an imposed sanction means that a winner and a loser are designated when interests conflict, we are speaking generally of the corpus of law. Some Marxist interpretations would suggest that the nature of law is such that all law is imposed. A populist interpretation may suggest that the true nature of law is that it derives only from the willing consent of those governed: this perspective would reserve a much smaller subset of law, that which is not the willing extension of the governed, to label "imposed," and would characterize such law as naked oppression. A number of interpretations of imposed law are possible, just as there exists diversity in theoretical and philosophical interpretations of law generally.

A definition of imposed law, which eclectically combines elements from the preceeding discussions of macro theory and an institutional perspective, is offered:

> Imposition reflects the nonalignment of values, choices and behaviors of a group with those prescribed and proscribed values, choices, and behaviors in the law which affect the group.

Briefly, the exceptional character of imposed law is proposed.

In general terms, the rule of law is characterized by institutionalized sanctioning of a relatively limited number of possible interests and behaviors over the mass of society, representative of a relatively small elite who elicit compliance on the basis of sanctions. Law is conducive to particular configurations of social relations and material conditions, and in the interest of enhancement, solidification, etc. of such relations and conditions, state justice -- the administration of coercion -- fashions and protects the social order. The administration of justice in a general sense specifies (including socialization of those who administer the law and those subjected to the law) the social values which rationalize the rule of law and make compliance desirable. As a result, for example, the material condition of propertylessness may not be viewed as requisite to the accumulation of capital and endemic to a particular system of law, but rather, the rule of law may be viewed as independent and autonomous of the social relations it embodies and the material conditions which result.

The exceptional or extraordinary character of imposed law derives from the degree to which the locus of sanction and the locus of legitimation are removed from those subjected to the sanctioned prescription and proscription of values, choices and behaviors. In the case of federal Indian law, the fact of historical external sanction is clear. The tenor of the historical relations between European ethnic groups and indigenous populations in the territorial United States (discussed in Chapter Three and Chapter Five) is reflected in the course of development of federal Indian law: the source of sanctioned prescription and proscription of values, choices and

behaviors is generally beyond the control of Indian tribes and their members in matters to which the law extends.

In addition to the alienated locus of sanction, the locus of legitimation generally lies beyond tribal groups. Historically, the imposition of federal Indian law reflects only minimal efforts of the state to bring to bear its ideological arsenal in an attempt to resocialize or engineer traditional group identities consistent with the goals of the rule of law (e.g., fetishism of rights). The broad-ranging policies of physical and culture genocide and their segregationist manifestations absolutely mitigated against morphological combination of political, social, economic and cultural forms. Attempts by the state to "elicit" legitimation were very limited and only half-hearted. However, this should not suggest that the ideological component of law (in this instance, its socializing/resocializing dimension) is irrelevant to federal Indian law. The material aspects of ideology is a third characteristic that distinguishes imposed law.

It is often assumed regarding legitimation that the subjective ideological nature of any legal concept is of paramount importance, and that objective reality of the concept is a secondary or ancillary concern. This position might argue that state power is only an idea which materializes to the extent that individuals reify the idea and allow it to govern their behavior and prescribe their own power. While certainly relevant to an understanding of the law, this position begs the issue of social being as social form: the state is indeed an ideological form, but it is also a form of being and it embodies the material nature of the relations expressed in ideological form. Simple subjectivism will not do. For example, it will be proposed

that imposed federal Indian law is a manifestation of state penetration into tribal jurisdiction and sovereignty. As such, this manifestation is an objective entity. Hence we may study ideology and imposed law, not as merely the countless and varied subjective forms through which it is reflected and experienced, but in addition, from the point of view of its material aspects, as an expression of regulation of social relations that have assumed a legal character within a broad constellation of interests.

The locus of sanction, the locus of legitimation, and the material aspects of ideology are possible criteria for designating federal Indian law as a special case, imposed law. These themes will be reiterated in subsequent discussion.

Notes

1. Nader (1969) cautions that the phrase "law and society" is inadequate and misleading if "law is conceived of as in reality being a system independent of society and culture." (8) Law cannot be freed of social and cultural entanglements which define its development, form, and substance.

2. This is not to suggest, however, that the sociology of law has been narrowly defined (e.g., Riesman, 1951, 1952; Selznick, 1959; Skolnick, 1965) or negate its intellectual heritage in legal philosophy (Skolnick, 1965).

3. There is some dispute regarding Karl Renner's "Marxist theory." See Cain and Hunt (1979): 65, and Tigar and Levy (1977): 303.

4. These sources have been collected in Maureen Cain and Alan Hunt, Marx and Engels on Law (New York: Academic Press, 1979).

5. Karl Marx and Friedrich Engels, Collected Works V-VI (London: Lawrence and Wishart, 1976): 329-330.

6. Karl Marx and Friedrich Engels, Selected Works III (Moscow: Progress, 1979): 370-372.

7. Karl Marx and Friedrich Engels, Collected Works V-VI (London: Lawrence and Wishart, 1976): 59.

8. Karl Marx and Friedrich Engels, Selected Works I-II (Moscow: Progress, 1969): 503.

9. Ibid.: 365.

10. This discussion is very delicate and crucial to some notions of a Marxist sociology of law. Marx was clear in typing the withering of the state to the withering of law. This poses a rather critical dilemma for a sociology concerned with how interdependencies are to be ordered. The volume Soviet Legal Philosophy (V.I. Lenin et al., Cambridge: Harvard University Press, 1951) is an excellent exposition of ideas regarding the envisioned nature of law under socialism, specifically in the USSR. Galunskii and Strogovitch, who compare legal norms to moral norms and custom, postulate that within socialism law and morality will fuse i.e., when the definition of moral norms is consistent throughout society, legal norms will conform. Lenin, in a companion piece in the volume, speculates that the order of custom and morality will prevail in communism (initiated in socialism) and unlike legal norms, will not require the coercive presence of the state.

11. Karl Marx and Friedrich Engels, Selected Correspondence 1846-1895 (Moscow: Foreign Languages Publishing House, 1934): 434-435.

12. Karl Marx and Friedrich Engels, Articles from "Neu Rheinische Zeitung" 1848-1849 (Moscow: Progress, 1972); 227-247.

13. Friedrich Engels, Anti-Dühring (Moscow: Foreign Languages Publishing House, 1959): 386-387.

14. For example, Tushnet's (1977) discussion of instrumentalist and structuralist Marxist theories of the state, focusing as he does on contradictions between the content and form of the law due to competing interest groups, is soundly within a Weberian perspective.

15. The primary source materials of Weber's thought on law and legal institutions have been collected in Max Rheinstein, ed., Law in Economy and Society (Cambridge: Harvard University Press, 1954), which is the source of all citations herein.

16. The impact of Marx on the institutionalist school has been considerable. Commons (1924), for example, did not accept Weber's notions of an evolution of spirit as the basis for the development of rational, bureaucratic social structures, and turned instead to the more systematic, structural requisites of capitalism which Marx had indicated.

17. ". . .if a simple definition is necessary, institutions are sets of ordered relationships among people that define their rights, exposure to the rights of others, privileges, and responsibilities." (Schmid, 1978: 5)

18. Of course, the nature of the good or right is a critical element of transactions. Some goods and some rights can be jointly shared, while the consumption and use of other goods and other rights precludes their availability to other actors.

19. A class transaction may be all of these.

20. There may also be nonalignment within a group, where belief in a value and behavior do not coincide.

CHAPTER THREE

THE SOCIAL HISTORY OF INDIGENOUS PEOPLES

Drawing from the previous discussion, which situates law in the nexus of social relations, it is crucial to specify the socio-history that contextualizes what has been referred to as imposed law. This task has two interrelated components. First, selective aspects of the sociology of race relations and Americanist ethnology generally are reviewed. Second, a more fecund model for conceptualizing the socio-historical development of indigenous peoples[1/] is proposed. It is from the latter discussion that imposed law transcends its legal form and becomes inextricably rooted to social process.

The Sociology of Race: Theories of Amalgamation

Though tempered somewhat by earlier analyses of immigrant relations, modern studies of race relations in the United States have generally been content to limit the scope of most inquiry to the dynamics of contact between the white majority and the dominant minority, blacks. If even nominal concessions are made to the historical development of these relations, however, the costs of such selective inquiry become readily apparent. Prevalent explanatory models in the sociology of race relations, whose principle referent is the black experience, are replete with assumptions about the solubility of the

unique historical development among different racial and ethnic groups in the United States. Understanding the dynamics of the black experience is not, then, to necessarily comprehend the sum and substance of other milieu in this country.

Often, theories of race relations assume racial conflict to be, as Blauner (1972) observes, epiphenomenal and ephemeral. Included among these theories are integrationist-assimilationist ideas such as the melting-pot (Gordon, 1964), immigrant analogy (Glazer and Moynihan, 1963), class-caste analogies (Dollard, 1937), prejudice (Myrdal, 1944; Allport,1954), etc.[2/] Without exception, these theories treat the specific and unique social-historical development among different racial and ethnic groups as essentially malleable. Race relations theories which give conflict a more prominant place in their deliberations do not fare much better. A subset of these is illustrative of the problem.

A rallying point of some intellectuals engaged (to whatever degree) in the racial conflict of the 1960's and 1970's in the United States was identification with ongoing Third World liberation struggles. The international perspective afforded considerably more insight and flexibility than previous parochial analyses and strategies for oppressed peoples in the United States. While appeals for solidarity among "Third World peoples" were prevalent among some minority groups, Indian leaders most often struck discordant notes by rejecting the possibility of such collusion outright. Vine Deloria (1970) provides a rationale:

> The most common attitude Indians have faced has been the unthoughtful Johnny-come-lately liberal who equates certain goals with a dark skin. This type of individual generally defines the goals of all groups by the way he understands what he wants for the blacks. Foremost in this category have been younger social workers and clergymen entering the field directly out of college or seminary. For the most part they have been book-fed and lack experience in life. They depend primarily upon labels and categories of academic import rather than on any direct experience. Too often they have achieved positions of prominence as programs have been expanded to meet needs of people. In exercising their discretionary powers administratively, they have run roughshod over Indian people. They have not wanted to show their ignorance about Indians. Instead, they prefer to place all people with darker skin in the same category of basic goals, then develop their programs to fit their preconceived ideas. (170)

One finds, however, that the notion of solidarity was doggedly pursued in the social scientific literature despite the skepticism voiced by those immediately involved in their struggle. Allen (1969) who identifies Native Americans as people (sic) of the Third World, aptly demonstrates this sentiment:

> This raises for the nth time the thorny question of domestic allies. The black liberation movement needs allies. It needs allies who are capable both of aiding the black movement and of promoting social change in white America. In recent years of growing sense of unity has developed between Afro-Americans and Puerto Ricans, Mexican-Americans, American Indians, and Orientals. (281)

This is not a mute or frivolous point for Allen. His strategy for blacks in the U. S. is predicated on their ability to solidify the efforts of peoples whose commonality is simply their oppression. The analysis

presented by Gordon (1964) parrots a similar value of solidarity, though from Gordon's point of view Indian inclusion is tenuous based upon the responses of Indian agencies to universals, such as discrimination against minorities in the United States:

> The private "Indian" agencies are enthusiastic supporters of the principle of "letting the Indians decide for themselves" and are therefore, in fact, committed currently to the principle of Indian communal life . . . unlike most other intergroup relations agencies in the United States, the Indian agencies, so far as I can see, do not concern themselves with general problems of discrimination and prejudice in American life. They are the most highly concentrated in their deliberations and efforts of all the group relations organizations. (12)

Gordon's thesis[3] is couched in a sentiment which finds unity among social relations agencies functional only to the extent that it promotes the general assimilation of racial and ethnic groups into the dominant society. In this respect there is significant divergence between the purposes of solidarity for Allen and Gordon.

Tabb (1970) illustrates another problem with social science explanatory schemes of race relations, namely, use of the historical circumstances of non-black racial and ethnic groups as the basis for speculation on the past, present or future of black Americans. In a "Short Dictionary of Liberalism" Tabb discusses the "rhyme and reason" of demonstration projects:

> When funds go to help the poor, government programs are traditionally paternalistic, meaning simply that they breed and reinforce dependency. The group that has been longest under the care of the United States government

> is the American Indian. After pacification, his land was taken and he was segregated on reservation and cared for by the Bureau of Indian Affairs. Having been looked after the longest, the Indian is the worst off of any group . . . If this is the way White society compensates a people whom it has systematically robbed and murdered, why should blacks expect more generosity? (133-34)

The point of contention here is basing the future of blacks on the past and present disposition of Native Americans: Tabb has not taken into account a significant legal exposition -- based upon land tenure, etc. -- which has orchestrated into an Indian "condition." Tabb would be hard pressed to find the political, social and economic parallels in the black U.S. experience to justify his speculation. Sidney Willhelm (1970) proceeds from Tabb's level and takes this issue to its logical extension:

> The point is that the Negro may very well come to be treated much as the American Indian: confined to reservations or perhaps even eliminated through genocide . . . The possibility or the Negro transforming into the American Indian is, to most, a startling and unpalatable contemplation. (3-4)
>
> White racism and elimination from sustained employment bring the American Negro to the identical, ultimate fate of the American Indian . . . the Negro moves more decisively in the direction of becoming at best like an Indian ward. (333-34)

The above points, which speak to the fallacy of constructing analysis and strategies based on simplistic appraisals of divergent historical experience among ethnic and racial groups, represent issues which contribute to a racial amalgamation phenomenon. As a result of this

blurring, Native Americans have by and large been neglected in sociological explanatory schemes of race relations (which some Indian leaders have been quite happy about).

At the level of policy, service delivery, etc., this tendency to amalgamate diverse historical experience is part and parcel of the bankruptcy of development theory and policy that Frank (1966) speaks to:

> . . . even a modest acquaintance with history shows that underdevelopment is not original or traditional and that neither the past nor the present of the underdeveloped countries resembles in any important respect the past of the now developed countries. The now developed countries were never underdeveloped, though they may have been undeveloped. It is also widely believed that the contemporary underdevelopment of a country can be understood as the product or reflection solely of its own economic, political, social, and cultural characteristics or structure. Yet historical research demonstrates that contemporary underdevelopment is in large part the historical product of past and continuing economic and other relations between the satellite underdevelopment and the now developed metropolitan countries. Furthermore, these relations are an essential part of the structure and development of the capitalist system on a world scale as a whole. (18)

These basic tenents of dependency theory can be superimposed over the present discussion. While it may be useful and even necessary to construct a paradigm of race relations at such a level of abstraction that it speaks to the "American experience," attempts should be made to grapple with the complexities of situating Indian peoples in such an overview on their specific historical terms. Often, the historical

incorporation of indigenous peoples into our geo-political entity is ignored, either by assuming a commonality of experience with U.S. minorities, or by relegating it to caveats and footnotes which may qualify an analysis without contributing to or amplifying whatever general thesis is proposed. As a result, the science of race relations is hard-pressed to counter contemporary policy proposals and initiatives, or to even adequately analyze their importance. Consider, as an example, a highly touted front-page editorial by William Randolph Hearst, Jr. in 1976:

> It may have escaped the notice of many, but enormous sums of U.S. wampum have recently been bestowed on numerous Indian tribes for various reasons . . . entirely forgotten in all of the fuss is the fact that when settlers took the land, it was generally by agreements of some kind with the native Indians, and no records were kept,there being no county clerk with whom to file the deeds.
>
> . . . Overlooked too, is the fact that the original occupants of the land were the most primitive of people who had never thought of the wheel, had never learned to use metals, and knew nothing of the spinning and weaving of fibers. If the white settlers brought nothing but those gifts and skills, they were paid well for their land.
>
> . . . It is becoming apparent that some non-white Americans -- though certainly not all -- are thriving on what can only be described as "reverse discrimination."
>
> . . . Did we or didn't we decide that the color of a person's skin or the source of his ancestry didn't count? If we did decide that color or ancestry don't count, what the hell are we doing? (Chronicle/Examiner, 12 December)

The drama of recent land settlements with Indian tribes (e.g., the Passamaquoddies of Maine which incited Hearst), and the corporate thirst for subterranean energy stores on tribal reservations[3/] are intimately tied to the increasing clamor for fiscal (and moral) responsibility such as Hearst articulated in the area of Indian affairs. But analysis of these types of issues do not readily emerge from the sociology of race relations which generally lacks the sophistication to deal with historical diversity, and hence the incorporation of indigenous peoples into a modern state system. Such considerations are not part of the legitimate itinerary of inquiry. Briefly, an explanation of this neglect and its legacy for the study of indigenous peoples is proposed.

It is suggested (Lapierre, 1968) that the most widely shared characteristic of human communities in time and space is ethnocentrism, the narcissistic relationship to self, or the opposition of self (ingroup) to other (outgroup). It is further proposed (Clastres, 1977) that a salient distinction between Savage and modern societies is that the former rest content with the superiority of their ways, while the latter -- perhaps less sure -- feel obligated to mobilize an "objective" science that in turn endorses what we might have suspected all along: we are better. Some aspects of Americanist ethnology are a mire of enthnocentrism and evolutionism. Savage societies, we are told, are encumbered in a modern world by mutations of social structure. They are incomplete, societies without power, without a State, and without a market. From these, a dizzying array of deficiencies have been spawned: they lack a need to achieve, they lack future-orientation, they lack modern worldviews, they lack appropriate technology, etc. More recent scholarship, such as Clastres,

assails these assumptions, and suggests that 1) Savage society may generally lack a case of power, coercive power, opting instead for another case of power, non-coercive power; 2) Savage society, by maintaining absolute power over all its constituent elements, mitigates against the rise of a central, separate power and actively opposes the emergence of the State; and 3) Savage society, characterized by much leisure and a subsistence economy based upon reciprocity, flourished: the advent of political economy, i.e., the point where a people is compelled to give up their leisure and where products of their labor are accumulated and alienated, brought with it the destruction of many such groups (when Indians were forced to work, they died of work). Clastres puts it succinctly.

> This is what needs to be firmly grasped: primitive societies are not overdue embryos of subsequent societies, social bodies whose "normal" development was arrested by some strange malady; they are not situated at the commencement of a historical logic leading straight to an end given ahead of time, but recognized only a posteriori as our own social system. (If history is that logic, how is it that primitive societies still exist?) (168)

The shortcomings of the legacy of Americanist ethnology[5/] are amplified in many ways. For example, the preponderance of historical accounting of American history eludes analysis of the specific terms and outcomes of contact between European ethnic groups and indigenous peoples. Novack (1949) points to "systematic forgetfulness," or a memory lapse, as an attempt to hide from a painful past. The destruction of Indian collectivism and communal democracy characterize the earliest

and most fundamental social transformation in America. The colonial uprising, for all its importance in Eurocentric historical analysis, was a far less radical social development. In the long view, this legacy and its manifestations have become the apologetics, or as the Valentines' (1975) might insist, the substance of the intellectual defense of inequality and oppression.

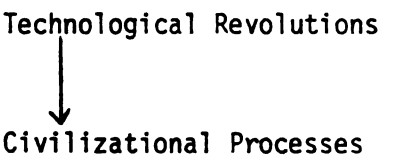
A broadened understanding of the development of race relations in the United States and the implications of historical experience in the face of changing multi-racial and ethnic relations necessitates accelerated attempts to analyze the indigenous American Indian experience. The tenor of this experience in North America and throughout the world emerges from the varied considerations of shared characteristics of indigenous populations, bound to a relative milieu within a world system.

The Civilizational Process

While indigenous social environs have literally been the field laboratories for the social sciences for many decades, efforts to systematically construct paradigms capable of the broad inquiry which is lacking, as suggested above, or action programs (see Chapter Four) on behalf of indigenous populations have been recent and few in number. This is largely due, it would seem, to a consistent focus upon "state" ontogenesis in most development theories i.e., the relevant social unit within which development unfolds is the political unit (within national boundaries). Theories of societal underdevelopment, on the other hand, situate underdevelopment within much larger units

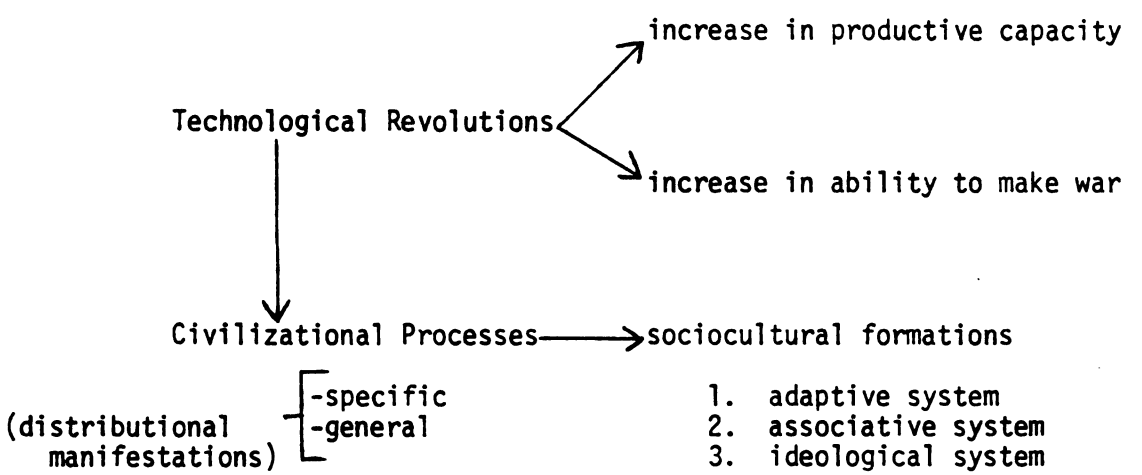
of analysis which tend to reject narrow national characteristics for broader configurative criteria, such as modern world system, capitalist civilization, and the like. Representative work of the latter mode would include Wallerstein (1974, 1980), Frank (1978, 1979). Kaplan (1978) and Goldfrank (1979). A relatively obscure contribution by Darcy Ribeiro (1968, 1971) speaks most directly to the American experience, and remains the most significant attempt to map the historical incorporation of indigenous peoples into alien state structures and modern societies. A review of his analysis will suggest the context within which imposed law unfolds.

Ribeiro sets out to chart the historical processes which have resulted in the unequal development of contemporary American societies. He focuses on technological developments and their sociocultural ramifications, the forces which trigger such evolutionary formations, and their impact on affected populations groups. The basic propositions of Ribeiro's theory of sociocultural evolution can be schematically represented in stages:



By technological revolution is meant acquisition and manipulation of a material technology such that non-marginal alterations in the type and way of life of societies result. Ribeiro identifies eight technological revolutions in the past ten thousand years of human development: agricultural, urban, irrigation, metallurgical, pastoral,

mercantile, industrial, and thermonuclear. Insisting that technological inventions cannot be divorced from their use and dissemination to the whole sociocultural context, Ribeiro isolates civilizational processes which represent major transformations in material life among diverse peoples. In general terms, technological revolutions result in an ever-increasing ability to improve productive capacity and to make war. These have obvious effects in a <u>specific</u> sense, that is, related directly to those peoples who have acquired a technological invention or innovation. General effects are also apparent, in that evolutionary sequences have distributional impact for diverse groups of people. An expanded schematic integrates these points:



The civilizational processes (the sociocultural dimensions of the effects of technological revolutions) result in sociocultural formations, consisting of three interrelated systems: the means of producing and reproducing the material requisites of a society (adaptive); the means of regulating interpersonal relations (associative); and the means

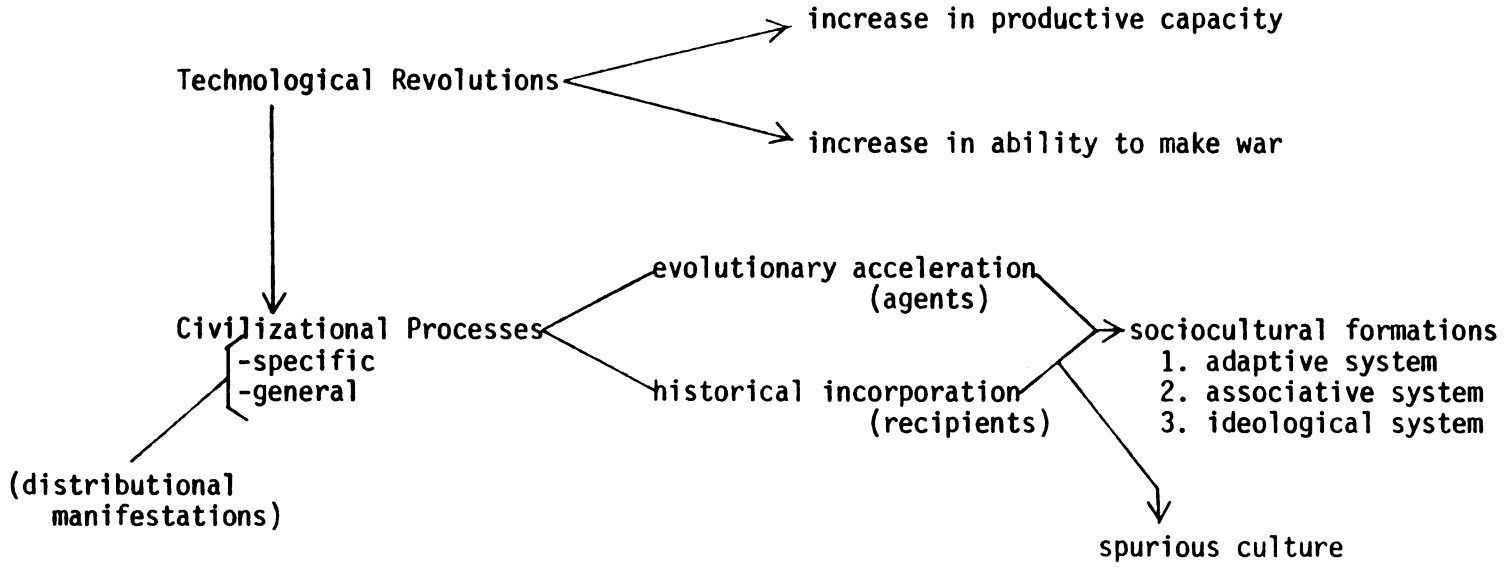
of transcribing social experience into language, knowledge, beliefs and values of a society (ideological). Taken together, these processes are crux of Ribeiro's model of sociocultural evolution:

> We conceive of sociocultural evolution as a temporal pattern of alteration in the ways of life of human groups. This alteration is created by the impact of successive technological revolutions (agricultural, industrial, etc.) on specific societies, tending to transform them from one evolutionary stage to another, or from one sociocultural formation to another. Sociocultural formations are conceptual models of social life, each of which combines a specific level of development in productive technology with a generic form of social regulation and with an ideological configuration that represents a greater or lesser degree of lucidity and rationality. (1968: 9)

Ribeiro was not, however, content to pose a relationship between civilizational processes and sociocultural formations which could be interpreted to suggest a unilineal, unproblematic transition to a higher state of human progress. The evolutionary development of technology and its attendant sociocultural formations was frought with conflict and sociocultural regressions. Ribeiro encapsulates the process of sociocultural formation in the concepts <u>evolutionary acceleration</u> and <u>historical incorporation</u>. The schematic is elaborated accordingly in Figure 2. All processes follow from the larger dynamic of sociocultural evolution: "Civilizational processes transfigure ethnically the peoples they touch, remodeling them through racial fusion, cultural intermingling, and economic integration into new sociocultural formations." (1970: 404) Evolutionary acceleration refers to the process where a people (agents),

Figure 2

Sociocultural Evolution



Darcy Ribeiro (1968, 1970, 1971)

having acquired or mastered a new technology, are able to 1) preserve and enhance their dominant institutions and ethnic identity, 2) accelerate their development by enlisting the material (resources, human and physical) of less developed peoples through conquest, enslavement, colonization, and the like, and 3) expand their dominant institutions and ethnic identity over subjugated peoples. Historical incorporation -- which most succinctly represents the indigenous experience in the Americas -- describes a process whereby peoples (recipients) are adversely affected by the development of other peoples i.e., they are incorporated into the development of others and are thereby underdeveloped. The resulting sociocultural formations of recipient populations bear the scars of their incorporation. First, relative autonomy of the group is lost, that is, the group is no longer in control of its destiny and increasingly, because its major institutions are discredited or destroyed, the group becomes dependent upon others to direct their destiny. Second, deculturation occurs, whereby the ethnocentric values, ways of thinking and behaving, and major social institutions are abandoned in the wake of domination. Third, these traumatized cultures are redefined, not in the image of previous values and institutions, but from a narrow range of values and behaviors consistent with the image which agents hold of recipients e.g., as inferior beings. Borrowing from Sapir (1924), Ribeiro designates these interrelated elements "spurious culture:"

> Under such circumstances the original culture falls into a state of alienation by absorbing foreign ideas relevant not to its own experience but to justification of the colonial domination. (1970: 405)

Ribeiro utilizes an ethnic typology to describe extra-European peoples and their impact on the unequal development in the Americas. One group, Transplanted Peoples, is of particular importance here because it represents the European ethnic groups who transfigured the ethnic terrain in the territorial United States (and elsewhere: e.g., Australia, New Zealand, South Africa). Though Transplanted Peoples are quite diverse, they share a number of characteristics which reveal succinctly the terms of historical incorporation for indigenous Indian peoples. Foregoing an analysis of their development as a consequence of European mercantile expansion, their "hybrid cultural inventory" is summarized:

1) predominantly Caucasoid racial type;

2) cultural homogeneity (due in part to the relatively limited area of origins);

3) concentration in homogenous nuclei structured into families, they substituted themselves in place of the indigenous population (decimation favored to absorption);

4) Re-creation of landscape (e.g., farming);

5) transplantation of major institutions from Europe to the territorial U.S. (little combination of indigenous and European institutions);

6) equalitarianism (democratic institutions, access to land ownership, etc.);

7) capitalist nature of the economy;

8) modernity ("in the sense of synchronization with the ways of life and aspirations of the societies undergoing industrialization from which they were detached");

9) assimilation of new groups which represent varients of a single cultural tradition -- provisional integration of non-European groups, characterized by deculturation (e.g., indigenous peoples, Africans); and

10) discrimation and segregation yield well-defined racial minorities.

Factors such as these had enormous bearing on the development of relations between indigenous peoples and European ethnic groups in the territorial United States.

The structuring of sociocultural formations, as Ribeiro conceptualizes them, suggests that accelerated development for some meant certain underdevelopment for others. The law, as a sociocultural formation, embodies this same dialectic. That law is vital to the process of development should not be surprising: by securing requisite material for development (i.e., land), by regulating the pitch of ethnic relations, and by expositing the ideological apparatus conducive for uninhibited development, law has significantly facilitated the historical incorporation of diverse indigenous peoples. In subsequent chapters, the penetration of law and its impact on contemporary indigenous social environs will be explored. That portion of Americanist ethnology which concludes that the retarded, stunted, and regressive development of indigenous peoples vis-a-vis the "modern" world is an endemic feature of their sociocultural institutions must be rejected and a paradigm which locates the prerequisites of development in the systematic underdevelopment of selective sociocultural formations, substituted in its place. The social history of indigenous peoples illuminates the instrumental role of the rule of law in the processes of underdevelopment which embody it.

Notes

1. The following definition of indigenous peoples shall suffice:

> "Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant."

United Nations, Economic and Social Council, Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, Twenty-sixth Session, Study of the Problem of Discrimination Against Indigenous Populations, "Preliminary Report" (E/CN. 4/Sub. 2/1. 566), 29 June 1972, para. 34.

2. A clear exception in the early period of the sociology of race relations was the work of Park, whose race relations cycle was premised on conflict: "What are properly referred to as race relations ordinarily involve some sort of race conflict" (1937). Further:

> "Racial competition leads easily, and more or less inevitably to racial conflict. The only sitution in which the Oriental is able to live without prejudice is in some occupation in which he does not come into too direct competition with other members of the community. This exclusion, although not always formally and legally recognized, is enforced by the prejudices and public opinion that racial conflict engenders.
>
> These seem, in general, to be the inevitable tendencies of the racial situation . . ." (1924)

3. To say that Indian agencies are enthusiastic supporters of self-determination and are therefore committed to Indian communal life is to turn history and fact upon its head. Historically, Indian agencies have regressed to "self-determination" when more overt, direct interference (genocide, termination of tribes -- federal relationship, etc,) has failed. Self-determination need be nothing more than pretending the dependency doesn't exist or that treaties are void, etc. One of the most pervasive charges of Indian agencies throughout U. S. history has been to

Notes (cont'd)

destroy Indian communal life: Gordon's contention to the contrary flies in the face of major programs (one in 1962, for instance, before Assimilation in American Life was published) designed to debilitate Indian tribes. Further, Indian agencies have long concerned themselves with general problems of discrimination and prejudice: Indian agencies are the supreme melting-pot strategists in U. S. history and their zeal to "Americanize" the indigenous populations has been justified on the premise of protecting Indians (and others) from the naivete of an Indian way of life. These issues aside, however, Gordon is correct in his contention that Indian agencies have little to contribute to a unified offensive by other social relations agencies to promote assimilation in American society. The assumption that they will not because Indian agenices have Indian concerns at heart is an impoverished causal interpretation at best: the fact that Indian agencies, despite the colossal effort, cannot foster or force a comprehensive assimilation of Indian peoples must rely on a more rigorous interpretive scheme than Gordon give us.

4. Excellent reviews of the drama regarding energy resources are provided by Steiner (1977) and Johansen and Maestas (1979).

5. H arris (1968) notes the reliance of Marx and Engels on Americanist ethnology, particularly on the work of Morgan among tribal peoples:

> "Ancient Society was a work of supreme importance to Marx and Engels because it opened their eyes to the complexity of primitive cultures and to the inadequacies of their own dabbling in this area . . . The important point here is that as far as primitive culture is concerned, Marx and Engels bought Morgan lock, stock, and barrel. Morgan's scheme, it tri-part periodization, its evolution from sexual communism to monogamy, from gens to state, from matrilineality to partilineality, became the standard source of ethnological enlightenment for Marxists . . . (246)

CHAPTER FOUR

DELIMITED PERSPECTIVES AND PROSPECTS: RESEARCH ON INDIGENOUS POPULATIONS

In the preceeding discussion, precepts of the sociology of race relations and Americanist ethnology were contraposed to a paradigm of sociocultural formation. These discrepant points of view regarding the development or underdevelopment of indigenous peoples perhaps delineate the boundaries of such inquiry. However, artificially cast as polar extremes, they do not adequately represent the thrust of policy-oriented research conducted under the auspices of national governments or international organizations. This chapter digresses momentarily to review twentieth century attempts to specifically isolate indigenous peoples as a locus of inquiry, largely from a transnational perspective. This material will be a prelude to subsequent discussions of international law and the development of federal Indian law, as well as providing a substantive basis to speak of strategic macroethnic[1/] research and action programs.

The National Pattern

The paucity of international action on behalf of indigenous peoples can be well documented (see Bennett, 1978). In part, the lack of action is related to a lack of documentation of the contemporary problems of indigneous people which might become the basis for

concerted action within a developing world system. Major international organizations and their instruments have either failed to recognize the salient features of indigenous populations beyond their interaction with national development, or have amalgamated and relegated these features to concern for racial and ethnic minorities generally. The never-ending debate on the "Indian problem" is replete with these tendencies, and in a report to the Second Labour Conference of the American States which are Members of the International Labour Organisation, in Havana (1939), the ILO director combines them:

> All Latin American countries have adopted a policy of racial equality. In some countries however, certain of the descendants of the original inhabitants are living under tribal or semi-tribal conditions and some Governments have found it necessary to take special measures for their protection and assistance. Only in this limited sense can one speak of an "Indian problem." Those questions which concern principally the indigenous people not as Indians, but because they happen to be the most backward and oppressed section of the population, should not be considered as part of the "Indian problem" but rather as part of the general social problems of the country, and they should be dealt with rather from the angle of general reforms than of action on behalf of any particular race.[2]

National action and study of indigenous groups in the United States[3] generally adheres to these patterns, although there is certainly no paucity of material purporting to review the "Indian problem" in the U.S.:

> Libraries of official Washington have become crowded morgues for reports which document that Indians are denied basic civil rights, such as the right to counsel; that Indian welfare payments and services are grossly inadequate; that many Indians go hungry; that Indian housing is a travesty -- 70% of it substandard; that job-training programs are insufficient, misguided and ineffective; that the relocated Indian, far from raising his living standards, is drowning anonymously in the worst ghettoes of our land . . . Thousands of recommendations are on the shelves and in the files, probing every corner of Indian life, every facet of Government policy. Each calls for reorganization, shuffling of priorities, new vistas. (Cahn and Hearne, 1969)

Government sponsored research on Native Americans is largely micro-analysis, either because it is restricted to a particular event or tribal group, or because its scope and depth are limited by the exigencies which call the research into being (e.g., the research is politically expendient). For instance, research done under the auspices of the United States Commission on Civil Rights often focuses on specific violations of federal law (e.g., Michigan Advisory Committee, Civil Rights and the Housing and Community Development Act of 1974; v. 3: The Chippewa People of Sault Ste. Marie, 1976) or the impact of federal law and administration (e.g., United States Commission on Civil Rights, The Navajo Nation: An American Colony, 1975). Research directly linked to evolving philosophies and enactment of federal Indian policy is historically the most prevalent, such as that of the Doolittle Committee (1867), Dawes Commission (1894), Hoover Commission (1949), Commission on the Rights, Liberties, and Responsibilities of the American Indian (1961), Johnson Presidential Task Force (1966), Inter-Agency Task Force, 1973, and the like.

Despite the shared limitations suggested above, some government sponsored research remains distinctive largely on the basis of their macroscopic approaches. In this century there have been three such studies. The first, The Problem of Indian Administration (1928) [also known as the Meriam Report after Lewis Meriam, project director] was executed by the Institute for Government Research, which would later become the Brookings Institute. This study was the recipient of substantial amounts of private funds, and involved a broad spectrum of specialists who directed their research to the Indian "condition" in diverse areas such as federal policy, health, education, economic conditions, migration, missionary activities, and law. The recommendations, tailored to improve the Indian Service (later known as the Bureau of Indian Affairs), were based on survey materials gathered from ninety-four of the one-hundred five agency jurisdictions in twenty states. The Meriam Report was an impetus for a substantive shift in federal Indian policy which culminated in the Indian Reorganization Act of 1934 (see Chapter Five).

A second distinctive research effort, the Indian Personality and Administration Project, was undertaken at the University of Chicago in 1941. Published as Personality and Government (1951) in its final form, it generated some twenty-five satellite publications on elements of its findings. The research, which involved over fifty scientists, was a series of case studies designed to assess Indian personality and to suggest, on the basis of a composite profite interpreted in an environmental context, how the Indian Service could shape its policy and programs to improve Indian welfare.

A third and most recent study was conducted by the American Indian Policy Review Commission (AIPRC) which was established by joint action of Congress in 1975. Their charge was straightforward:

> to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians. (PL 93: 580)

The Final Report (1977) of the American Indian Policy Review Commission is a compendium of several thousand pages of testimony and documentation compiled in hearings conducted by eleven task forces commissioned by the AIPRC: task force reports and special studies are incorporated into the comprehensive report dealing with federal trust responsibilities, tribal government, structure of Indian affairs, jurisdiction, education, health, resource development, urban and non-reservation Indians, law revision and codification, terminated and non-federally recognized Indians, alcohol and drug abuse, Bureau of Indian Affairs management, and Alaskan Native issues.[4]

The emergent character of government sanctioned research on Native Americans -- both micro and macro in scope -- is decidedly insular with respect to broader spatial and temporal dimensions of an "Indian problem." These efforts, without exception, fail to posit generic links between indigenous groups in the territory of the United States and indigenous groups in the Western Hemisphere on the basis of the trajectory of Western development and its impact on indigenous populations. The research of international

organizations has generally recognized the debilitating effects of limiting horizons of inquiry to geo-political entities, though their projection of the interrelatedness of macroethnic underdevelopment and hemispheric development is variable.

The International Pattern

Considered in turn, research on indigenous populations by the Organization of American States (OAS), the International Labour Organisation (ILO), and the United Nations (UN) is considered. The lion's share of materials on indigenous populations has been generated by these supra-national organizations[5] and a review of their efforts reveals the historical development and substantive foci of these undertakings.

Organization of American States

The preponderance of activity related to indigenous populations in the Americas has been carried out by what would be known in 1948 as the Organization of American States. The VII International Conference of American States (Montevideo, December 1933), IV Pan American Scientific Congress (Mexico, D.F., September 1935), and the III Inter-American Conference of Education (Mexico, D.F., August 1937) all passed resolutions in the contexts of their specific topical interests calling for a broad investigation of Indian life and problems in the Americas.[6] Three separate resolutions of the VII International Conference of the American States (Lima, 1938) spoke directly to

problems of indigenous groups: resolution XI called for an improvement of the social welfare of the American indigenous population as reparation for the "lack of understanding" which prevailed in earlier periods; resolution XII called attention to the special problems of indigenous women; and resolution XIII recommended that comparative study be undertaken of national strategies for ensuring the well-being of indigenous groups. Further, this latter resolution encouraged appointed delegates to establish an Inter-American Indian Institute.[7] Resolution X of the Inter-American Indian Conference (Pátzuaro, Michoacán, Mexico, April 1940) formally created the Inter-American Indian Institute.[8]

In addition to those functions relegated to the Inter-American Indian Institute, matters related to indigenous groups continued to surface in other OAS activities. Resolution XXIV of the II Inter-American Conference of Agriculture (Mexico, D.F., July 1942) called for the conservation of art and culture of indigenous groups which were vital to the welfare of these populations. The III Inter-American Conference on Agriculture (Caracas, 1945) recommended that American countries cooperate to improve the living conditions of rural agricultural workers, including Indians. Resolution XII of the I Inter-American Demographic Congress (Mexico, D.F., October 1943) rejected the policy and manifestations of racial discrimination (as unscientific); resolution XXX called for Indian autonomy, the right of Indians to know and live their culture, and the necessity of study in the area of Indian culture and its impact on the development of the Americas. Articles of the OAS charter -- approved at the IX International Conference of American States (Bogota,

March-May 1948) -- though they do not always specifically single out indigenous groups, espouse general rights and principles which protect indigenous populations which are included as well in the designated functions of affiliated groups, and in the resolutions and charters formed or passed at the same conderance.[9] The Inter-Cultural Council (Mexico, 1951) passed several resolutions calling for investigation into the problems of Indians groups, the improvement of Indian education, assistance in the progressive integration of the Indian into national life, etc.[10] While hardly exhaustive, these examples typify OAS efforts on behalf of indigenous populations. Such activities continue to the present: a recent instance is the Five Year Inter-American Action Plan approved by the OAS General Assembly (LaPaz, 1979)[11]

By and large the focus upon indigenous populations in the OAS has been orchestrated most coherently through the Inter-American Indian Institute. The member countries of the Institute (Argentina, Bolivia, Brazil, Columbia, Costa Rica, Chile, Ecuador, El Salvador, United States, Guatemala, Honduras, Nicaragua, Mexico, Panama, Paraguqy, Peru, and Venezuela) contribute to the Institute's activities and functions, which include conducting and distributing statistics on Indian groups and their well-being in the Americas, developing the technical base of development personnel, providing technical cooperation and coordination to national programs of Indian affairs, as well as various publication and documentation services. Perhaps its most serious responsibility is to act as the Standing Committee for the Inter-American Indian Conferences, eight of which have been held through 1980.[12] Several hundred conclusions and substantive

resolutions have been reached at these conferences. By necessity, they cover an extensive range of situations, problems, and strategies which attempt to correspond to the diversity of Indian peoples in the Americas and the individual national programs attendant to indigenous groups. The Inter-American Indian Institute remains the primary locus of international activity for the American states.

International Labour Organisation

The involvement of the International Labour Organisation with the issue of indigenous populations is noteworthy on two counts. First, study and research of indigenous groups culminated in a comprehensive survey published in 1953, entitled Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries.[13] This document has become the primary reference point for most subsequent work in the area. Second, within the scope of legal provisions on behalf of indigenous peoples, Convention 107, "Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries"[14] is a significant statement of rights of indigenous peoples in international law (see Chapter Five).

As early as 1926, the ILO Governing Body called for a Committee of Experts to draw up international standards for protection of indigenous workers. The results were four studies by instruments of the ILO: Forced Labour Convention (1930), Recruiting of Indigenous Workers (1936), Contracts of Employment (Indigenous Workers)(1939), and Penal Sanctions (Indigenous Workers) (1939).[15]

The decided focus of the ILO efforts regarding indigenous groups is the Americas. There are clear exceptions: the Preparatory Asian Regional Conference of the International Labour Organisation (New Delhi, October-November 1947)[16] dealt with forced labor in rural areas, plantation labor (particularly problems of laborers of special crops), and problems of aboriginal tribes and untouchable castes in various Asian countries. Generally, however, activities of the various conferences of American States Members of the International Labour Organization formed the basis for the 1953 study, Indigenous Peoples. At the Labour Conference of the American States Which are Members of the International Labour Organisation (Santiago, January 1936) information was requested concerning the economic and social welfare of indigenous peoples, as well as initiation of a comparative study to suggest international action in this regard.[17] The Second Labour Conference of the American States Which are Members of the International Labour Organisation (Havana, November-December 1939) called for a special study of indigenous workers and special measures which might protect them[18] [questionnaires were sent to Latin American governments in 1940, but replies could not be processed due to the outbreak of war]. The Third Labour Conference of the American States Which are Members of the International Labour Organisation (Mexico, April 1946) established "a committee of experts on social problems of the indigenous populations of the world." Resolution No. 21 commissioned a study to this effect.[19] The Fourth Labour Conference of American States Members of the International Labour Organisation (Montevideo, April 1949) adopted a program of action which called for a Committee

of Experts on Indigenous Labour to prepare a study of such areas as vocational training, recruitment, social security, handicrafts, safety and health in mines, forest dwelling indigenous populations, and the like.[20] At its 114th Session (Geneva, March 1951) the ILO Governing Body of the International Labour Office reviewed and accepted the results of the Committee of Experts. Included among the priorities for application of this so-called "La Paz program" was publication of a special volume on the life and work of indigenous populations in independent countries. The resulting Indigenous Populations appeared in 1953.

The "frame" of Indigenous Populations is simply put: ". . . the problem of indigenous peoples in independent countries can best be understood in an international context." The "context," however, affords a multinational overview of the status of indigenous peoples without providing the basis for systemic analysis i.e., issues pertaining to generic supranational processes that have had an impact on indigenous peoples are not generally proposed as endemic to the living and working conditions under study. Instead, the loci of underdevelopment are often indigenous peoples themselves:

> Nevertheless, there are features of the problem common to all such peoples, even when their history shows that some of them differ from the others in that they have, in the past, experienced periods of great economic, social and cultural progress. The most salient of these features are their geographical isolation, cultural barriers -- especially those of linguistic origin -- considerable economic backwardness by comparison with the remainder of the population, the mythical concepts underlying their social organization and economic activities, inequality of opportunity and the survival of anachronistic economic and

> land tenure systems that prevent indigenous peoples from fully developing their production and consumption and contribute to perpetuating their inferior social status. (iii, emphasis added)

Generally, these are recurrent themes of Indigenous Peoples in its comparative analysis of twenty-seven nations of the Americas, Canada, Asia and Australia. There can be no dispute that it is the most comprehensive review of indigenous peoples attempted to 1953. Its range of considerations, under the general rubrics "living conditions" and "working conditions," include demographic characteristics, food, housing, health (alcoholism and cocaism), education, occupations, agrarian systems, vocational training, handicrafts, and the various national and international measures which affect the situations of indigenous peoples. The thrust of this major work, as well as subsequent ILO analysis,[21] is broadly integrationist: 1) the living and working conditions of indigenous peoples reflect only marginal incorporation into the social and economic life of the nations of which they form part; 2) these variable conditions are impediments to the well-being of indigenous peoples as they are impediments to national development; and 3) the common good lies in the vitality of national progress. These points are embodied in Convention 107 and Recommendation 104 of the ILO (1957), major contributions to international law regarding indigenous peoples (see Chapter Five).

United Nations

Efforts and study by the United Nations related to indigenous populations have been sporadic and correspond to discernable phases. The first period, 1949-1965, typically involved collaborative research with other world organizations, such as the OAS and the ILO. During the second phase which extends to the present, UN efforts become decidely more concerted, and global in scope.

General UN resolutions which deal specifically with indigenous questions are infrequent. In 1949, the General Assembly adopted resolution 275 (III) (11 May 1949) which called for an investigation of indigneous peoples of the American States. This work, to be done under the auspices of the UN and the Inter-American Indian Institute (OAS) was never completed, as the resolution was abandoned due to protest of the United States.[22/] The following year, the Economic and Social Council passed resolution 313 (XI) (24 July 1950) which offered assistance, when requested, to raise the standards of living for indigenous peoples in the Americas (with the assistance of other specialized agencies and nongovernment organizations). Generally, such resolutions[23/] are of similar ilk as the tenor of other major world organizations. For example, the General Conference of United Nations Educational, Scientific and Cultural Organization (UNESCO) (Sixth Session, 1951) passed resolution 322 which is representative:

> . . . to undertake in collaboration with Member States concerned, a critical inventory of the methods and techniques employed for facilitating the social

> integration of groups which do not participate fully in the life of the national community by reason of their ethnical or cultural characteristics or their recent arrival in the country.

Again, the problematic is lack of integration which inhibits a full measure of participation in national life.

United Nations activity has also included studies of limited geographic areas or issues, including examinations of forms of labor comparable to slavery,[24] forms of servitude which prevail among indigenous groups in Latin America,[25] cocaism,[26] forest-dwelling Indians in Peru,[27] the Andean High Plateau,[28] and the like. Such activities have involved, in addition to the ILO, the OAS, national governments, and several UN instruments such as the United Nations Educational, Scientific and Cultural Organization, Food and Agricultural Organization, World Health Organization, and the United Nations International Children's Emergency Fund.

A second, recent trajectory of UN related to indigenous populations began with an effort to specify the global significance of racial discrimination. This comprehensive study was prompted by a resolution of the Seventeenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1965, entitled "Measures to be taken for the cessation of any advocacy of national, racial and religious hostility that constitutes an incitement to hatred and violence, jointly or separately."[29] The impetus of the United Nations Declaration on the Elimination of all Forms of Discrimination[30] had resulted in several limited studies undertaken by the Sub-Commission in the areas of education,

religion, political rights, mobility of nationals, rights of persons born out of wedlock, and administration of justice.[31] However, the Sub-Commission voiced a need for a more comprehensive treatment of the area of racial discrimination and recommended to the Economic and Social Council that such a study be undertaken. Resolution 1076 (XXXIX) of the Economic and Social Council (28 July 1965) and resolution 2017 (XX) of the UN General Assembly (1 November 1965) endorsed the prospect of a broad examination of racial discrimination in the political, economic, social and cultural fields, and at the Eighteenth Session, in resolution 8 (XVIII) in 1966, Hernan Santa Cruz was appointed Special Rapporteur for the study. The Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres[32] was completed and examined at the Twenty-Third Session of the Sub-Commission in 1970, and was subsequently published as Racial Discrimination during the International Year for Action to Combat Racism and Racial Discrimination.[33]

Santa Cruz (on behalf of the Sub-Commission) included in his study[34] a review of national and international measures taken on behalf of indigenous populations. The relative size of indigenous groups as compared to the national populations and the variable extent to which indigenous and colonial institutions, etc. were integrated, had bearing on the degree of discrimination experienced by indigenous groups in nations. Though unspecified, Santa Cruz advocates development programs as a remedy for the prevalent unequal status of indigenous groups:

> There is no doubt that the policy of racial integration is the most appropriate way of

> eliminating discrimination against indigenous populations. However, every precaution must be taken to ensure that the process of integration is not carried out to the detriment of the institutions and traditions of those groups and that their cultural and historical values are respected. (para. 1098)
>
> No integration policy for indigenous races and populations, whether they represent minority groups or a majority of a country's population, can succeed unless it is accompanied by a policy of economic and social development aimed at achieving a rapid and substantial rise in the living standards of those backward populations. No doubt this applies especially to countries with huge indigenous populations. (para. 1099)

While Santa Cruz ignores the integration of indigenous peoples into national and world development, which is the source of their "backward" appearance, he should be credited with recognizing the scope of the problem, the complexity of historical and national relations with indigenous peoples, and the inadequacy generally of both the existing depository of information and research efforts focused specifically on indigenous peoples as a supranational (macroethnic) consideration. Santa Cruz recommended (para. 1102) that a comprehensive study in this area be undertaken. On 21 May 1971, resolution 1589(L) of the Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to initiate a study of discrimination against indigenous populations.

The Study of the Problem of Discrimination Against Indigenous Populations has been underway for more than a decade, and its preliminary results have not been made public.[35/] The scope of the Study . . . includes both a comprehensive analysis of the problem of discrimination against indigenous populations, and remedies --

national and international -- for eliminating such discrimination. An obvious first task of the Sub-Commission was to define "indigenous populations," a complex exercise which had been attempted by the ILO in its work, Indigenous Peoples (1953). The working definition of the UN Sub-Commission was largely restructured from the earlier ILO definition, and is as follows:

> Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national social and cultural characteristics of other segments of the population which are predominant. 36/

The Sub-Commission emphasized several points regarding this definition:

1) the study would not be concerned with who the original inhabitants of a region were, if such information is even knowable;

2) "present territory of a country" is preferred to "country" or "nation" because in all likelihood the nation may not have existed at the time of original contact, or an independent community may not have constituted a "state" as it is presently defined, or if a country did exist, it is likely that its territory has changed;

3) the distinctiveness (culture or ethnic origin) of those who colonized and conquered is emphasized to indicate that it was not two indigenous groups in conflict;

4) "by other means" is to include trade and expansionist settlement policies which resulted in "dependence on a 'metropolitan' Power which exploited land, goods and peoples to its own advantage;" 37/

5) contemporary indigenous institutions are not "original" institutions, but have -- for a number of reasons -- changed in response to their new condition and have incorporated elements of the dominant institutions of a society; and

6) "indigenous," for the Study . . . designates non-dominant groups in non-neutral state structures.

The study design relies upon the collection, verification, and analysis of data from a wide variety of governments, world organizations, (ILO, OAS) and non-governmental specialized organizations (e.g., Anti-Slavery Society) from which monographs will be prepared for all member-states of the United Nations who have indigenous populations. Modes of gathering this information include extensive questionnaires[38/] and on-site visitations. Topics to be incorporated in the study include general demographic information, basic provisions (Constitutions and laws) concerning indigenous populations, fundamental national policy and administrative arrangements regarding indigenous groups, and the provisions intended to eliminate discrimination in health and social services, housing, education, language, employment and vocational training, political rights, religious rights, and legal assistance.

It appears the final document of the Study . . . will be somewhat encumbered by the persistent problems that have been encountered. The most obvious of these are the delays in publication (several years overdue) which threaten to render some information and usefulness of the study obsolete. Also, the reliance upon governmental support, which has not been forthcoming to the degree hoped for, may well curtail the scope of some national monographs. For instance, at various junctures of the study, more than three-quarters of the member-states responding to the questionnaire denied having indigenous

populations, including some Latin American countries.[39] Difficulties in operationalizing the definition of indigenous populations partly accounts for this. However, there has been dissatisfaction with the removal of some sensitive areas from consideration by the Sub-Commission, such as southern Africa and the Middle East (particularly the Syrian region of Golan, and Palestinian Arabs in Israel).[40] Debates over whom is "out" and whom is "in" have often represented thinly veiled political agendas.

There also emerged a view, early in deliberations by the Sub-Commission, that social scientific literature was of marginal utility in establishing the contemporary status of indigenous peoples:

> Mr. Martinez Cobo has wisely neglected anthropological and sociological writings, most of which served only to confuse the issue. It was important to bear in mind that the question under consideration was a very difficult, ill-defined and perilous one, which had to do with prejudice against peoples who were called "primitive," "savage" and "backward" and were thought to have no history. Such prejudices had been promoted by science and pseudo-science, but they were now being counteracted by a new view of indigenous groups which recognized that they comprised human communities which were just as valid as other types, and not inferior to them. [41]

The effect this might have, if indeed such writings are excluded, will certainly be worth noting. A criticism of the International Labour Organisation's Indigenous Peoples is its encyclopedic presentation. Whether the Study of the Problem of Discrimination

Against Indigenous Populations is able to integrate the breadth of information into a comprehensive overview of over two hundred million people, distinct and yet sharing in the underside of human development, remains to be seen.

Notes

1. Macroethnic is derived from macro-ethnos: "The ethnos (ethnic groups) are the operative units of the civilizational process, each of which corresponds to a unique human group united by a common language and culture . . . We can speak of a national ethnos when linguistic, cultural, and national political boundaries coincide, and of a macro-ethnos when such states expand to incorporate populations of different ethnic origins . . . [When] combined by imperialistic domination in an attempt to amalgamate them into a larger entity, they form part of a macro-ethnos." (Riberio, 1968: 19)

2. Report of the Director of the International Labour Office (Geneva; ILO, 1939): 56.

3. A comparative discussion of national measures on behalf of indigenous groups is contained in Santa Cruz (1971): 126-144.

4. American Indian Policy Review Commission, Report on Trust Responsibilities and the Federal-Indian Relationship; Including Treaty Review (Task Force One), Report on Tribal Government (Task Force Two), Report on Federal Administration and Structure of Indian Affairs (Task Force Three), Report on Federal, State, and Tribal Jurisdiction (Task Force Four), Report on Indian Education (Task Force Five), Report on Indian Health (Task Force Six), Report on Reservation and Resource Development (Task Force Seven), Report on Urban and Non-Reservation Indians (Task Force Eight), Report on Indian Law Revision, Consolidation and Codification, Vol. I-II (Task Force Nine) Report on Terminated and Nonfederally Recognized Indians (Task Force Ten), Report on Alcohol and Drug Abuse (Task Force Eleven), Bureau of Indian Affairs Management Study (Warren King and Associates, Inc.), Special Joint Task Force Report on Alaskan Native Issues (Task Forces Two, Four, Seven) (Washington, D.C.: Government Printing Office, 1976).

5. It is clear, however, that these organizations are somewhat removed from the orbit of the most critical and comprehensive work currently underway regarding indigenous populations. As an illustration, the Stichting Werkgroep Indianen Projekt, a sponsor of the Fourth Russell Tribunal in Amsterdam in 1980 (see Chapter Five) has affiliated chapters in some forty Dutch cities. The Fourth Russell Tribunal received support from seventeen organizations in ten Western European countries devoted to research and action on behalf of indigenous populations throughout the world.

6. Carnegie Endowment of International Peace, The International Conferences of American States: First Supplement (Washington, D.C.: 1940).

Notes (cont'd)

7. Ibid.

8. Pan American Union, Inter-American Specialized Conferences (Washington, D.C.).

9. Carnegie Endowment for International Peace, The International Conferences of American States: Second Supplement (Washington, D.C., 1958).

10. Pan American Union, Annals of the Organization of American States, Volume IV (Washington, D.C., 1952).

11. Organization of American States, Resolutions of the Ninth Regular Session of the General Assembly of the Organization of American States (AG/Res. 422) (the Five Year Inter-American Action Plan (AG/doc. 1102/79)).

12. I Inter-American Indian Conference (Pátzcuaro, Michoacán, Mexico, April 1940); II Inter-American Indian Conference (Cusco, June-July 1949); III Inter-American Indian Conference (LaPax, August 1954); IV Inter-American Indian Conference (Guatemala City, May 1959); V Inter-American Indian Conference (Quito, Ecuador, October 1964); VI Inter-American Indian Conference (Pátzcuaro, Michoacán, Mexico, April 1964); VII Inter-American Indian Conference (Brasilia, August 1972); and VIII Inter-American Indian Conference (Mérida, Yucatán, Mexico, November 1980).

13. International Labour Organisation, International Labour Organisation Studies and Reports, New Series, No. 35 (Geneva: ILO, 1953).

14. International Labour Organisation, General Conference of the International Labour Organisation at its Fortieth Session, 26 June 1957, Treaty Series, Vol. 328 (Geneva: ILO, 1957): 248-266.

15. International Labour Conference, Conventions and Recommendations, 1919-1949 (Geneva, ILO 1949); and International Labour Organisation, The International Labour Code 1951 (Geneva: ILO, 1952).

16. International Labour Conference, Record of Proceedings (Geneva: ILO, 1948).

17. International Labour Conference, Record of Proceedings (Geneva: ILO, 1936).

18. International Labour Conference, Record of Proceedings (Montreal: ILO, 1941).

Notes (cont'd)

19. International Labour Conference, Record of Proceedings (Montreal: ILO, 1946).

20. International Labour Conference, Record of Proceedings (Geneva: ILO, 1951).

21. International Labour Conference, Thirty-Ninth International Labour Conference, Report VIII (1), Living and Working Conditions of Indigenous Populations in Independent Countries (1956) [reprinted, Greenwood Press, 1974].

22. Bennett (1978) briefly reviews this event. See also United Nations, Official Records of the Economic and Social Council, Ninth Session, 320th Meeting (Geneva: UN, 1949): 537.

23. There are more recent resolutions which pertain to indigenous peoples, such as General Assembly resolution 2497 (XXIV) (28 October 1969) which is designed to ensure that education in countries under foreign rule is responsive to the traditions (culture) of indigenous populations.

24. Reports by the Ad Hoc Committee on Slavery to the Economic and Social Council in 1950 and 1951: see report by the Secretary General on the matter, Thirteenth Session of Economic and Social Council (E/2123; E/AC.33/R.11-14).

25. See resolution 350 (XII) of Economic and Social Council (19 March 1951).

26. United Nations, Narcotics Commission of the Economic and Social Council, Report of the Commission of Enquiry on the Coca Leaf (E/1666; E/CN.7/AC.2/1), 1950.

27. United Nations Educational, Scientific and Cultural Organization, Informe sobre el Huallaga (Lima, Peru, Organismo coodinador de la Hilea amazónica peruana, 1950).

28. United Nations and Specialized Agencies Joint Field Mission on Indigenous Populations. See International Labour Organisation, The Andean Programme (Geneva, 1958); also E. Beaglehole, "A Technical Assistance Mission in the Andes," International Labour Review, Vol. 67 (1953): 521.

29. E/CN.4/882, para. 378.

30. Resolution 1904 (XVIII) of the General Assemby of the United Nations, 20 November 1963.

Notes (cont'd)

31. United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of Discrimination in Education (E/CN.4/Sub.2/181/Rev.1), 1957; Study of Discrimination in the Matter of Religious Rights and Practices (E/CN.4/Sub.2/200/Rev.1), 1960; Study of Discrimination in the Matter of Political Rights (E/CN.4/Sub.2/213/Rev.1), 1962; Study of Discrimination in Respect of the Rights of Everyone to Leave any Country, Including His Own, and to Return to His Country (E/CN.2/Sub.2/220/Rev. 1), 1963; Study of Discrimination Against Persons Born out of Wedlock (E/CN.4/Sub.2/265/Rev.1), 1967; and Study on Equality in the Administration of Justice (E/CN.4/Sub.2/296/Rev.1), 1972 (Geneva).

32. E/CN.4/Sub.2/307.

33. Resolution 2646 (XXV) of the General Assembly of the United Nations, 30 November 1970.

34. The mechanics of the study, including general discussions of its preparation and data, are contained in Annex I and Annex II of the text (E/CN.4/Sub.2/307/Rev.1). The specific sections directly relevant to examination of indigenous populations are Chapter IX, "Measures Taken in Connexion with the Protection of Indigenous Peoples" (E/CN.4/Sub.2/307/Add.2, para, 340-536), and Chapter XIII, "Conclusions and Proposals" (E/CN.4/Sub.2/307/Add.5, para. 1094-1102).

35. Some documents, intended for limited distribution, have been obtained. One of these is the preliminary Chapter XIII, "Language" (E/CN.4/Sub.2/L.732) presented at the Thirty-third Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 22 July 1980.

36. E/CN.4/Sub.2/L.566, para. 34, 29 June 1972.

37. Ibid., para. 41.

38. For the text of the outline used for the collection of information, the response of the United States, and a retort to the U.S. American Indian Law Center, American Indian Law Newsletter, Vol. 7, No. 11 (1974).

39. If such information specifying which countries deny having indigenoius peoples is available, it is limited-distribution material and unavailable to the author.

40. See, for instance, the exchange between Al-Zahwi and Khalifa, Twenty-eighth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/SR.728, at 127) 3 September 1975.

Notes (cont'd)

41. Bouhdiba, Twenty-fifth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/SR.651, at 11) 24 August 1972.

CHAPTER FIVE

THE SOCIO-HISTORICAL CONTOURS OF LAW

The 1968 Indian Civil Rights Act (ICRA), or any instant of federal Indian law, draws its significance from the historical complexion of ethnic relations within a framework of sociocultural development and underdevelopment. Foregoing chapters have suggested how federal Indian law might be contextualized, within considerations of the nature of imposed law, the process of historical incorporation, and selected research on the contemporary problems of indigenous populations. Chapter Five will supplement these previous discussions by staking the enactment of the Indian Civil Rights Act to 1) the development of international law regarding indigenous peoples, 2) federal Indian law and policy, and 3) the legislative history of the ICRA. The intent here is not to engage in comprehensive review of these topics: the literature in these areas is established and does not need to be reproduced for purposes of the present inquiry. Instead, a broad overview is sufficient to indicate the relatedness of the Indian Civil Rights Act to national and international developments in law pertaining to indigenous peoples.

International Law

The early period of contact between European ethnic groups -- particularly the Spanish -- and indigenous peoples of

the Americas was characterized by the salvationist expansion of the former and decimation of the latter. A theory of natural slavery formed the substance of Spanish foreign policy in the New World, that is, peoples who were by nature feeble minded and incapable of directing their own affairs must necessarily be enslaved. Enslavement would accomplish both the spiritual salvation of Indian peoples, and would assist in the development of European peoples. This latter objective, though clearly less articulated than the former, was nonetheless codeterminant.[1/] The Requerimiento, read to Indian peoples before the Spanish would begin an attack, reviews the consequences of resisting the sacred obligation of the colonizers:

> Therefore as best we can, we ask and require you . . . that you acknowledge the Church as the Ruler and Superior of the whole world and the high priest called Pope, and in his name the King and Queen Dona Juana our lords, in his place, as superiors and lords and kings of these islands and this Terra-firma by virtue of the said donation . . .
>
> If you do so, you will do well . . .
>
> But if you do not do this, and wickedly and intentionally delay to do so, I certify to you that, with the help of God, we shall forcibly enter into your country and shall make war against you in all ways and manners that we can . . . we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them as their Highnesses may command; and we shall take away your goods, and shall do all the harm and damage that we can, as to vassals who do not obey, and refuse to receive their Lord, and resist and contradict him; and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their Highnesses, or ours, nor of these cavaliers who come with us. 2/

The "Indian problem" emerged as the legal questions related to intervention in the New World were proposed. The New World was characterized as 1) terra nullius, unowned land available for use and exploitation, and 2) inhabited by peoples of inferior civilizations incapable of managing themselves. Competing European interests, particularly those of the Spanish and Portugese, were mediated by the pope and the Treaty of Tordesillas which divided the New World into Spanish and Portugese enterprises. The legal status of indigenous peoples was defined in this context. Francisco de Vitoria,[3] advising the emperor of Spain on rights in the New World in 1532, concluded that the mere fact of discovery by the Spanish conveyed no title for land -- the divine rights of the pope and emperor, and the lack of Faith and sinfulness of the Indian peoples, notwithstanding: Indian peoples "were true owners, both from the public and the private standpoint . . . the discovery of them by the Spaniards had no more effect on their property than the discovery of the Spaniards by the Indians had on Spanish property."[4] According to Vitoria, only a just war waged against the Indians, for violations of the natural rights of Spaniards, would give Spain rights to title based upon conquest. However, title and sovereign power could be attained, he said, through treaties. The assertion of Indian title by Vitoria was generally ascribed to in the ensuing development of international law, and can be expressed in three conditions of treatying:

> 1) That both parties to the treaty are sovereign powers; 2) that the Indian tribe has a transferable title of some sort to the land in question; and 3) that the

> acquisition of Indian lands could not be left to individual colonists but must be controlled as a governmental monopoly. 5/

Such early developments, which are said to form the basis of international law,6/ are consistently characterized as being emancipatory (for recipients) in nature i.e., recognition of indigenous title and the obligation to treaty with political equals is said to have tempered the intensity of conflict between ethnic groups. In point of fact, however, the ensuing relations between European ethnic groups and indigenous peoples in the Americans clearly indicated the consistent, methodical erosion of Vitoria's ideal in the development of international law (between European nations, and between European nations and indigenous peoples). The continual, purposeful incursions into the sovereignty of indigenous peoples differed in intensity at specific historical junctures due to the uneven development of European groups and underdevelopment of Indigenous populations: in the main, however, a clear pattern emerges. The exposition of this pattern in U.S. federal Indian law will be noted.

As a projection of European development, international law has been instrumental in defining the locus of the "Indian problem," and the modicum of behavior (variably sanctioned) of colonizers consistent with such national development. Treatying presupposed both the existence of a state among indigenous peoples with whom to treaty, and a transferable title to territory which was used, but not owned. While the dicta of international law (e.g., a la Vitoria) may appear satisfied during

some historical periods, it is crucial to delve beyond mere appearances to propose the expediency of international law for national development. For instance, the Swiss legal scholar Emmerich de Vattel concluded in 1758 that the use of land should have a bearing on its title. Lands, inhabited by wandering peoples whose numbers and needs relative to the mass of area they occupied were insignificant, can be expropriated:

> We have already said, that the earth belongs to the human race in general, and was designed to furnish it with subsistence: if each nation had resolved from the beginning to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. People have not then deviated from the views of nature in confining the Indians within narrow limits. 7/

This rationale became important in federal Indian policy regarding the removal, by treaty or force, of Indian tribes from the southeastern U.S. to west of the Mississippi. This involved an issue of progress: progress for Indians was their continued civilization as a consolidated unit in the west, and progress for white settlers was the resolution of land shortages in the south, and assertion of state jurisdiction impeded by the presence of Indian tribes over whom the federal government exercised jurisdiction in southern states. Forceable removal was one mechanism for expediting two disparate forms of "development."

The foregoing points are not to suggest that the total complexion of international law is repressive regarding indigenous

peoples: there have been historical interludes where international law, and national law and policy, have stymied -- if only momentarily -- the methodical underdevelopment of indigenous peoples which such law embodies. The Indian Civil Rights Act is characterized by such contradictory emancipatory and repressive impact. However, in general international law projects the interests of agent-nations concerning their development which have historically been opposed to the interests of indigenous populations in their own autonomous development. In the modern era, characterized by the uneven incorporation of indigenous peoples into unevenly developed state structures, the complexion and impact of international law is variable. This can be illustrated from an ILO convention and the proceedings of the Fourth Russell Tribunal.

The heart of modern international law[8/] regarding indigenous peoples is Convention 107 (Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries) and the supplementary Recommendation 104 (Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries), which were chartered by the International Labour Organisation in 1957 (see Appendix I for full texts).[9/] The tenor of these instruments is apparent in the continual references to the goal of integration of indigenous peoples into national life. While the terms of integration are to be responsive to legitimate indigenous values, behaviors, and institutions (e.g., religion, customary law) special national protections for indigenous groups are felt to encourage dependence

and ultimately to impede the development of indigenous peoples within the dominant nation-states. The locus of responsibility is the national government which is to plan the program of integration, the pace of integration, and the extent of incorporation of indigenous groups in national development. Despite hosts of qualifications which speak to the integrity of indigenous peoples, the ultimate consideration appears to be their assimiliation. Article 24 is quite explicit in this regard:

> The imparting of general knowledge and skills that will help children to become integrated into the national community shall be an aim of primary education for the populations concerned.

Generally, the Convention defers to national development, or rather, seeks to establish a modicum of behavior, adjudged humanitarian, that allows nations to deal with impediments to national development. The provisions for expropriation of land (Article 12) are instructive in this regard:

> 1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
>
> 2. Which in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer

to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury.

These are very similar to rationales for the forced removal and relocation of indigenous peoples in the territorial United States, which restated from the ILO Convention, appear as follows:

-Federal Indian law is plenary; mutual consent between the federal government and Indian tribes is not required.

-National security interests (for protection of colonists and settlers from Indians; for the protection of Indians from colonists and settlers; pacification of tribes resistent to domination) are served by the removal and relocation of Indian tribes and alienation of their land irrespective of their choice.

-National economic development interests (expansion of colonization westward; contemporary energy development, etc.) are served by the removal and relocation of Indian tribes and alienation of their land (including inability to control use of their land) irrespective of their choice.

-Renumeration and compensation (land, royalties, etc.) are deemed appropriate to the economic and political status of indigenous groups relative to the larger national political and economic system (which is the source of their underdevelopment).

Generally, much of the U.S. history of federal incursion into indigenous life can be defended as within the parameters of acceptable conduct of Convention 107. The discretionary power of national governments is seemingly boundless, particularly when one considers the implications of Article 28:

> The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

In addition to the instruments of the ILO, there are a variety of other international agreements and covenants which, though not as narrowly focused upon indigenous peoples as Convention 107, are interpreted to have direct relevance for such populations. These may be illustrated by briefly reviewing their use in the recent proceedings of an international tribunal.[10/]

The Fourth Russell Tribunal, held in Rotterdam in November, 1980, was assembled to consider alleged violations of rights of indigenous peoples of the Americas. Jointly sponsored by the Stichting Werkgroep Indianen Projekt (Amersterdam) and the Russell Peace Foundation (London), the Tribunal considered a total of forty-five cases representing twelve nations of the Americas. The range of substantive concerns was very broad, including land rights, mineral rights, genocide, ethnocide, and forced labor. The international jury heard fourteen cases, including presentation of witnesses, exhibits, and expert testimony. For each of these cases, the jury issued an opinion and cited violations of international law. Figure 3 presents, in descending order of frequency cited by the Tribunal, the various instruments of international law and their specific (generally summarized) provisions applied to indigenous peoples in the Americas.

The Fourth Russell Tribunal is indicative of the recent intensification of activities on behalf of indigenous peoples. As noted in Chapter Four, the forthcoming United Nations study

Figure 3

Violations of International Law

of discrimination against indigenous populations will be comprehensive and may itself become the impetus for additional provisions in international law directed to the problems of indigenous groups. There is an apparent dissatisfaction with the underlying "integration" theme of Convention 107, evident in the work of the Russell Tribunal, and made most explicit in the Final Resolution of the International Non-Governmental Organizations' Conference on Discrimination Against Indigenous Populations. This NGO conference (1977), which drew representatives of indigenous groups from most States of the Americas, concluded that the instruments of international law impeded the development of indigenous peoples by assuming that integration into national life was a remedy to their problems, instead of a source of unequal development.* Whether these and like activities will contribute to a non-marginal shift in the trajectory of international law is unclear. The tendency to view the problems of indigenous peoples as supranational, and the increased direct involvement of these populations in international activities on their own behalf, are encouraging recent developments. The somber point remains, however, that international law embodies a historical itinerary of expansionary development. This corpus of law, for all its attention to human rights, can only project the substantive forces of such development which maintain a historical continuity and which incorporate periodic, marginal interruptions (e.g., human rights law) to mitigate the glaring contradictions of human underdevelopment.

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*The text of the Final Resolution, the Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere of the NGO conference, and the Declaration of Indigenous Peoples of the Fourth Russell Tribual are attached in Appendix I.

Federal Indian Law

The development of federal Indian law and policy[11] may appear inconsistent if not arbitrary. Major pieces of legislation seemingly convey a favorable intent regarding relations with Indian tribes, while other enactments clearly undermine such intent. The historical evolution of federal Indian law (the corpus of treaties, statutes, court cases, opinions of the Solititor, etc.) and federal policy (expedient conduct) is guided by dynamics similar to those noted in the previous section on international law. Federal Indian law and policy is a series of developmental consistencies i.e., there is relative continuity in the elaboration and impact of law and policy which erodes tribal sovereignty and jurisdiction. This progressive erosion, then, is a principle feature of the development of federal Indian law and policy. Hence, specific laws and policies are said to be developmental consistencies with respect to their contribution to such eroding processes. However, the development of federal Indian law and policy has been uneven, not unlike the development of most sociocultural formations. A developmental process spawns contradictions (inherent in uneven evolution) which, if not incorporated or mitigated in some way, may curtail or terminate development in a particular trajectory. With respect to the development of federal Indian law and policy, the results of such contradictions are disjunctive interludes. These interludes in development are marginal to the extent that they only retard the developmental process (they may slow the erosion of sovereignty): they do not reconstruct development nor alter its course significantly.

While a law may appear to restore tribal sovereignty, for instance, there is ample consistency in the subsequent elaboration of federal Indian law and policy to overshadow a momentary retrogression. There are few clear and absolute distinctions between developmental and disjunctive tendencies, as the history of national development and indigenous underdevelopment (which are causally linked) projects them both in federal Indian law and policy. An overview of a subset of major legislative acts illustrates this complexity.

Federal Indian law and policy is rooted to the development of legal relations between European colonizers and the indigenous peoples of the Americas. As has been noted, these developments were uneven and differentially affected Indian populations. For instance, by the time of the American Revolution, Spain, England, France, Holland, and some British colonies had forged treaties or alliances with indigenous peoples in the present territory of the United States, regarding tribal groups as sovereign political communities. In the central and southern Americas, however, the Portugese and Spanish penetrated with relative impunity, seldom constrained by considerations of the legal status of the peoples they affected. Several factors account for such a difference. Ribeiro (1971) notes the fundamental characteristics of European ethnic groups and indigenous peoples which had an impact on the form and substance of colonization. Additionally, the area of the United States was not the reserved domain of any single European interest (as was more the case in Spanish and Portugese territories) and the competition between European nations (and ultimately, the colonies) for territory, trade, etc. made friendly relations with Indian groups imperative.

As perhaps the cornerstone of federal Indian law,[12] the Northwest Ordinance of 1787[13] provided that:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them. (Article 3)

This expression of Congressional intent is said to have guided legislative enactments during the formative years of federal Indian law and policy. The Trade and Intercourse Acts (1790, 1793, 1796, 1799, 1802, 1834) which complement treatymaking, indicate various methods of operationalizing this intent. The first of these Acts (1790)[14] provided for the mandatory licensing of all those who traded with Indian groups, invalidated all purchases of Indian lands except those transactions governed by treaty with the United States, and directed that all crimes committed by whites against Indians in Indian Country be punished in the same manner as if the crimes had occurred outside of Indian territory. This temporary Act was amended by another in 1793[15] which incorporated several new provisions. These prohibited settlement on Indian lands, and empowered the President to remove such settlers, provided regulations for horse trading and stipulated penalties for horse thieves, prohibited Indian affairs employees from having an interest in Indian trade, provided for the delivery of various goods and

services to tribes, and declared that states shall not act to restrict the trade of Indian tribes. The temporary Act of 1796[16] added a detailed description of Indian Country,[17] prohibited driving livestock onto Indian lands, required passports for travel into Indian territory, and directed the punishment of any tribal member who enters a state or territory jurisdiction and commits one of several designated offenses. The Act of 1799[18] included only minor adjustments to the Act of 1796. These four temporary acts of the 1790's were incorporated into permanent legislation in 1802[19]. In addition to the general outline of regulations which preceeded it in the temporary measures, the 1802 Act provided the President with the power to restrain the distribution of liquor in Indian Country. Considered in toto, these five Trade and Intercourse Acts regulated relations with Indian tribes and generally reproduced the intent of the Northwest Ordinance of 1787. They indicate, by virtue of their specific provisions, problems regarding interaction of indigenous peoples and settlers.

A host of factors, directly related to national development, were to substantively shift federal law and policy as it applied to Indians. A thirst for agricultural land, westward expansion, and the opinions of some that interaction with whites was destroying the autonomy (legal and cultural) of Indian tribes anyway, all resulted in measures to effectively assimilate indigenous peoples, or remove them to west of the Mississippi, or both. The Indian Removal Act[20] embodied these considerations. The Act provided that federal lands west of the Mississippi be exchanged for Indian lands in the eastern United States. The Act was designed to be

voluntary and provided that land of equal quality was to be exchanged, and that federal protections would be extended to the new Indian settlements. The Act was less innocuous in intent than in practice. The "voluntary" accession of eastern lands were often secured through bribery of tribal officials, treaties with non-representative tribal "leaders," etc. The results were disastrous for many tribes: movement west brought about general deterioration of health and many deaths, the fragmentation of some tribes (portions stayed in the east while other portions traveled west), and general undermining of political and social structures of tribes. These effects appear contradictory to law,[21] but were often consistent with the intent of policy, in this case, to unencumber development in the southeast and to foster westward expansion. The last of the Trade and Intercourse Acts in 1834[22] echoed much of the substance of the earlier 1802 Act which was not obsolete (e.g., a new definition of Indian Country reflected the treaty cession since 1802), beefed-up the system of control over traders, relaxed the requirement of a passport for entry into Indian Country, and provided for extended provisions dealing with the prosecution of crimes.

By the mid-nineteenth century, the expansion of settlement west had accelerated significantly with the establishment of railroads, discovery of gold, Mexican cession (1848), and the like. Such events were to have direct bearing on law and policy affecting indigenous peoples. Some argued that treatying had become too burdensome for the federal government, and that the assimilation of Indians was impeded by negotiating with them

as nations. Tribes were, as the argument went, increasingly dependent. The issue of utilization of land was fodder in these criticisms of treaty-making: "The idea of thirty or forty thousand men owning in common what will furnish homes for five or ten millions of American citizens, cannot be tolerated."[23] The Appropriation Act of 1871[24] ended the treaty system:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .

Congress was no longer required to negotiate, but could now legislate unilaterally to Indian tribes. This "breach" in posture regarding the legal status of tribes (from sovereigns to dependent wards) was an expression of changes in objective conditions. As has been pointed out, the balance of power -- measured in terms of military strength (include here the loss of English, French and Spanish Indian allies) and relative population size -- had undergone a complete transformation since shortly after the War of 1812. Market conditions had changed as well. Where Indians had made a significant contribution to U.S. trade by the goods extracted from their lands (e.g., the European fur trade), these lands and minerals were more profitable in the direct control of non-Indians. Tribes, once independent on lands suited for self-sufficiency, were dependent upon federal annualties after having divested themselves (or having been divested of) lands, and being congregated on reservations.

Two statutes of the 1880's further illustrate the depreciated value of tribal status. The much publicized decision of Ex Parte Crow Dog[25] held that the murder of one Sioux by another Sioux on a reservation was not within the criminal jurisdiction of any court except of tribal determination. Congress reacted to this upholding of tribal law and passed the Seven Major Crimes Act[26] in 1885 which enumerated seven crimes which were to be the exclusive jurisdiction of federal courts, regardless of whether offender and victim were Indian.[27] The General Allotment Act of 1887[28] (Dawes Act) is perhaps the most significant legislation of the nineteenth century. The chief proposals of the Act were to grant land to tribal members (160 acres to each family head, 80 acres to each single person over eighteen and to each orphan under eighteen, and 40 acres to each other person under eighteen), issue a patent in fee to each allottee to be held in trust by the federal government for twenty-five years (land could not be sold or encumbered during the trust period), allow a four year period for Indians to make selections of land, and confer citizenship upon allottees and all other Indians who would abandon tribal life. The intent of the Allotment Act was to substitute white civilization for indigenous cultures, a process, it was felt, that depended upon the transformation of common property to individual ownership. Further, allotment was said to provide security to Indian lands that could not be guaranteed by the tribal organization and would, in the long run, relieve the federal government of the burden of Indian dependence. Allotment had a number of consequences, the most obvious of which was an estimated alienation of 90,000,000 acres of Indian lands to whites.[29]

Reservations became checkerboards, with white owned land interspersed with Indian owned property (making grazing, for instance, impossible). Lands that remained after allotments ("surplus lands") were sold to the federal government who opened them to white settlement. Lands that were not used for farming were leased by Indian tribes, often for far below their market value. The Burke Act of 1906[30] gave the Secretary of Interior power to waive the twenty-five year trust period for owners who were judged "competent." Tribes were not required to consent to allotment, and were not consulted. By and large, the Allotment Act was rationalized as responsible government intervention by a variety of pro-Indian support groups and interests (charitable societies, religious organizations, etc.). It was also rationalized as responsible government intervention by industrialists, and railroad and mining interests who felt that during the processes of removal and relocation of Indian tribes from the east, entirely too much land had been reserved for indigenous groups relative to their needs, and most importantly, relative to the needs of national development.

The heightened destitution of indigenous peoples as a result of the Allotment Act had become quite obvious by the turn of the century. Largely in response to the deteriorated conditions of tribes, documented in part by the Meriam Report in 1928 (see Chapter Four), the Indian Reorganization Act was passed in 1934.[31] The Act spoke to several issues: it terminated allotment of land on Indian reservations, prohibited transfer of Indian lands or shares of tribal corporations (the Secretary of the Interior could

authorize voluntary exchanges of lands or interests to consolidate tribal holdings), established a revolving fund for the purpose of economic development of incorporated tribes, allowed the tribe to reject the Act for itself, permitted a tribe or tribes on the same reservation to organize (adopt a constitution and bylaws), vested certain powers and rights in a tribal council, and provided for issuance of a charter of incorporation to tribes (oriented to business transactions). The Act had several purposes, including the shoring-up of tribal lands and resources, allowing tribes more lattitude and decision-making power over their own affairs, and "standardization" of Indian administration.[32/] The Act was accepted by 181 tribes and rejected by 77 tribes by 1936, with adoption of 161 constitutions and 131 corporate charter.[33/]

Generally, the legal and social scientific[34/] literature have been quite supportive of the Indian Reorganization Act. There was (is) considerable opposition to the Act, however. From one perspective, the Act was a developmental regression. Individual rights of inheritance, private ownership of land, and free enterprise were sacrificed for a policy which would return Indians to a primitive state and frustrate assimilation efforts. The following sentiments are representative of this position:

> Arguments advanced against the Wheeler-Howard Act [the Indian Reorganization Act] in general, can be summarized as follows:
>
> 1. Acceptance of the act changed the status of the Indians from that of involuntary wardship to voluntary wardship.
>
> 2. The act provides for continued wardship of the Indians and gives the Secretary of the Interior increased authority.

3. The act is contrary to the established policy of the Congress of the United States to eventually grant the full rights of citizenship to the Indians.

4. The act provides for only one form of government for the Indians, viz, a communal government, with all property, real and personal, held in common; and it compels the Indians to live in communities segregated from the rest of American citizens.

5. The act itself and the administration of the act violates the rights of citizenship which the Indians have won through long years of efforts.

6. That the Indians prefer to be under the jurisdiction of the laws of the respective States where they reside.

> Fundamentally the so-called Wheeler-Howard Act attempts to set up a state or a nation within a nation which is contrary to the intents and purposes of the American Republic. No doubt but that the Indians should be helped and given every assistance possible but in no way should they be set up as a governing power within the United States of America. They should be permitted to have a part in their own affairs as to government in the same way as any domestic organization exists within a State or Commonwealth but not to be independent or apart therefrom. 35/

At the other end of the spectrum, the Act is criticized for the incorporation of white values into the inner-workings of tribal life by specifying tribal structure, reserving the right (by the Secretary of the Interior) to approve tribal constitutions and bylaws, vesting too much authority in created tribal councils and none in traditional forms of leadership, and the like.

The reception of the Indian Reorganization Act is perhaps best illustrated by the fact that one of its co-sponsors (Wheeler) demanded as early as 1937 that the Act be repealed. It was clear that local whites were unable to retain their power over tribes

as the latter organized under the Act. For some, this was an unintentioned, unanticipated disruption of Indian "assimilation." There was growing resentment in Congress as well with the communal emphasis of the Act, and with the performance of the Bureau of Indian Affairs which was said to be perpetuating the wardship status of Indian tribes (which in turn perpetuated the Bureau).[36] Accordingly, appropriations for Indian programs were drastically reduced, and the Indian Reorganization Act functioned even more poorly than it had. In 1949, the Hoover Commission recommended that all efforts on behalf of Indian tribes be designed to ensure their complete integration into the American mainstream. In 1953, House Concurrent Resolution 108[37] was passed:

> That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the State of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from federal supervision and control and from all disabilities and limitations specifically applicable to Indians . . ..

During the following year, a Joint Subcommittee on Indian Affairs began writing termination legislation and holding a total of thirteen hearings on acts specific to Indian tribes.[38] Testimony at the hearings from Indian representatives was largely in opposition to the legislation of termination, though sentiments opposing tribal ownership[39] and federal trusteeship were expressed. Undaunted, thirteen acts were passed in an eight year period,

affecting 109 tribes or bands which were terminated.[40] In general, these Acts and the administrative plans developed specifically for each terminated group provided that tribal lands were sold, state legislative, judicial, and taxing authority were imposed, all federal programs to tribes and individuals were discontinued, and tribal sovereignty was effectively terminated. The effects of termination were largely disastrous for Indian tribes.[41] It was, in the history of federal Indian law and policy, the most overt and furthest extension of assimilationist policy.

It is clear that certain of these enactments and policies are more favorable to Indian tribes than other enactments and policies. A very simplistic division of legislation discussed would group the Northwest Ordinance of 1787, Trade and Intercourse Acts (1790-1834), and the Indian Reorganization Act of 1934 together as either expressing or effectuating Congressional intent to (for the most part) preserve tribal sovereignty and jurisdiction.[42] Contraposed to these are the Indian Removal Act of 1830, the Appropriation Act of 1871, the Seven Major Crimes Act of 1885, and General Allotment Act of 1887, and the Termination Acts (1954-1962).[43] However, these enactments are not so easily amenable to characterization as simply "favorable" or "unfavorable" to Indian tribes. The developmental "logic" of federal Indian law and policy -- disjunctive interludes notwithstanding -- has been erosion of tribal sovereignty and jurisdiction. This does not mean, however, that small groups of individuals consciously plotted incursions into tribal affairs, calculated to infirm tribal structures, etc. Instead, the progression of national development

has set into motion processes which create objective conditions that affect tribes. While humankind certainly makes its history, no group of individuals can plot its course as surely as tribal sovereignty has been compromised.

This examination of legislation also suggests that the narrowly constructed legal discussions of tribal sovereignty and jurisdiction do not capture the complexity of forces and factors which are involved. Tribes have been subjected to a series of external and internal pressures which variably affect tribal cultures, institutions, legal status, etc. -- these project the relative solvency of tribal sovereignty and jurisdiction. For instance, there are internal pressures that erode tribal sovereignty and jurisdiction that result from external inducements, such as education. The history of Indian education policy clearly indicates that during some periods, the education of Indian children by non-Indians (either on or off-reservation) was designed to belittle and slander tribal values, institutions, etc. This process, as has been noted, is that of deculturation and results in a spurious product (see discussion on historical incorporation, Chapter Three). The diminuation of confidence in the validity, integrity, and vitality of the tribe on the part of successive generations of Indian children most certainly has had an impact on the sovereignty and jurisdiction of Indian tribes. Again, while such processes may be accelerated or given expression in complementary legislative enactments, they do not significantly retrogress in the face of disjunctive statutes and policy: inconsistencies, the contradictions inherent in the evolution of such processes and forces, produces

them. In the larger view, it is proposed that the development of federal Indian law reflects a generally consistent, methodical incursion into tribal sovereignty and jurisdiction. Further, it is proposed that the 1968 Indian Civil Rights Act embodies developmental and disjunctive characteristics of that process.

The Indian Civil Rights Act

The "era of termination" which so dominated federal Indian policy in the 1950's crystalized the sentiments of those who objected to favorable treatment for Indian tribes at the expense of other U.S. citizens. The outcomes of this period, however, prodded a renewed examination of tribal institutions. It was becoming apparent that terminations -- such as the Menominee and Klamath had experienced -- were not a final solution to dependency upon the federal government. How Indian peoples were to be assimilated into national life was still a prevalent query, though the ill-advised, expedient Termination Acts suggested that less radical measures had to be taken. The courts in the late 50's struck discordant notes in the midst of terminations. In Native American Church v. Navajo Tribal Council[45/] the Tenth Circuit Court held that 1) it had jurisdiction to hear a case involving Indian litigants residing on a reservation,[46/] and most importantly, 2) that the Constitution of the United States did not apply to tribal governments. Members of the Native American Church complained that an ordinance of the Navajo tribe prohibiting their use and possession of peyote as a religious sacrament violated their first amendment right as citizens of the United States. The court argued that the Constitution

restricts the conduct of the federal government and the states, but that Indian tribes are not encumbered by its provisions. In Williams v. Lee[47] the Supreme Court ruled that tribes retain jurisdiction -- except as it is limited by specific acts of Congress -- over themselves and non-Indians on reservations. This action held that state courts lacked jurisdiction to intervene in the affairs of tribal members in a civil matter.[48] These opinions, supportive of the right of tribes to regulate their affairs and adjudicate civil disputes on reservations for members and non-members alike, did not go unnoticed. In two reports[49] which generally recognized some inherent problems with termination policy, the point is made that tribal institutions and actions are largely unresponsive to the rights (and structures which operationalize such rights) that are applicable to other citizens. This difficulty, they maintained, required critical examination and action.

Senator Sam Ervin, who "fathered" the Indian Civil Rights Act and was its prime mover, initiated hearings in 1961 on the constitutional rights of Indians. His decision to do so was not fortuitous, and it was clear that the opinions in Native American Church and Williams, as well as the Interior, and Fund for the Republic reports, prompted his interest. Burnett (1972) also raises some issues concerning Ervin directly which (though they are used or discounted as ammunition in debates concerning "intent" of the Indian Civil Rights Act) are worth mentioning. These points regarding Ervin may be summarized as follows:

1) his interest in Indian affairs derived from a large Native American constituency in North Carolina;

2) the conflict between Constitutional guarantees and tribal sovereignty intrigued him;

3) he could afford to be critical of the immunity of tribes from the Constitution because of the extent of assimilation of Native Americans into the state structure of North Carolina; and

4) northern liberals, whose primary attention was turned to blacks and civil rights, were easy targets for Ervin who embarrassed them for their lack of interest in Indian problems.

Alvin Ziontz[50/] suggests in addition that Ervin gained leverage for his bill by making the point to non-southern legislators that discrimintion against a racial minority (as he characterized the status quo in Indian affairs) was not the sole providence of the south.

The public hearings prior to the introduction of legislation in 1965[51/] were conducted from 1961-1963 in numerous locations, and gathered testimony and evidence from a wide spectrum of Indian and non-Indian representatives and authorities. The transcripts and supporting materials (e.g., 2500 questionnaires) display an array of interests and concerns which could not possibly be significantly addressed in omnibus legislation. In general, however, testimony focused upon impingement and violations of "Indian rights" (predominantly, rights of individual Indians). Sources of abuses of discretion and power included tribal courts, tribal councils, tribal police, state and local courts and police, and the Bureau of Indian Affairs. It was noted that most organized tribes did not have provisions for individual civil rights, particularly in the area of due process e.g., few protections against self-incrimination, prohibitions against professional counsel in most tribal courts, problems with jury trials, inadequate or non-existent

appeals procedures, and the like. The enforcement of state laws, particularly in communities situated near reservations, was a major source of complaint. Cited were double standards in the application of state laws to the detriment of Indians, the penetration of local and state police into the reservation where they lacked jurisdiction, and the differential and prejudicial treatment of Indians by non-Indian police and in non-Indian courts (where Indians were often denied due process). In states that had been granted criminal jurisdiction over Indian tribes[52/] there was general consensus that the states ignored their responsibility to develop law enforcement programs that would afford Indians the same protections extended to non-Indians. It was alleged that in some areas there was no police protection on Indian reservations. Complaints regarding abuse of power centered on the absence of accountability. The actions of some tribal councils were unfettered by the tribal courts, which they controlled, or by any other agency or jurisdiction. The Bureau of Indian Affairs was assailed on specifically this point: the activities of Bureau employees, including police and agency directors, were said to be inconsistent, arbitrary, and seemingly immune from review.

These and other concerns are not easily reduced, principally because the characteristics of tribes differ sharply. For instance, some tribes were certainly more "developed" when assessed against Anglo standards of court structure and procedures. The relative size of some tribes had an effect on their power and status in the state where they reside. The financial conditions of a tribe were particularly telling amid allegations of denial of

due process (i.e., inability to pay a jury, or to pay judges, or to afford appellate courts, etc.). All subsequent statutes that Ervin proposed to address the problems enumerated in the testimony were, however, universal and could not be responsive to the variability of tribal conditions and structure.

Eight bills and one joint resolution were introduced by Ervin in 1965, ostensibly as the result of the previous hearings by his subcommittee. Each is briefly stated:[53/]

S. 961 Exercise of powers of self-government by an Indian tribe is subject to the same limitations imposed upon the federal government by the Constitution.

S. 962 Criminal convictions in tribal courts can be appealed to federal district courts, with trials de novo on appeal.

S. 963 Indian claims of violations of civil rights are to be investigated by the Attorney General.

S. 964 The Secretary of the Interior is to formulate a new model code as a guide for tribal courts.

S. 965 In the absence of exercise of state jurisdiction, federal jurisdiction is extended to crimes committed by non-Indians on a reservation.

S. 966 Repeal of those sections of Public Law 280 which authorize the extension of state jurisdiction without consent of the affected tribes; tribal consent is required for the future extension of jurisdiction; states may retrocede from 280 status.

S. 967 Federal jurisdiction is extended to the crime of "aggravated assault."

S. 968 Attorney contacts submitted to the Bureau of Indian Affairs for approval are automatically approved after ninety days unless contrary action is taken within ninety days.

S. J. Res. 40 The Secretary of the Interior is to revise, update, and consolidate all legal materials related to Indian law.

Reactions to these bills varied among the different tribes and the Department of the Interior.[54/] The extension of the Constitution to tribes (S. 961) was favorably received in principle by some tribes who felt it would be consistent with their current practice, and adamently opposed by other tribes (most notably, the Pueblos) who sought to maintain their tradition practices. Several tribes objected to the financial burden of federal trials (S. 962). The federal investigation of civil rights infractions (S. 963) was generally supported: there was apprehension voiced, however, about disparity in interpretations of rights (an infraction for one tribe may not be an infraction for another tribe). Similarly, a model code (S. 964) proposal was variably received, and strongly opposed by tribes who feared imposition of the modal code on tribes. The bills designed to remedy jurisdictional problems of law enforcement (S. 965, S. 966, S. 967) received scant criticism: some felt that the option of retrogression for states should be extended to tribes as well. The bills pertaining to attorney contracts and the maintenance of legal materials (S. 968 and S. J. Res. 40) posed only minor difficulties for tribes, but were unsettling -- as other bills had been -- for the Department of Interior. Burnett (1972) succinctly characterizes their sentiment:

> Throughout the debate sparked by Senator Ervin's proposals, the attitude of the Department of the Interior and of the BIA remained consistent. When vital organizational interests, such as reputation and control, were not involved, and when a commitment of resources were not required, they proved to be cooperative. But when confronted with the limitation of their

> responsibilities or influence or when pressed for a commitment to additional tasks, they resisted, even if the interests of the Indian people were compromised. (602)

By 1967, Ervin reintroduced revised legislation, S. 1843-1847 and S. J. Res. 87. In large part, these bills resembled their tentative counterparts made in 1965 with only minor adjustments and clarifications. S. 1843 enumerated constitutional rights that applied to tribes (as the Interior substitute for S. 961 had specified in 1965) and limited appeals to the federal court to habeas corpus instead of trial de novo. Proposals S. 963 (investigations of civil rights violations) and S. 965 (extension of federal jurisdiction in absence of state jurisdiction) were not addressed in the new legislation. After a rather fascinating series of events, compromises, and uncertainty (detailed in Burnette, 1972) the Ervin proposals, consolidated and attached to H. R. 2516, were passed and became law in April, 1968.[55/]

Six titles of the Civil Rights Act of 1968 comprise what is known as the Indian Civil Rights Act. Title II (see below) is most germain to the present study. Other titles concern a model code for tribal administration of justice (Title III), amendments to Public Law 280 which require tribal consent for state assumption of civil and/or criminal jurisdiction and providing for retrogression of any or all such jurisdiction by a state (Title IV), an amendment to the Major Crimes Act (Title V), measures regarding contracts or agreements of legal counsel with tribes (Title VI), and the organization and revision of legal materials relating to Indian rights (Title VII). Title II of

the Civil Rights Act of 1968, "Rights of Indians,"[56/] is as follows:

> Sec. 201. For purposes of this title, the term --
>
> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, tribes, 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.
>
> Indian Rights
>
> Sec. 202. 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 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 six months or a fine of $500, or both;
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> (9) pass any bill of attainder or ex post facto law; or
>
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
>
> Habeas Corpus
>
> Sec. 203. 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.

Title II applies only to Indian tribes and their instrumentalities (and not to federal, state or local government, nor to individuals and non-governmental entities) and specifically enumerates prohibited conduct of Indian tribes:

> "No Indian tribe in exercising powers of self-government shall -- make or enforce any law prohibiting . . . abridging . . . violate . . . issue . . . subject . . . compel . . . take . . . deny . . . require . . . impose . . . inflict . . . deny . . . pass . . . deny . . . .."

The rights of individual members of tribes and (to the limited degree the courts have addressed the issue) non-tribal individuals and entities, then, derive from limitations placed upon the exercise of tribal government. These rights, often referred to collectively as the "Indian Bill of Rights," differ significantly from their supposed counterparts in the U.S. Constitution:[57/]

1. Constitutional guarantees of the right to bear arms (Second Amendment) and the right to a jury trial in civil cases in federal courts (Seventh Amendment), and prohibitions against quartering of soldiers in private homes (Third Amendment) and against racial discrimination in voting (Fifteenth Amendment) are absent in the Indian Civil Rights Act.

2. The First Amendment language "Congress shall make no law respecting an establishment of religion" is not comparable to the ICRA provision that no Indian tribe may "make or enforce any law prohibiting the free exercise of religion." This is significant in the case of the Pueblos, for instance, where a "religion" is embodied in the tribal structure.

3. The grand jury requirement of the Fifth Amendment is not applied to the Indian Civil Rights Act.

4. The Sixth Amendment provision for trial by jury for all crimes is more narrowly constructed in the ICRA: a defendant has a right to a jury trial ("of not less than six persons") in all proceedings in which the possibility of imprisonment exists. Federal and state courts are not required to provide jury trials in all cases whch may result in imprisonment.

5. The Sixth Amendment provision of professional counsel for indigent defendants is to be at government expense: The Indian Civil Rights Act provides for representation by counsel, but only at the defendant's expense.

6. The Indian Civil Rights Act mirrors Constitutional prohibitions against cruel and unusual punishments, but limits the sentencing of defendants by tribal courts to six months imprisonment and limits fines to $500 for a single offense.

An analysis of the adjudication of the Indian Civil Rights Act will suggest further characteristics of the developmental and

disjunctive features of international and federal law regarding indigenous peoples, and of the requisites of national development and social order.

Notes

1. National development was foremost on the minds of early explorers and their sponsors, and received the fullest cooperation of the pope. See, Hans Koning, Columbus: His Enterprise (New York: Monthly Review Press, 1976), and Wilcomb Washburn, Red Man's Land -- White Man's Law (New York: Scribner, 1971).

2. Quoted in Washburn, Red Man's Land -- White Man's Law: 7.

3. Francisco de Vitoria, De Indis et de Iure Belli Reflections (Washington, D. C.: Carnegie Institution, 1917).

4. Ibid.: 7, 44-45.

5. Felix Cohen, Handbook of Federal Indian Law (Washington, D.C.: Government Printing Office, 1942): 47. See also Felix Cohen, "Original Indian Title," 32 Minnesota Law Review 28 (1947).

6. A broad spectrum of legal literature e.g., Cohen (1942), Clinebell (1978), Getches et al. (1979), designate Europe in the sixteenth century as the locus of development of international law. This would appear arbitrary at best, and ignores several centuries of development of formal, sanctioned relations between nation-states.

7. Emmerich de Vattel, The Law of Nations; or the Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns (Philadelphia: P. H. Nicklin and T. Johnson, 1758): 158-159.

8. For discussion of the further development of international law regarding indigenous peoples to the modern period, see A. H. Snow, The Question of Aboriginies in the Law and Practice of Nations (Metro Books, 1972) which was prepared in 1918 for the Department of State for use at the Versailles Conference; see also Gordon Bennett, Aboriginal Rights in International Law (London: Royal Anthropological Institute, 1978).

9. The development of Convention 107 and Recommendation 104 can be traced through International Labour Conference, Living and Working Conditions of Indigenous Populations in Independent Countries (Geneva, 1956) which has been reprinted by Greenwood Press, 1974. This research was subsequent to Indigenous Peoples and presented preliminary discussions, presentation of the questionnaire, summary of the responses of member-states, and conclusions which formed the basis of Convention 107 and Recommendation 104.

Notes (cont'd)

10. A problematic feature of international law is sanction. Conventions and agreements are binding upon those who sign them, although sanctioning authorities vary from the International Court of Justice to the review of a particular sponsoring organization. The teeth of international law, particularly that related to minority peoples, are seldom bared. Convention 107, for example, has been ratified by twenty-six member-states of the International Labour Organisation, several of which do not have indigenous peoples within their national territory. The jury of the Fourth Russell Tribunal, who acknowledge they lack the power to enforce its decisions, appeal to "human conscience and reason alone." Further:

> "With the answer to the question if a state has violated an article or several articles of some treaty, it is important, viz., states are only committed to a treaty when they have ratified it. However, the jury sides with the opinion of a great number of prominent international authors on human rights, that particularly the treaties concerning human rights and the right of self-determiniation of peoples are the result of standards of justice which are already generally accepted. Therefore the jury is of the opinion that in those cases, that states have not ratified a certain treaty, those states are still committed to those treaties on account of the so-called international customary law." (Report of the Fourth Russell Tribunal on the Rights of the Indians of the Americas (Amsterdam: Workgroup Indian Project, 1980): 2.

11. The authority on federal Indian law has remained Cohen (1942). The contributions of Price (1973) and Getches, Rosenfelt and Wilkinson (1979) are within Cohen's philosophical tradition and update the development of federal Indian law and policy. Federal-tribal policy is reviewed by Prucha (1962), Debo (1970), Tyler (1973), Washburn (1975), McNickle (1975), and the American Indian Policy Review Commission (1977).

12. Felix Cohen, Federal Indian Law: 69. The Constitution provided Congress with powers to conduct the relations of the United States and Indian tribes: "to regulate commerce with foreign Nations, and among the several States and with Indian tribes." (Article I, Section 8, clause 3).

Notes (cont'd)

13. 1 Stat. 50.

14. C. 33, 1 Stat. 137.

15. 1 Stat. 329.

16. 1 Stat. 469.

17. This definition would change over the ensuing decades as treaties redefined the Indian territory. The final legislative attempt to indicate the boundaries of Indian Country was in 1834 (4 Stat. 729).

18. C. 46, 1 Stat. 743.

19. 2 Stat. 139.

20. 4 Stat. 411.

21. See Cherokee v. Georgia, 5 Pet 1 (1831), and Worcester v. Georgia, 5 Pet 515 (1832).

22. 4 Stat. 729.

23. 41 Cong., 3d Sess., Congressional Globe, p. 743.

24. 16 Stat. 566.

25. 109 U.S. 556 (1883).

26. 23 Stat. 385.

27. The complexion of criminal jurisdiction is only partly revealed by the Seven Major Crimes Act of 1885. The General Crimes Act (C. 53, 62 Stat. 757) and the Assimilative Crimes Act (54 Stat. 234), and additional legislation (e.g., those Acts incorporated into 18 USC 1153) have defined the scope of tribal, state and federal criminal jurisdiction.

28. 24 Stat. 388.

29. Hearings on HR. 7902 Before the House Committee on Indian Affairs, 1934 (73d Congress, 2d Sess. 16-18).

30. 34 Stat. 182, 183.

31. 48 Stat. 984.

Notes (cont'd)

32. For example, a goal was to limit the broad discretionary powers of Indian agents, in order to yield a more consistent Indian policy.

33. Comment, "Tribal Self-Government and the Indian Reorganization Act of 1934," 70 Michigan Law Review: 955-74 (1972).

34. See J. B. Nash, ed., New Day for the Indians (New York: Academy Press, 1938).

35. Hearing on S. 21030 Before the Committee on Indian Affairs, H. R., 1940 (76th Cong., 3d Sess.).

36. Report, No. 310 of U. S. Senate, 11 June 1943 (78th Cong., 1st Sess.).

37. HCR 108.

38. Actual termination began in 1954 and continued to 1962 for the following groups: Menominee (68 Stat. 250), Klamath (68 Stat. 718), Western Oregon -- 61 tribes and bands -- (68 Stat. 724), Alabama-Coushatta (69 Stat. 768), Mixed Blood Utes (68 Stat. 868), Southern Paiute (68 Stat. 1099), Lower Lake Rancheria (70 Stat. 58), Peoria (70 Stat. 937), Ottawa (70 Stat. 963), Coyote Valley Racheria Act -- 37 to 38 rancherias -- (72 Stat. 619), Catawba (73 Stat. 592), and Ponca (76 Stat. 429).

39. Tribal affairs e.g., communal ownership of property, do not appear to have been beyond the scope of "unAmerican activities" in the era of McCarthy.

40. In relative terms, only 3% of federally recognized Indians were involved. See Wilkinson and Biggs (1977).

41. For instance, see Felsenthal and Preloznik (1974), and Kickingbird and Ducheneaux (1973).

42. To these might be added the Snyer Act of 1921 (42 Stat. 208), the Oklahoma Indian Welfare Act of 1936 (49 Stat. 1967), the Menominee Restoration Act of 1973 (98 Stat. 770), and the Indian Self-Determination and Education Act of 1974 (88 Stat. 2203).

43. A notable addition here would be Public Law 83-280 (18 USC 1162). See Goldberg (1975) for detailed analysis; also American Indian Policy Review Commission, Task Force Four (1976).

Notes (cont'd)

44. The legislative history of the Indian Civil Rights Act is complicated, or has been complicated in voluminous accounts within many Indian Civil Rights Act cases, and in over fifty books, law journals, and reports. For present purposes, a limited chronological overview is provided. The complex issues related to congressional intent, in as much as they will be incorporated in this analysis, are discussed in Chapter Six.

45. 272 F.2d 131 (10th Cir., 1959). The precident for tribal immunity from the Constitution was Talton v. Mayes, 163 U.S. 376 (1896). On petition for habeas corpus, the Supreme Court ruled that a Cherokee convicted of murder in the Cherokee court was not entitled to remedy of the fifth amendment of the Constitution, as Indian tribes are "distinct, independent, political communities" and are not subject to the limitations of the Constitution.

46. The Navajo tribe, the largest in the United States, is not organized under the 1934 Indian Reorganization Act.

47. 358 U.S. 217 (1959).

48. Specifically, the dispute involved non-payment (an action to recover) for goods purchased on credit on the reservation from a non-Indian business concern.

49. Fund for the Republic, Commission on the Rights, Liberties and Responsibilities of the American Indian (see Brophy and Aberle, 1966); and Department of the Interior, Task Force on Indian Affairs, A Program for Indian Citizens (1961).

50. Personal correspondence, 19 June 1981.

51. Hearings on Constitutional Rights of American Indians Before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pt. 1 (1961); Hearings on Constitutional Rights of American Indians Before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pt. 2 (1961); Hearings on Constitutional Rights of American Indians Before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 2d Sess., pt. 3 (1962); and Hearings on Constitutional Rights of American Indians Before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., pt. 4 (1963).

Notes (cont'd)

52. The so-called "280 states" (from Public Law 83-280) such as California.

53. Adapted from Donald L. Burnett, Jr., "An Historical Analysis of the 1968 'Indian Civil Rights' Act," 9 Harvard Journal on Legislation: 557-626 (1972).

54. Hearings on S. 961-968 and S. J. Res. 40 Before the Sub-Committee on Constitutional Rights of the Senate Committee of the Judiciary, 89th Cong., 1st Sess. (1965).

55. 82 Stat. 73. The legislation history of the ICRA does not end here. The Pueblos persuaded their congressional delegation to introduce legislation at the next Congress that would exempt them from the Act. Ervin reopened hearings in New Mexico (Hearings on S.211 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 1969), but did little pursuant to the general apprehension concerning the impact of the ICRA. Special measures that Ervin introduced shortly thereafter, as well as the original exemptory bills on behalf of the Pueblos, all quietly died in committees.

56. Codified at 25 USC 1301-1303.

57. Summarized from Gil Hall, "Civil Rights in Indian Country," unpublished manuscript (1979).

CHAPTER SIX

ADJUDICATION OF CIVIL RIGHTS

Preceeding chapters have suggested socio-historical concommitants of the indigenous milieu, including developmental and disjunctive aspects of evolving international and national law and policy regarding indigenous peoples, and the impact of national development on Indian tribes, specifically their spurious incorporation into national life, and underdevelopment. The modus operandi to this point has been macro-structural, with a decided emphasis on the logic, consistency, and integration of macro-structural, historical elements. The conventional wisdom (the preponderance of social scientific, legal and historical literature) suggests otherwise: 1) the undevelopment of indigenous peoples is historically aberrant within the American experience of assimilation and integration of multiple racial and ethic groups; 2) the unfortunate circumstances of national development are past history, and the contemporary isolation of Indian peoples is largely a matter of their choice; and 3) the persistent rejection of efforts to integrate Indian peoples in national life eminates from a) so-called traditional values and behaviors which are bankrupt and misplaced in modern American society, and b) a preference for continued dependency upon the federal government as opposed to independent, creative self-actualization. Such explication of the "Indian problem"

also contains its own logic and consistency, but selectively ignores the development of underdevelopment, and its penetration and manifestations in socio-cultural formations.

The intent of Chapter Six is to illustrate, by delimiting the scope of analysis, this penetration and manifestation of underdevelopment in the arena of contemporary civil rights adjudication.* An inventory of socio-legal impacts will be considered which indicate the terms and direction of interdependence within, between, and beyond indigenous peoples. The examination is largely descriptive and does not, as stated previously,[1] hinge upon points of law, but rather addresses socio-legal outcomes of conflicting interests. Before proceeding, however, it is necessary to restate the Indian Civil Rights Act. Thusfar, the ICRA has been characterized as a projection of historical underdevelopment as imposed law. The Act may also be cast within the previous discussion of human interdependence.

Human and Civil Rights

Within natural law traditions, the rational faculty of humankind (which discovers and applies natural law) or the virtue of humankind (which links the nature of humankind to the moral elements of existence) made human and civil rights apparent and justified claims. However, when the multiplicity of "rational" schemes,

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*The federal court case files examined for this analysis are listed in Appendix II, including a statement on the style/format used with reference in ICRA case material.

the disparate interpretations of human virtue, the variable "nature" of humankind, and endless definitions of morality and moral conduct are considered, the bases for questioning human rights characterizations as absolute, self-evident, immutable, basic, inalienable, essential, inherent, etc. human and civil rights is established. Throughout history, rights -- so construed -- have undergone significant transformations. Generally, the ownership of humans by humans is not sanctified in either moral or civil codes as it once was. The notion that natural parents have the right of absolute domination over their children is being assailed by both the ascendency of children's rights and the broadening of states' rights of penetration into the family.2/ It is therefore unlikely that empirical discovery will yield the formulation of rights. It is from the arena of political and social action, however, that the nature and existence of a set of rights or institutions which orchestrate human conduct at a particular point in time emerges.

A review of national, transnational (application to disparate economic and social systems), and transcultural (application to disparate value systems) civil and human rights policies and law, reveals some common assumptions, among them notions that civil and human rights are 1) general principles which reflect general properties and relations; 2) universal in application; and 3) inherent rights. However, these points cannot be the necessary and sufficient parameters of an impact assessment, for even a cursory overview of civil and human rights formulas reveals that 1) their imbued "naturalness" is dependent upon dominant conceptions of human orderliness; 2) non-dominant cultural patterns,

ideological persuations and goals, etc., both intranational and transnational, undermine even the possibility of universal compliance; and 3) despite their utilization as the natural, logical and apparent bases of ordering conflicting claims to justice, they reflect little of -- and actually mitigate against -- alternative formulations of human institutions. The range of these qualifications is fully applicable to the Indian Civil Rights Act.

In general, the ICRA enumerates rules for making rules. Legislative and judicial use of these rules (as prescriptions of civil rights) may result in the creation, change, or sanctioning of institutional structures. The intent of formulations like the ICRA is to affect a substantive change in performance;[3] in this case, to limit the actions of tribal self-governance and to alter remedies for individual tribal members in a tribal setting. At one level, the ICRA does not appear to be an institutional alternative in the context of what we know to be a series of attempts to give expression to broad guarantees of individual rights (beginning with the first amendments to the Constitution).[4] While the ICRA has its distinctive features[5] (such as its specific designation of a segment of the population, "Indians") it might be concluded that the Act is simply a variation on an existing theme and policy, and that lack of systematic (universal) success of prior legislation is the basis of intensification of civil rights legislation -- hence, the ICRA. Within a tribal setting, however, the possibilities for institutional change are not easily dismissed. While the Act pursues a general theme of federal Indian law, namely, federal incursion into the affairs of tribal governments, its outcomes

appear to go beyond diminuations in tribal sovereignty and jurisdiction, to the regulation of a wide arc of human interdependence. Unaccustomed to viewing civil rights as a form of regulation (and not as moral, etc. requisites), their repressive dimension may be particularly difficult to grasp.

Human interdependence is shaped by the arrangement of rights within institutions which delineate who can avail themselves of opportunities, and whose choices are to be encumbered by the exercise of rights by others. Generally, civil rights are viewed as epiphenomenal to the regulation of human interdependence, as a consequence of either their specific protection of individual or group interests which are held sacred and seldomed questioned (i.e., civil rights as emancipatory), or because civil rights are perceived as inevitable outcomes (tradition, custom, i.e., unreflective habituation) of human consociation which are seldomed questioned despite the possibility that such rights may not best serve the valued interests, and may only restrict opportunities. It is not enough to defend civil rights as the necessary guarantee of both individuals' rights in society and a modicum of social order, without specifying which individuals and whose interests are protected, and whose definition of social order is to count. These are choices from a range of possibilities whose "integrity" is intimately related to whichever interests and values prevail. The ICRA establishes opportunity sets (for Indians and some non-Indians alike) from which individuals and corporate bodies (tribes, municipalities, businesses, etc.) choose courses of action. Stated baldly, civil rights protect some interests at the expense of other interests, and as sanctioned claims, regulate

the opportunity structure within which human interdependence takes its course. The conflict over the ascendency of rights (i.e., how interdependence is to be ordered) is no less generic to the discussion of the Indian Civil Rights Act.

Civil Rights Litigation

Several preliminary points warrant consideration prior to examination of ICRA cases. The first of these deals generally with the indistinctiveness of court cases decided, court cases in the process of litigation, and court cases which have -- for any number of reasons -- been terminated during the course of litigation. Adjudication shall refer to the process of litigation, irrespective of whether a court decision has been rendered. A case represents a formalized statement of conflict, and can represent a class or category of conflict. Litigation may occur when a "critical mass" of conflict is reached, and when the instant case of conflict is felt to be adequately tailored to the requisites of the federal court (e.g., the issues of conflict are germain to federal court subject matter jurisdiction). An impetus of formal litigation may also be the appearance of a new remedy, either due to enactment of new legislation, or due to ongoing judicial interpretation of law which suggests alternative avenues of remedy. The ICRA was a new remedy in both of these respects. Another factor which blurs the distinctions between decided cases and those yet undecided by the courts is their shared element of risk. Litigation embodies costs, the least of which appear to be

related to attorney and court fees.[6] The most apparent and immediate cost hinges upon the risk that an act or activity will be specifically prescribed or proscribed i.e., the status quo, under scrutiny of the courts, may be changed. This risk factor is operative whether a final court determination is forthcoming or not.

A second preliminary note is related to constraints on generalizing from the data. The intent of the review of ICRA cases is not to judge the adequacy of remedy, but to survey the litigation and areas of conflict which it embodies, and relate these to competing interests within the context of tribal sovereignty. The analysis cannot be reduced to a series of frequencies drawing from a decade of adjudication of the Indian Civil Rights Act. This is largely due to the absence of representitiveness. As noted previously, ICRA cases do not reveal the conflict which is avoided or solved because of the threat of sanction in federal courts: this could include adjudicated conflict in tribal courts. In addition, frequencies constructed from federal court litigations are applicable only to the limited arena of federal court litigation. A hypothetical example makes this point clear. In one instance, a federal court decision, which is specific enough, and of such merit and weight, precludes one hundred similar instances of conflict from seeking a federal remedy i.e., conflicting interest groups view the single adjudicated case as an accurate measure of their odds in federal court. The risk is unreasonable for a particular interest. In another instance, one hundred (each and every) occurances of a type or class of conflict are adjudicated in

federal court. No single federal court decision has been so specific, meritorious or weighty so as to preclude the frequency of federal litigation i.e., competing interest groups view the disparities in decisions of adjudicated cases as accurate measures of their odds in federal courts. The risks appear evenly shared among litigants. To proceed with a frequency analysis, therefore, means citing the single case within its category of type of conflict with a frequency of one, and citing the one hundred cases within their category of type of conflict with a frequency of one hundred. The hypothetical reveals, however, that the frequency of conflict (irrespective of whether it receives final adjudication in federal court) is equal. Accordingly, the relevance of frequencies is quite limited in this analysis.

A third consideration is the utility of a strict legalistic interpretation of ICRA cases in the present analysis. Such interpretation relies solely upon legal precidents (the decisions of federal courts) to construct the legal impact, or the status and interpretation of a legislative enactment. For present purposes, given the attempt in previous chapters to view law generally, and federal Indian law and policy specifically, as a response or reflex of evolutionary acceleration and historical incorporation, the adequacy of a legalistic approach is insufficient. This is not to suggest, however, that it is irrelevant. It would be ludicrous, for instance, to ignore the points of law in the Santa Clara Pueblo v. Martinez (001565) decision of 1978 which in every respect are specific, and of sufficient merit and weight (a U.S. Supreme Court decision) to preclude the adjudication of entire categories of

conflict in federal courts. Gil Hall (1979) provides an excellent and succinct review of ICRA case law[7/] which is generally within the strict legalistic approach. His conclusions indicate the development of substantive points of law in pre-Martinez cases. For instance, the majority of ICRA cases turned on specific elements of tribal self-government, including membership and enrollment procedures, eligibility criteria for voting in tribal elections and candidacy for elective office, apportionment of voting districts, and conduct of elected and appointed tribal officials. Property interests, of tribal members and non-members, were examined on a number of procedural grounds (largely administrative) felt to be affected by the ICRA. A much smaller number of cases involved criminal issues and the habeas corpus provision of the Act. In finding generally that tribes were no longer protected by sovereign immunity from suits by members and non-members due to specific Congressional intent (the ICRA), the courts promulgated standards applicable to tribes in the conduct of self-governance. These included requirements of due process in the administrative and judicial conduct of tribal affairs (affecting members and non-members), and consistent (and reasonable) application of enrollment, membership, and voting criteria. These standards, however, were largely tempered by considerations of tribal custom and culture. Hence, some distinction between Indians (blood quantum) that had bearing on enrollment and membership were allowed to stand, as were differences in the treatment accorded to members and non-members. Customary interpretations of tribal rules and regulations (and practice) were weighted favorably to tribes: however, lacking these, tribal structures which mirrored Anglo counterparts (e.g., tribal court

structures) were expected to apply tribal rules and regulations in a manner consistent with the expected conduct of like instruments in the larger society. A buffer between the status quo conduct of tribal governance and asserted ICRA rights was the general requirement of exhaustion of tribal administrative and judicial remedies prior to federal court intervention.8/

Such an overview is instructive in its own right, and reveals a dimension of legal impact of the Indian Civil Rights Act. It does not readily disclose, however, the particulate social impact of a legislative enactment and its interpretation in federal courts. To this end, the substance of ICRA cases is nominally divided into considerations of litigant interests, boundary conditions, perceptions of legitimate authority, and interests-at-risk, which when viewed as an interrelated whole, reveal socio-legal impact.

ICRA Litigation

It is difficult, if not altogether meaningless, to characterize ICRA litigation in neat, circumscribed categories. The range of issues and conflicts seeking federal remedy was very broad, and in instances where cases appear to be similar in most respects, further scrutiny reveals discernable contrasts. These would include differences in tribes -- historical development, degree of federal dependency, development of tribal court systems, etc. -- which were variably considered by the courts. It is reasonable to suggest that the initial decade of adjudication of the ICRA was sufficiently complex to warrant the proliferation of appeals to federal intervention.

The deliberations and decisions of federal courts had limited application and would not, until the Martinez decision in 1978, be of sufficient breadth to indicate (or rather, to ultimately establish) federal intent regarding the application of ICRA to Indian tribes.

Litigant Interests

The majority of ICRA litigation involved strictly intratribal disputes: a) the issues presented to the federal courts for adjudication were related to elements or aspects of tribal self-governance, and b) litigants were tribal members (individual members or tribal entities). This latter point requires clarification. More than one-half of ICRA cases were complaints brought by an individual tribal member(s) against the "tribe." These individuals, often attempting to represent a class of tribal members, represented many different interests of the tribe. Many were aggrieved political candidates or voters, some were convicted criminals (in tribal courts), some were tribal employees, and the like. The "tribe," defendant in over three-quarters of the federal cases, included the various instruments of tribal government, such as the tribal council, election boards, business committees, tribal courts, tribal judges, jailers, and tribal police. In addition, various instruments of the federal government (Secretary of the Interior, Bureau agency directors, etc.) were named in suits along with tribes. For instance, litigation testing the power or effect of a tribal ordinance would include the Secretary of the Interior where a tribe, organized under the

Indian Reorganization Act of 1934, had received the Secretary's approval for amendments to a tribal constitution.[9/] Similarly, in controversies regarding the conduct of tribal police, the Bureau of Indian Affairs (BIA) might be a defendant, as in many tribes police are employess of the BIA. Complaints against tribal instruments, which specify a limited number of members who hold elective or appointed positions, have on occasion included a broader spectrum of tribal members. For example, in Lefthand v. Crow Tribal Council (001089), an action brought by an individual alleging procedural irregularities in the conduct of the Executive Committee, and in Stands Over Bull v. Bureau of Indian Affairs (003665), an action brought by an impeached tribal chairman alleging violation of due process, the Crow Tribal Council was a defendant. The Crow Tribal Council consists of the entire adult membership of the tribe (males 21 years and older; females 18 years and older), hence the legislative body of the tribe is not so narrowly constructed as was the case in most ICRA litigation. The various and competing interests of tribes and tribal members projected in federal courts, due to the preponderance of intratribal ICRA controversies, will be threaded throughout the ensuing discussion. A sample category, political disputes, can indicate the contours of some intratribal conflict.

Controversies regarding tribal membership and enrollment criteria and procedures, and tribal elections (voting eligibility, apportionment, certification of election, candidacy for tribal office, etc.) constitute the lion's share of ICRA litigation. These are properly boundary disputes, involving various aspects

of participation in tribal life, such as membership in a tribe, and political enfranchisement. While these will be discussed elsewhere as boundary issues, they often project political interests within a tribe. In Marchand v. Nicholson (001206) a former member of the Colville Business Council alleged she was ousted because of a change of political views. The background of the dispute is described:

> In 1959 a political bloc was formed on the Colville Business Council to liquidate the Reservation by termination of federal status. Termination in federal Indian law means liquidation of a reservation by sale and distribution of proceeds to individual members. The Colville Reservation has been valued at between $30,000,000.00 and $1,000,000,000.00.
>
> Since 1959 the pro-termination and anti-termination factions on the Colville Business Council have been engaged in a life and death struggle over the future of the Reservation. Positions of the two factions have hardened, and shortly after the last council election of May 9, 1970, the political position of each faction became one of no compromise. Uniform bloc voting resulted even on matters not connected with the termination issue . . .
>
> As a result of plaintiff Thelma Marchand's change of political views defendants conspired to seize control of the Colville Business Council by ousting plaintiff Thelma Merchand from the Council. 10/

In another case, twenty-eight plaintiffs, Indian residents of the Pine Pidge Indian Reservation, brought action against twenty officers and employees of the Oglala Sioux Tribe alleging that election irregularities (fraudulent and criminal acts) deprived them of their vote, and of the opportunity for newly elected officials

to take office [Means v. Wilson (002567)]. This controversy at Pine Ridge was but a single manifestation of an ongoing political struggle between an entrenched leadership and tribal factions which to various degrees, were supporting activities of the American Indian Movement on the reservation. In Oglala Sioux Civil Rights Organization v. Wilson (002002) plaintiffs allege that tribal President Wilson had organized a private police force, a "goon squad" to carry out a program to "terrorize, harrass, intimidate, assault, threaten"[11/] members who support the American Indian Movement, and intimidate and prevent members' attorneys from access to their clients. Additionally, Wilson and other tribal officials were accused of enforcing a prohibition against public meetings on the Pine Ridge Reservation, tampering with official court documents, and providing erroneous police and court records on the plaintiffs to extra-tribal law enforcement jurisdictions. Exerpts from a tribal newsletter establish the purported rationale:

> The time has come for all good citizens of the Pine Ridge Reservation, to lay aside their petty differences and squabbles and unite. Unite against the American Indian Movement and their planned takeover of our Reservation.
>
> What has happened at Wounded Knee, is all part of a long range plan of the Communist Party. First, they divide the people, get them to fight among themselves: Hasapa against wasieu, lakota against wasieu, iyeska against lakota, father against son, mother against daughter or religion against religion. Disrupt the normal function of society. Demand the removal of key officials. Demand the resignation of Heads of State, and so you see the jigsaw puzzle begins to fall in place.

> To combat this unpleasant nuisance we are confronted with Oglalas, we are organizing an all out volunteer Army of Oglalas Sioux Patriots . . . There is no doubt that Wounded Knew is a major communist thrust. They have established a beach head. Now it is up to us to Get Them Out. We will organize and train while the Fed. Gov. is negotiating with them. And when the Fed. Gov. has yielded, conceded, appeared and just short of surrender, we will march into Wounded Knee and Kill Tokas, waticus, hasapas and spiolas. They want to be martyrs? We will make it another Little Big Horn and any one of their beatnik friends can be a stand-in for Yellow Hair. 12/

Similarly, in Rosebud Sioux Tribe v. Driving Hawk (002901), the Sioux Tribal Election Board brought a complaint against tribal individuals to prevent them from interfering with performance of official duties. The defendants, claiming to be duly (and newly) elected, countersued and alleged that the actions of the election board in refusing to certify an election were motivated by the defeat of incumbent tribal officials. Specific allegations from the litany of defendants' claims against incumbent officials included:

> . . .
>
> 2. Ordered the credit and loans to the Driving Hawk [defendant] supporters from the tribe to be terminated called in and withdrawn.
>
> 3. Robert Burnette [President of the Rosebud Sioux Tribe] changed the payroll deduction credit plan of Driving Hawk supporters to prevent monthly installment payments on cars to be deducted from tribal employees wages and paid to Mr. Driving Hawk's car sales business.
>
> 4. Secured a Restraining Order by one of his [Robert Burnette] supporters in Tribal Court restraining Ed Driving Hawk, doing

> business as Oyate Sales [car dealership] from doing business on the reservation.
>
> 11. Fired approximately 130 of the employees of the CETA Program, who were mostly Ed Driving Hawk supporters. 13/

Similar cases which involve political factionalism include White v. Tribal Council, Red Lake Band of Chippewa Indians (003376), an action of a "defeated" tribal chairman, Colombe v. Rosebud Sioux Tribe (002816), an action of a disqualified council representative, and Stands Over Bull v. Bureau of Indian Affairs (003665), an action by an impeached tribal chairman. In Rank v. Crow Creek Sioux Tribe (003535), the district court judge's[14/] Memorandum Opinion begins with an appraisal of like controversies:

> This lawsuit presents the Court with a situation with which it has, of necessity, become all too familiar; i.e., political controversies of the Crow Creek Sioux Tribe are reduced to legal questions of allegedly constitutional significance and presented to the federal court for resolution. 15/

While the above are perhaps most blantant, the "political" nature of intratribal disputes is a recurrent theme (see Chapter Seven).

The bounds of tribal disputes are broadened in litigation involving non-members and non-member entities, though such disputes generally revolve around the exercise of tribal governance. There have been, for example, several instances where Indian non-members of tribes have pursued actions against tribes. These cases involve membership and the attendant rights of membership. In Markovich v. The Puyallup Indian Tribe (003001) individuals with between 1/8 and

1/32 Indian blood alleged denial of due process when, in 1938, they were not included on the membership roll that is currently used to grant Indian fishing permits under treaty provisions. In Thompson v. Tonasket (001499) a disenfranchised Indian sought federal remedy from the action of the Colville Business Council which struck her from membership rolls, alleging that she had lost her American citizenship when voting in a foreign election in Canada. In Standing Rock v. Chippewa Cree Tribe (003596), an action to re-enroll a former member, and in Williams v. Chippewa Cree Tribe (003536), an action to enroll a new member, claims to annualty payments, and allotments of tribal lands (concommitants of membership in the Chippewa Cree Tribe) were made by the plantiffs.

Several actions have been brought by non-Indian corporations affected by tribal decisions. In Wasson v. Gray (001015), a nonprofit legal aid corporation, funded by the Office of Economic Opportunity and located on the Zuni Reservation, sued the Pueblo of Zuni because of alleged harrassment of public defenders, and exclusion from the Tribal Administration Building which amounted to "a denial of effective assistance of counsel to plantiff's present and potential clients."[16/] Several for-profit corporations involved in ICRA litigation are energy related. In Olympic Pipe Line Company v. Swinomish Tribal Community (003076), plaintiffs sought to prevent the tribe from blocking and removing pipelines from tideland property on the reservation. Non-Indian leasees who produced oil and gas on the Jicarilla Apache Reservation brought action in federal court against the Jicarilla Apache Tribe [Merrion v. Jicarilla Apache Tribe; Amoco v. Jacarilla Apache Tribe

(consolidated: 003553)] which is pending before the current session of the U.S. Supreme Court. The plaintiffs allege that enforcement of a tribal gas and oil severance tax is contrary to terms of leases approved by the Secretary of the Interior prior to enactment of the tax. In Lake v. Peabody Coal (001492) tribal individuals[17] alleged they were due compensation for use of their property. The plaintiffs prevail:

> Under Peabody's lease with the Navajo Tribe, it (Peabody) agreed to compensate all tribal licensees and surface owners for all damage to or destruction of any or all their property. Thus, it appears Peabody assumed a tribal authority or function, to-wit: the payment of just compensation for property rights of tribal members affected by Peabody's operations under its lease with the Navajo Tribe. 18/

There are additional permutations of plaintiffs and defendants which, though statistically insignificant, indicate some of the variable impact of the ICRA. For instance, in Plummer v. Jones (001070), individual tribal members brought action against the Bureau of Revenue of the State of New Mexico and alleged that collection of state tax from tribal members living within the exterior boundaries of the Reservation (Navajo) who derived their incomes wholly from sources within the Reservation violated the ICRA [section 1322 requires consent of tribes prior to state assumption of civil jurisdiction.] An intertribal dispute, Tso v. The Hopi Tribe (002882) involved the jurisdiction of the Hopi tribe over Navajo individuals living on lands which were once contested between the Navajo and Hopi tribes. A case of federal intervention

is United States of America v. San Carlos Apache Tribe (002367), an action where the plaintiff sought remedy to prevent a tribal election because the defendant tribe lacked election ordinances and administrative procedures consistent with ICRA provisions.

The interests of outside litigants in tribal conduct are at once apparent, if one chooses to focus specifically on the issue at hand. Hence non-members who own or lease land on Indian reservations are intent upon preserving property rights -- including use rights -- in the wake of or in anticipation of a tribal action. Non-members who seek recognition as tribal members assert their interest in birthrights, usually including annualties, land allotments, or other rights (e.g., fishing permits) which membership confers. Non-member employees and corporations may insist on general due process (adequate notice, impartial hearings, etc.) when tribal action alters the terms and conditions of their employment or business affairs. Similarly, non-members who practise before tribal courts or who are litigants in tribal courts have an interest in the conduct of tribal courts (e.g., do they conform to familiar and expected court structure and procedures?) which in turn is to affect a personal interest in defending a client, or in the issue when prompts the litigation. Occasionally, much broader interests are specified. These might result from the complexity of conflict in a particular case. For instance, Settler, A. v. Lameer and Settler, M. v. Yakima Tribal Court (consolidated: 001213) details a controversy involving the criminal jurisdiction of the Yakima Tribe over members' activities off the Yakima Reservation. Tribal members, the plaintiffs, were arrested by tribal police for fishing during the

closed season at a location approximately sixty miles beyond the reservation, but in a "usual and accustomed" fishing station. The case is unusually complicated due to the jurisdictional disputes between the tribe, the state, and the federal government (BIA) over fishing regulations, as well as the protracted conflict between the State of Washington and various Indian tribes in the state over treaty fishing rights. In the Settler cases, the State of Washington argued that BIA approved laws and criminal sanctions related to fishing of the Yakima Tribe authorized Indians to fish in violation of State of Washington laws. The state's interest, in addition to their jurisdiction stake, is represented to include the following:

> The decision reached in this case will have a significant and far-reaching effect upon the state's ability to conserve, protect, and perpetuate the anadromous fishery resource for the benefit of all citizens.
>
> Fish and game laws . . . and regulations promulgated thereunder . . . are designed to accomplish the goals of conservation of these valuable resources. 19/

The federal interest is similarly stated, except for the proviso that the Yakima Tribe should determine how fishing rights are to be shared and exercised among its members. The Yakima Tribe stipulated its interest in the protection of treaty rights (again, partially a jurisdictional issue) to fish at designated places, and its interest in the protection of the resource (and the right to fish) for Yakima Indians yet unborn. The tribe argued that State of Washington law, regulations and enforcement were too lax, and the State was not interested in protecting Indian fishing rights

or the fishery: "A hiatus in enforcement exists in the State of Washington. The conflict is real and is harming all parties concerned."[20] The opinion of the court notes: "Cooperation between state, local and Tribal officials is encouraged. Ultimately, effective regulation of the fishing resource is of benefit to both Indian and non-Indian."[21] These disparate definitions of the "public good" involved several conflicting interests: individual tribal members with the tribe, the tribe with individual citizens in the State of Washington, and in the U.S. generally, the tribe with the State of Washington, the federal government with the State of Washington, etc. In Olympic Pipe Line Company v. Swinomish Tribal Community (003076), a similar conflict emerged between the tribe who argued that the tribal fishing resource could be threatened by the presence of oil and gas pipelines in tidelands, and the corporation which contended that disruption in the delivery of petroleum products would adversely affect a significant segment of the general public. These interests are voiced in addition to those interests of the tribe in the ownership of land, and of the corporation in property rights (pipelines and valves) including use rights of an easement.

United State, ex rel. Cobell v. Cobell, and Sharp v. United States (consolidated: 001601) is another complicated jurisdictional dispute, involving child custody. The Blackfeet Tribal Court claimed jurisdiction of two children on behalf of their maternal grandmother (an enrolled member) and mother (not a member) after State of Montana courts awarded custody to the children's father (also not a tribal member). The Blackfeet tribe argued that its children are the strength of the tribe and that the tribe is enhanced by the

jurisdiction over children. The State of Montana directed its concerns to the "best interests" of the children:

> The State of Montana, Amicus Curiae, supports the position of the father, Henry F. Cobell. Unless clearly defined guidelines are set forth in the jurisdiction of custody of children in divorce and marriage and related matters, irreparable damage will be done to many children. There will be a constant flood of litigation of one court overruling another court, of no one knowing for sure which order to obey, children will be snatched from one jurisdiction and one state court to Tribal Courts, to reservations. The State of Montana basically attempts to protect the interests of the children. Most of the arguments which have gone before in this case have centered around the rights and best interests of the father and of the mother, and even of the grandmother; but we would argue that this court should look to the best interests of the children, and that would dictate well-defined limits of jurisdiction and guidelines for both the Tribal Courts, and state courts, and the United States court to follow in child custody matters. 22/

In United States of America v. San Carlos Apache Tribe (002367) the federal government intervened in a tribal election in the absence of procedures and ordinances consistent with guarantees of the ICRA. Its statement on the rationale for federal advocacy is the most explicit of ICRA cases:

> The public interest has been defined as being something that either furthers some recognized public good or minimize a public harm . . .

> The United States has a special relationship to Indians which is grounded upon Constitutional provisions, upon Congressional enactments and upon federal Court decisions. Not only is the United States concerned that the interest of the San Carlos Apache people in having a fair and unbiased election is vindicated; but the federal government also believes this action also furthers the broader interests of the American people. In recent years, the United States has seen normal social processes disrupted by persons who, rightly or wrongly, felt that their views could not be expressed through normal elective processes. The San Carlos Apache reservation is not immune from such possible disruption, which, if it were to occur, would not be confined to the geographic boundaries of that reservation . . .
>
> The granting of the relief sought is eminantly consistent with the public interest, in that is increases reliance on established avenues of expressing social concern and political views, and tends to avoid the potentially harmful effects which would obviously result from an unfair tribal election. 23/

The interests projected by non-Indian litigants in ICRA cases, such as those reviewed above, are significant to the extent they indicate the impact of tribal actions beyond the mere confines of reservation boundaries or membership. However, to reiterate an earlier point, most ICRA litigation was intratribal, related to what shall be designated as boundary issues.

Boundaries and Agenda

For present purposes, a "boundary" is the parameter which distinguishes whom or what is included, and whom or what is excluded in a sphere of social interaction. A boundary condition is a

specific criterion which, considered alone or with other conditions, defines a boundary. The enumeration of boundaries and boundary conditions related to ICRA litigation does not appear, on its face, to be problematic. One could methodically note, for instance, the criteria which were the bases for decisions regarding membership in tribes, certification of candidacy for elective tribal office, and the like. In situations where boundary conditions appear unevenly applied or inconsistent, it becomes obvious that the various rationales which govern the implementation of boundary conditions can be expedient and blatantly political. Such rationales, though they do not fairly represent the dynamics of all boundary disputes, nonetheless suggest that the delineation of "insiders" and "outsiders" is immeasurably complicated by factors ranging from tribal factionalism to resource depletion.

A most obvious category of litigants embroiled in boundary issues are "outsiders,"though the designation belies the variation in their circumstances. In Tso v. The Hopi Tribe (002882), plaintiffs argued that a geographic boundary was an insufficient boundary condition. The plaintiffs, Navajo individuals, one of whom had lived on a parcel of land for all her life, the other for more than twenty years, were prevented from rebuilding their home after a fire destroyed it. The property in question was among territory that had been the focus of an intertribal dispute between the Navajo Tribe and the Hopi Tribe. The Secretary of the Interior had stepped in and designated areas under the exclusive control of each tribe. Navajo plaintiffs' property was within the new (or rather, newly sanctioned) exterior boundaries of the Hopi Reservation. Hence, plaintiffs, non-members, were subject to the actions of the

Hopi Tribe. Dry Creek Lodge v. United States of America (002438) involved geographic boundary issues as well. The plaintiff, a non-Indian business located on privately owned land within the exterior boundaries of the Arapahoe and Shoshone Reservation, sought federal remedy to prevent the tribe from blocking an access road (which passed over lands of tribal members) to a newly constructed lodge. The Wind River Reservation, the locus of the dispute, includes a city and several small communities and has a population of approximately 35,000, only 4,500 of whom are enrolled members of the Arapahoe and Shoshone Tribes. The reservation resembles a checkerboard, with private land holdings of non-Indians interspersed among the tribal property (see discussion of Allotment Act, Chapter Five). Plaintiff corporation alleged:

> That the acts of the said Tribal Council are discriminatory and have been undertaken with the avowed intent of driving from the Reservation non-Indians and other persons associated with non-Indians who now reside on the Reservation, and who have resided on the Reservation from the earliest time." 24/

In Berry v. Arapahoe and Shoshone Tribes (003108), non-Indian lodge owners on deeded land within the reservation brought action against the Joint Business Council of the tribes when they were denied a tribal liquor license (they had been able to obtain the required county liquor license). The plaintiffs argued that deed land and population patterns in the area surrounding their lodge (within the Wind River Indian Reservation) constituted a "non-Indian community" and the extension of tribal jurisdiction

to non-Indians and deeded lands was unlawful. In both Dry Creek Lodge and Berry, non-Indians argued that the fact of their geographic inclusion on an Indian reservation was not balanced by other boundary conditions, such as the vote (i.e., non-Indians do not have a say in the tribal governance which affects their businesses). Other non-Indian businesses, such as those in Merrion, Amoco, Lake and Olympic Pipe Line Company (discussed above), with interests in leases and easements on reservations, had expressed similar objections.

Tribal actions to exclude non-members from reservations took various forms. The first ICRA case, Dodge v. Nakai (001037) involved the removal from the Navajo Reservation of a non-member attorney [this case will be discussed in detail below]. Less drastic, a number of cases addressed the exclusion of non-Indian lawyers from practice before tribal courts. Prior to the ICRA, many tribes that had courts prohibited professsional counsel because they were felt to impede (or intimidate) the deliberations of judges who were not trained in Anglo law, or to demand of the tribal court what it could not produce (e.g., Anglo notions of due process). The ICRA specifically legislated that any person in a criminal proceeding was entitled to have the assistance of counsel (the courts consistently interpreted this to mean professional counsel) at his/her own expense. Tribal action which would exclude non-members also includes incarceration. In Ortiz-Barraza v. United States of America (002729) a Papago tribal police officer stopped and searched a non-member vehicle as it passed through the Papago Indian Reservation, finding burlap sacks containing marijuana. The plaintiff was taken to the Papago detention facility and held

for transfer to the drug enforcement administration, thus effectively excluding a non-member engaged in illegal activities from the Papago Reservation. Plummer v. Jones (001070) could be said to describe another type of boundary, namely the exclusion of state instruments (the Bureau of Revenue of the State of New Mexico) from a reservation where plaintiffs alleged the state was involved in illegal activities by collecting taxes from members of reservation. The Tribe (Navajo) had not consented to state assumption of jurisdiction.

Another variant of exclusion is demonstrated in Wisconsin Potawatomies v. Houston (001656). In this case, the Hannahville Indian Community brought action against the Michigan Department of Social Services which had placed three children of a full-blood tribal member father and a white mother (both deceased) for adoption in Florida. The Department of Social Services argued that the state had jurisdiction over the matter because the children assumed the status of their mother (who was white) and hence the children were "white" and beyond the jurisdiction of the tribe (i.e., excluded from tribal jurisdiction). In ordering the Department of Social Services to return the children to the tribe from Florida, the court determined that according to Potawatomie tribal custom regarding both the care and custody of children and status of children of an Indian father and white mother, that the children were Indian and were included within the jurisdiction of the tribe. United States, ex rel, Cobell (described supra), which involved three separate jurisdictions in a child custody dispute, shares with Plummer and Wisconsin Potawatomies the manipulation of jurisdictional criteria to assert boundaries and to designate insiders and outsiders.

The relevance of boundary and boundary conditions to intratribal disputes becomes more apparent as control of the "agenda" is taken into account. Designation of the agenda, ostensibly the prioritized inventory of tribal deliberations and actions, is positively correlated with the relative power of individuals or groups in tribes. For instance, non-Indian businesses on reservations complained that they had no voice in tribal affairs, and that tribal councils and business committees, who appeared to have little interest in the viability of a business, nonetheless dictated the conditions and terms under which it had to operate. Such excluded entities lacked the vote, lacked eligibility for tribal office, and some would argue, lacked the ability as a class of interests to prevail in struggles over the agenda (be it through tribal courts, etc.). A federal remedy, the ICRA, was seized upon as a means of penetrating the tribal boundary.

As is evident in several cases cited thus far, membership criteria control access to the tribe, the agenda, and tribal resources. Membership controversies appear to be intratribal when former members are excluded, because of the changed status of their national citizenship, violations of reservation residency requirements, and the like. There are additional types of membership disputes. A member of the Three Affiliated Tribes of the Fort Berthold Reservation, in Necklace v. The Tribal Court of the Three Affiliated Tribes (003362), petitioned the court for write of habeas corpus. The plaintiff had been confined in a state hospital pursuant to an involuntary commitment order of the tribal court, and she argued that her exclusion from the reservation and confinement in a state facility did not satisfy basic due process. In Groundhog v. Keeler

(002261), plaintiff descendants of enrolled citizens of the Cherokee Nation brought action against the Principal Chief of Tribe who had been appointed by the Secretary of the Interior. Challenging the power of the Secretary to designate the Chief, plaintiffs alleged that the current appointee, Keeler, was not a citizen by blood of the tribe. In this case, in spite of tribal membership criteria, federal intervention (Secretary's appointment) resulted in an allegedly non-member official assuming a measure of control of the tribal agenda.

Determinants of political power, such as eligibility for tribal elective office and eligibility to vote, are fundamental requisites for controlling the tribal agenda. In Jacobson v. Forest County Potawatomie Community (002672) an adult female descendant of an enrolled member of the Forest County Potawatomie Community alleged that a contemporary stipulation of the tribal Constitution and Bylaws that the "General Tribal Council shall elect from its male members . . ." prohibited female tribal members from holding office on the Executive Council, though females had traditionally participated in the General Council (including the plaintiff). Another boundary condition was based upon alleged conflict of interest. In Luxon v. Rosebud Sioux Tribe (001107) the plaintiff challenged a section of the Constitution of the Rosebud Sioux Tribe which denies eligibility for membership on the tribal council to employees of the Public Health Service or Department of the Interior:

> Even if it be admitted that the tribe has a legitimate interest in proscribing employees of the Bureau of Indian Affairs from membership on the tribal council, it

> has no legitimate interests in excluding all employees of the Department of the Interior (which would include, for instance, a national forest ranger, a federal inspector of mines, etc.) or for excluding any employee of the Public Health Service, an organization which by law has no direct or indirect influence upon or connection with the internal governance of the tribe. 25/

The tribe maintained that federal employees in administrative capacities in the tribe may unduly influence tribal affairs in a manner detrimental to the integrity of the tribe. In Howlett v. The Salish and Kootenai Tribes (002779) two tribal members were declared ineligible candidates for tribal council membership on the basis of residency requirements. The plaintiffs, who were absent from the reservation for several months the year prior to the election (working and attending school), contended that a residency requirement was a violation of their right to travel. The tribe argued that residency was requisite: the political and managerial responsibilities of tribal council members could only be discharged if the members had full knowledge of the constituents and area represented, acquired by daily presence on the reservation. In addition, they argued that the cultural identities of the tribes were entrusted to political leaders to carry forward -- knowledge of these cultures was gained only by continual residence on the reservation.

In addition to eligibility for tribal elective office, voting criteria are basic boundary conditions. The twenty-sixth amendment to the U.S. Constitution (right of citizens eighteen years and older to vote) was cited by plaintiffs in Wounded Head v. Tribal

Council of the Oglala Sioux Tribe (002646) who were denied the right to vote in tribal elections. The tribal constitution stipulates that only members twenty-one years or older may vote. Though not specifically articulated by either litigant, enfranchising a new class of the tribal population (a three-year cohort) would have implications for the balance of power on the reservation. Similarly, in Logan v. Morton (002471) the plaintiff class, Osage Indians who possess no "headright" annuity interest (or only fractional interests) in the Osage Mineral Estate, were not permitted to vote (fractional annuity interests permit corresponding fractional votes) in the election of the Principal Chief, Assistant Principal Chief, or tribal council. Plaintiffs argued that they were unfairly deprived of membership privileges (a whole vote) because they lacked annuity shares. The tribe, on the other hand, argued that its powers to sell certain tribal reserves, lease oil, gas and mineral rights, determine royalities paid to the tribe, etc. provided a rationale why a member's stake in annuity interests should be accorded full weight. Hence, members without such annuity interests should not dictate the actions of council which directly affect headright annuities. Apportionment is a related boundary condition which affects eligibility for tribal elective office and voting. In Mousseaux v. Rosebud Sioux Tribe (003549) the member plaintiff, seeking office as a tribal councilman, alleged that the tribe had arbitrarily and without notice redefined the boundaries between two Indian communities. This allowed a competing candidate, previously excluded because he could not satisfy the residency requirement for tribal office, to be placed on the ballot.

The plaintiff, no longer running unopposed, accused the tribal council of taking its action solely to remedy the residency problems of the other candidate. Reapportionment, in this and like instances, has an impact on voters in that the populations of election districts may not be sufficiently equal to guarantee equal representation. For example, a proposed action pending before a tribal council, which will have an impact on the entire tribe, will be decided by the majority of five votes cast by five elected representatives from five communities within a reservation. If the populations of these communities are unequal, the vote of a representative of a small district may disproportionately affect the outcome of tribal council deliberations i.e., the "vote" of a small district, which may result in a tribal action which disproportionately affects a larger district, controls the agenda. Daly v. United States of America (001274) largely reflects such a situation.

It should be reiterated that such intratribal boundary conditions and agenda issues have a distinctive political, factional flavor (see section, Litigant Interests, supra). In Soloman v. LaRose (002033) plaintiffs readily admit that they are challenging the decision of the tribal council to invalidate election results because such actions deprived them (the plaintiffs) of an opportunity to form an intratribal council coalition.[26/] The substance of like cases was noted by the courts. In Burnette v. Rosebud Sioux Tribe (003697) Judge Bogue observed:

> The complaint is a veritable hodgepodge. Interspersed among the allegations about the recent election, we find several dozen allegations concerning alleged deprivations

> of property without due process of law. On top of that we find occasional references to an alleged conspiracy -- who allegedly conspired and for what alleged purpose we must for the most part surmise from the context . . .
>
> We have referred to the prior election and the disputes that came in its wake in order to demonstrate that this business of federal courts being called upon to intervene in tribal elections is becoming routine operating procedure. There appears to be no end in sight. Every two years one can expect as a matter of course that a replay will occur. This cannot go on indefinitely. There are five reservations in the Central and Western Divisions of South Dakota, and one federal judge. Unless this trend is cut off at some point, it will become virtually impossible to deal effectively with the ordinary run of cases by virtue of the fact that disputes of this nature will dominate the federal docket. 27/

Perceptions of Legitimate Authority

The perceptions of litigants regarding the legitimacy or illegitimacy of structures (e.g., tribal courts) and actions which facilitate or impede opportunities are, of course, relative to the perceived costs or benefits of intervention (where at least one "side" of a controversy invokes outside arbitration of a dispute, such as occurs with a civil complaint). Such perceptions, when articulated in ICRA cases, are overwhelmingly rooted to beliefs, values and interpretations of legitimate and illegitimate authority which go considerably beyond the issues directly at hand. Contending parties have a clear sense of which authority, for them, has integrity, and merits their compliance and respect.

As the underlying theme of all ICRA cases is tribal self-governance, manifest in impacts upon tribal members and non-members, there is considerable attention paid to the adequacy and the proper exercise of tribal authority. Tribal entities -- courts, councils, committees -- and classes of tribal members (which are fluid and construct themselves around any single issue) embrace a basic set of domain prerogatives which ensure they can preserve themselves and the status quo. The authority of the tribe is so exercised in determinations of boundary conditions, such as enrollment criteria, eligibility for tribal office, and distribution of the vote. The tribal exercise of authority, as pointed out, has been extended beyond the geographic confines of the reservation. In Wisconsin Potawatomies v. Houston (001656) and in United States, ex rel. Cobell v. Cobell (001601) children involved in custody or probate disputes in state courts were alleged to be the exclusive concerns of Indian tribes. In Settler v. Yakima Tribal Court (001149) the tribe asserted its control over activities of members exercising a membership right (fishing) some distance from the reservation. Non-member activities on a reservation are also perceived to be germain to the exercise of tribal authority. Regulation of these matters has had wide impact. In Ortiz-Barraza v. United States (002729) the action of a tribe to remove a non-member was cast as self-protection from persons wishing to conduct illegal activities on the reservation. In Berry v. Arapahoe and Shoshone Tribes (003108) and Dry Creek Lodge v. United States (002438) the regulation of alcohol consumption on a reservation was defended as a means of controlling the debilitating effects of alcohol in tribal life.

The extraction or use of tribe resources (grazing permits, oil and gas leases, easements, etc.) has been subject to tribal regulatory actions on the basis of protecting the tribal livelihood for present and future members. Included here as well are boundary conditions related to membership which in effect regulate the distribution of tribal rights in property to individuals. In Plummer v. Jones (001070) an attempt is made to shield assets of tribal members (the incomes of individual members) from taxation by the state. The disposition of tribal assets and resources also involved intratribal regulation. For instance, in Logan v. Morton (002471) the structure of tribal governance is defended on the basis of interests in the Osage Mineral Estate: voter eligibility is determined by headright annuity interests. In Aubertain v. Colville Confederated Tribes (003638) a tribal member, who was granted a Discharge in Bankruptcy in federal court, alleged that the tribe illegally withheld tribal per capita payments from him to apply to the unpaid balance of a loan from the tribe. The tribe in turn argued that the federal bankruptcy decision did not discharge the individual member's obligation to the tribe.

Tribes have also reserved, as their legitimate exercise, the interpretation of their own constitutions and bylaws. In Big Knife v. Rocky Boy's Chippewa-Cree Tribal Business Committee (001060), an action regarding qualifications of candidates for the Business Committe, the defendant tribe maintained it had the discretion to waive an article of their constitution which required district representatives to reside on their selections (property) for two years to qualify for office:

> The Rocky Boy Reservation covers only a limited land area. Consequently, there is not enough selection for all the qualified members of the Tribe. Location of selection or the necessity of proper and adequate living conditions often dictate that a member and his family cannot live on their selection. Because of these conditions, Business Committees have not interpreted this requirement strictly. Rather, they have looked to where the particular individual lives. Given the conditions of Reservation life, this is a reasonable interpretation of the qualification and it affords all members of the Tribe an equal opportunity to seek elective office. 27a/

In Howlett v. The Salish and Kootenai Tribes (002779), reviewed previously, the tribe defended a strict interpretation of residency requirement as requisite for the responsible conduct of tribal affairs by the council members.

Another critical area of self-governance which tribes steadfastly defended as legitimate was the right to adjudicate intratribal conflict. In Indian Political Action Committee v. Tribal Executive Committee of the Minnesota Chippewa Tribe (003050) plaintiff members protested elections on the White Earth Indian Reservation alleging, in part, that they were denied due process by the Tribal Executive Committee (TEC). A court opinion aptly described the TEC defense:

> In the present litigation, plaintiffs' claims concerning the hearing procedures cannot be measured by normal due process standards including formal testimony, cross-examination, a written record, and written reasons for decision. The "town meeting" type hearing which was employed by the TEC is the traditional form of tribal hearing and must be measured by the general standard of fundamental fairness . . .

> This court refuses to hold that this time-honored and customary procedure employed by the TEC is so lacking in fundamental fairness as to constitute a denial of due process. All members of the tribe had notice of the meeting, and all who came were given the opportunity to be heard. No fairer procedure could exist. 28/

The tribal courts are instrumental in this adjudication process [the court structure, however, is largely imposed, a product of legislative enactments such as the Indian Reorganization Act], and in United States, ex rel. Cobell defendant tribal judge Sharp spoke to the legitimate involvement of the tribal court in the child custody matter and jurisdictional dispute with State of Montana courts:

> The recent history of this country shows an ever increasing level of self-awareness on the part of the minority groups that comprise such an important part of our population. It has only been recently that this tide of self-awareness has reached the American Indian but it has reached them and cannot now be ignored. The primary goal of the entire self-awareness movement is self-determination an element of which is the autonomy of the tribal courts. Tribal courts are beginning to act like autonomous, functioning tribunals capable of asserting independent jurisdiction over a variety of subjects and capable of dealing with them competently. Correspondingly, the Indians themselves are pressing their own tribal courts to assume jurisdiction over matters important to them. 29/

In Burnette v. Dann (003147), an action by an Associate Judge against the Chief Judge of the Fort Hall Tribal Court alleging due process

violations on the part of the tribal court, the federal court upheld the solvency of the tribal remedy: "Exhaustion of tribal court remedies in cases of this nature should be the rule . . . It is essential to the strengthening of the Tribe's 'power of self-government.'"30/ However, in a number of ICRA cases, discussed below, litigants challenged the tribal courts and the conduct of tribal government generally: the federal court findings and opinions regarding the adequacy of their structure and process were variable.

Aggrieved litigants who sought federal remedy from the impacts of tribal self-governance often alleged the illegitimacy of tribal actions. Federal court decisions involving ICRA disputes, where the federal courts deemed the intent of Congress to be intervention in such controversies, addressed a broad range of tribal affairs. From these, the general framework of "proper conduct" emerged for intratribal and extratribal matters based upon the opinion that tribes were not immune from suit, and that the federal court could review tribal affairs. This posture was advocated by a number of affected interests, including interests of some tribal members. With respect to intratribal conflicts, some of which have been reviewed in preceeding pages, "proper conduct" mandated by the federal court included directives that tribes must abide by their own constitutions and apply their own rules of conduct with consistency,31/ that tribes are accountable to individual members for the contracts they enter into, the expenditures they make, and the conduct of their instruments (e.g., police), and that their administrative and judicial institutions must reasonably referee intratribal conduct (see Bogue's comment at 165, supra).

With regards to boundary conditions of all types as they affected "outsiders," some tribal actions were considered arbitrary and tribal discretion in these matters was questioned. In the Settler cases, as noted, tribal jurisdiction -- more specifically, the right of tribal members to fish according to tribal ordinances off-reservation -- was challenged with regards to the larger public good. Treaty fishing rights were felt by the State of Washington to pale in the face of managing the fishery for the larger public. Similarly, plaintiffs in Olympic Pipe Line Company, confronted with accusations that oil and gas lines could irreparably harm a tribal fishery if a rupture were to occur, retorted that the larger public was served by uninterpreted delivery of petroleum products. In United States, ex rel. Cobell, the federal (District) court, in concert with the State of Montana which alleged that the extension of tribal jurisdiction to the custody case in question undermined State efforts to secure the best interests of the children, observed of the tribal actions:

> The effect of the order [of the tribal court] is to allow a Tribal Court to establish a sanctuary for Indian persons both members and non-members, who have subjected themselves to state court jurisdiction, merely because the Indian person takes flight to the Indian reservation. I find that to be an exercise of Tribal power beyond that granted in a controlling Act of Congress. 32/

It was issues of tribal justice and tribal courts that elicited the most poignant considerations of illigimate authority and power in ICRA cases. Tribal adjudication of conflict was often

alleged to something less than a "civilized standard of justice." Some of these sentiments eminate from general perceptions of tribal conduct. In Wasson v. Gray (001015), an action against tribal officials for interference with a legal aid corporation, it is observed:

> A basic purpose of the federally-funded Zuni Legal Aid program is to provide literate and sophisticated advocates for low-income persons who are in many cases unfamiliar with the English language and most cases unfamiliar with their most basic legal rights in dealing with governmental officials. It is understandable that governmental officials may feel apprehensive about dealing with such advocates, especially if such officials are accustomed to treating Indian people in an arbitrary manner without significant opposition, but it is clearly beyond the authority of such officials to hide behind the walls of their offices and refuse to deal with the advocates retained by the people they are supposed to be serving. 33/

Other themes were broader and spoke to the trans-tribal complexion of Indian rights, as in Cliff v. Hawley (002924):

> It is submitted that the seeds for such deterioration can already be seen on other reservations including Fort Belknap Reservation and Rocky Boy Reservation both of which are in northern Montana. It is submitted that the answer does not find itself in greater funding for weaponry of arms and ammunition funneled to the reservations through various United States Government agencies . . .
>
> It is submitted that first there must be created an atmosphere conducive of respect for the law and a reliance upon principles of justice and fairness . . . 34/

In ICRA cases, when questions concerning the adequacy of tribal remedy were in dispute, an attempt was made by tribes to balance the alleged requirements of the ICRA with tribal custom and practice. Federal courts generally maintained that it was reasonable to take such factors as Indian culture into account. Litigants challenging the legitimacy of tribal authority often responded directly to such claims of cultural immunity by tribes. For instance, in Wounded Knee v. Andera (003083), an action alleging that the platiff was denied a fair and impartial trial because the tribal judge acted as both judge and prosecutor, the following point is made:

> The tribe contends that cultural and traditional Indian values will be injured if the tribe is required to hire a prosecutor. We find little merit in this contention. The judicial system is Anglo-American and assuredly not Indian; adding the safeguards guaranteed in Anglo-American law certainly is no more an encroachment upon the Indian way of life than the tribal court itself. 35/

A companion sentiment, though more direct, was expressed in Peterson v. Salois (003591), a petition for habeas corpus:

> The constitutional rights afforded all citizens are not available to Indians (and possibly all of us) in dealing with Tribal entities. To remedy this anomaly Congress has provided statutory protections, and remedy, through the Indian Civil Rights Act. To erode these protections and rights through a slavish pandering to the view that the Tribal Courts can disparage these rights because they represent the government of indigenous

> aborigines still engaged in a primitive hunting culture is to ignore reality. We are reviewing the actions of a court using an Anglo-American form of jurisprudence. These Tribal officials should be held to the same standard as the rest of us. There might well be exceptions but such should be demonstrable and constitute the exception and not the rule. Tribal courts are generally not of record (and here the record is of doubtful quality). The duty of the Federal Courts is to protect the rights of the people brought in contact with Tribal institutions, not vice versa. 36/

Structural inadequacies of tribal court systems which were cited in ICRA cases ran the gamut from total absence of courts in some tribes to lack of autonomy of the tribal judicial system vis a vis administrative bodies. Ruling that the plaintiffs in Two Hawk v. Rosebud Sioux Tribe (002857) had exhausted tribal remedies, the federal court noted that "due to lack of funds the Court of Appeals [tribal appellate remedy] has not heard a case in fifteen years."37/ In Schantz v. White Lightening (002137), amicus Marvin Sonosky spoke to the major deficiency, in his view, of tribal courts:

> The basic rights conferred by the Indian Civil Rights Act are magnificant. But the right to trial by jury, the right to counsel, the protection against unlawful search and seizure and all the other fresh benefits of the Indian bill of rights, mean little, if not given life. And that calls for money. Indian tribes have no tax base. Their income is limited to their tribal property and to some of the federal money available to States and their subdivisions for specific purposes. The administration of justice on Indian reservations is acknowledged to be a Federal responsibility. Unhappily, it is

> a responsibility that has not been fulfilled. This court cannot simply supply the monetary need. But, we mention it, because the problem is a practical one, that requires a pragmatic solution. 38/

Petitioner in Wounded Knee v. Andera (003083) is more direct, and seemingly less tolerant:

> Certainly the Tribe should be able to spend its monies as it sees fit, but to ignore basic rights guaranteed by the Indian Civil Rights Act on the ground that the Tribe cannot afford to provide those rights is simply beyond the discretion of the Tribe. Such excuses resemble the rhetoric of dictatorship and some communist governed sovereigns when they are faced with accusations of denying their citizens basic civil rights. They have no place in our country, on an Indian Reservation or anywhere else. 39/

From other points of view, the problem is located elsewhere. In White v. Tribal Council, Red Lake Band of Chippewa Indians (003376) plaintiffs, who contested election results, maintained that the tribal court had no jurisdiction over the tribal council, and further:

> This study clearly shows the inadequacy of the Court to handle this dispute . . . While our investigation has yielded imprecise information as to the extent of the training of Tribal Judges, it is beyond question that the Tribal Judges have had only slight legal training, and little academic training. 40/

The effect of tribal court procedures on a class of litigant, indigent, was purported to be adverse. For instance, the right

to counsel at the expense of the litigant, was said to exclude some tribal members. In Tom v. Sutton (002835) plaintiff/appellant Tom, convicted in tribal court of driving without a valid driver's license and incarcerated for ten days, alleged he was denied due process because he could not afford advice of counsel. The ICRA "which confers the right of counsel only upon those wealthy enough to take advantage of that right, controls and defines the 25 USC 1302 (8) command of due process and equal protection."[41/] In Walking Eagle v. Nightpipe (001077), an action against the Rosebud Tribal Court which refused to grant personal recognizance to the plaintiff who had two misdeameanor charges pending before the court, the bail policy of the Rosebud Court was "interpreted" to be a policy "which promises only to incarcerate those 'dangerous' people who are also destitute; wealthy multiple offenders can, and do, post the required cash bonds and go free until trial."[42/]

For some, the most debilitating constraint on the tribal court system was the influence, or control exerted by administrative units such as tribal councils, elections boards, and business committees. In Dry Creek Lodge, the tribal judge allegedly failed to enjoin the actions of the tribe because he feared he would lose his job if he did so without their consent. In Williams v. Sisseton-Wahpeton Sioux Tribe (002677), a candidate, Cloud, allegedly falsified a Notice of Candidacy by stating he was never convicted of a felony. The tribal judge took this information to the tribal chair and elections board, but was told Cloud's name would remain on the ballot. Acting on a petition by one of those not surviving the primary, the tribal judge issued a restraining order

to prevent the tribal council from counting ballots until the eligibility question of Cloud was settled. The council met and voted to disregard the court order -- when warrants were issued for the arrest of council members for contempt, the council suspended the Chief Judge of the Sisseton-Wahpeton Sioux Tribe. In Runs After v. Cheyenne River Sioux Tribe (003623) plaintiffs alleged that the Cheyenne River Sioux Tribal Council illegally cancelled debts to the tribal treasury incurred by tribal members during the course of a tribal rehabilitation program. Plaintiffs demanded a referendum on the matter, but the tribal council and tribal chairman refused to act on the demand. The court, assessing the adequacy of tribal remedy, noted the following:

> . . . it became clear that the council which originally cancelled the debt and thereafter refused to call a referendum, would be the same council that would determine whether the judicial officers of the tribe should grant plaintiffs an extension on the time for appeal. We do not assume that the council will operate in bad faith and cannot forecast with certainty what their decision would be. Yet, at this juncture it would strain common sense to postulate that appellate review would be granted in the council's discretion when the council has made every effort to foil plaintiff's hopes for a referendum, and has refused to waive sovereign immunity. Much as this Court would like to send this matter back for tribal appellate review, we decline to do so because there appears to be no reasonable possibility that a timely review would be made. 43/

In Spotted Eagle v. The Blackfeet Tribe (002189) plaintiffs, a class of persons convicted in the Blackfeet Tribal Court and detained in the tribal jail, lodged a broad spectrum of complaints against the general criminal justice system of the Blackfeet Tribe. Of tribal judges, it was maintained that defendants in criminal proceedings were made to incriminate themselves, were not advised of their right to trial by jury, were denied professional counsel, and the like. The tribal jail was assessed as well:

> For adults, the jail is a place of deprivation and despair; for minors it is a breeding place of immorality, lawlessness and crime. It is alleged on information and belief that the Blackfeet Tribal Jail must be classified as one of the most degrading facilities to be found anywhere in the United States, comparable in our time only to the concentration camps of the Third Reich. This jail would be the subject of outraged protest by a humane society if it were to be used for animal detention. No rehabilitation is possible in such a depraved atmosphere; the fostering of criminal propensities is a necessary and unavoidable result of time served in this facility which may truly be designated a pest hole. 44/

Perceptions of history and culture of Indian tribes are related to assertions regarding the legitimate and illegitimate exercise of tribal self-governance. For example, tribes in some ICRA cases attempted to contextualize tribal actions in history and custom in a manner that lent integrity to contemporary actions. In Markovich v. Puyallup Indian Tribe (003001), where plaintiffs challenged the procedures used to compile the Approved Tribal Roll of the Puyallup Tribe in 1929, the tribe responds:

> Over 45 years have passed since the events which plaintiffs want to question took place. The events involved determinations which we have no way of reconstructing, taking into account circumstances prevailing at the time of which we can be only in the most general terms aware. Decisions were made based on factors of tribal heritage and sense of community, an outlook which neither this Court nor anyone else could simulate. Enrollment decisions were based in part on the actions of ancestors and family members, many of whom have long ago died. The problem is particularly acute in this situation where plaintiffs apparently seek to go into detail concerning the state of mind and capabilities of persons no longer living. Even if plaintiffs are able to present credible evidence on such matters, the Tribe no longer has any way of testing or countering such evidence. 45/

In Big Eagle v. Andera (002506), conta plaintiffs' allegation that a disorderly conduct provision of the tribal code is so vague that its interpretation threatens freedom of speech, the status quo in the Crow Creek Sioux Tribe is proposed:

> Misconduct is not constitutionally protected, and residents of the reservation know that to be the fact. No arrest has ever been made by the Tribe or the police officers for making speeches at rallies, carrying picket signs or any other such activity. As a matter of fact, the normal tribal political situation contemplates active dissent and it is not unusual for political leaders to be vocally harangued by members of the audience, nor is it unusual to have several petitions for impeachment with respect to any and various members of the council or police department circulating on the reservation at the same time. Thus the statute in question

> has had no chilling effect upon freedom of speech or of dissent on the reservation. In fact, the cultural and traditional complexion of tribal politics ensures that no sanction will ever be imposed for speaking out or dissenting. 46/

It is difficult to summarize federal court interpretations of relations between indigenous groups and Anglo-Americans, except to note the simplistic and even romantic character of such accounts. Two examples should suffice to make this point. In Settler v. Yakima Tribal Court (001149) the district judge reviewed the origins of fishing rights:

> About 113 years ago, a group met in the Walla Walla Valley at a place called Camp Stevens. Some were called Indians and others white men, and, for the sake of brevity, will be referred to as red brother and white brother. The head white brother, a man named Stevens, talked to the head red brother, a man named Kamaiakun, and after due deliberation presented the head red brother with a piece of paper and asked him to make his mark on the paper, and that he would fill in the blank spaces later. Kamaiakun assented. It appears that he could neither read, write nor speak the English language. Communications were by interpreter. This piece of paper was described as a treaty, ratified by the Senate of the United States on March 8, 1859, and proclaimed by the President of the United States on April 18, 1859. After the blank spaces were filled in, it was provide that those who were represented by red brother, including delegates from a number of Indian tribes named in the treaty, would be considered as one "nation." 12 Stat. 951. The name of the nation was "Yakima," and the Yakimas ceded and relinquished certain lands to the United States, but reserved from the ceded lands for their own use what is now known as the Yakima Indian Reservation. 47/

A circuit court judge in Groundhog v. Keeler (002261) recounted the development of the Cherokee Nation (which, it appears, was the basis for his discounting the importance of plaintiffs' contention that Keeler, the Principal Chief appointed by the Secretary of the Interior, did not meet the blood quantum requirements for membership in the tribe):

> The Cherokees are one of the Five Civilized Tribes of Indians.
>
> They were the largest and most important tribe of Indians originally east of the Alleghanies. Compared with other Indian tribes, they ranked high in culture and intellectual receptivity. Their high degree of civilization was probably due to their own inherent character and the fact that many of their purebloods intermarried with fine members of Scotch families, and pureblood Cherokees intermarried with half-blood or less than half-blood Cherokees. The admixture of Cherokee and white blood began long before the Revolutionary War.
>
> . . .
>
> We have recited the above facts . . . to show the high degree of civilization the Cherokees attained. 48/

In addition to contemporary interpretations of tribal history, some ICRA cases present interpretations of contemporary intent. For the most part, these are articulated by litigants adversely affected by tribal actions. In Dry Creek Lodge non-member plaintiffs living within the exterior boundaries of the Arapahoe and Shoshone Indian Reservation conclude:

> What the Appellee Tribes are really saying to this Court is that "we may do what we wish to any citizen, Indian or non-Indian, and we are not bound to governing our own

> intra-Tribal affairs but may reach out into society in general, wherever we wish and whenever we please." 49/

Schantz v. White Lightening (002137) was an action of a non-Indian who, while traveling across the Standing Rock Indian Reservation, was involved in an automobile accident with tribal members who were at fault. State and tribal courts refused him remedy, claiming to lack jurisdiction. There is little question as to plaintiff/appellant's regard for tribal justice:

> Perhaps this case is unique, perhaps it is run of the mill. Explain to the plaintiffs that they have been injured by other "citizens of the United States." Explain to the plaintiffs that they cannot pursue the usual and customary route to redress their claim against the defendants because the defendants are Indians.
>
> Indians you say, but under the Constitution of the United States aren't we all equal without regard to race, color or creed?
>
> Well yes, that is true, but not where they are Indians and you happen to go on their reservation and have an accident with them.
>
> Well then are they a separate little nation down there, that they have their own laws and aren't subject to the laws of the United States?
>
> Well no, they are subject to the laws of the United States when it suits their benefit, but you must go to their courts and abide by their laws in order to redress your grievance.
>
> Well, even if I wanted to go into their Court, their Court doesn't want me. Their Court excludes me because I am not an Indian, not a resident of the reservation and my claim exceeds $300.00.

> So if my State Court doesn't want my case because the defendants are Indians, and if the Tribal Court doesn't want my case because I am not an Indian, and if the United States Courts do not want my case for the reason that this does not involve a question of Federal Law, then what Court is available to me? 50/

Interests-at-Risk

Litigants embroiled in ICRA controversies promoted their acts, intented actions, or appeals to federal remedies as benefits, contraposed to the costs and impact of adverse actions or threat of same. Costs and benefits appear obvious, in that at one level, the interests at stake (for the individual litigants and often for the class of interests represented) are baldly stated. They are, in order to "make the case," usually overstated and over-dramatized as well. The point is that at first glance some interests-at-risk are apparent. For instance, more than three-quarters of ICRA cases alleged denial of due process. This is a rather straightforward observation, which when combined with other equally obvious features of ICRA litigation, would allow the conclusion that the impact of the ICRA has been largely procedural versus substantive rights-oriented. While this is a valid conclusion in its own right, it does little to illuminate the complex interplay of factors which contour socio-legal impact. A balance is not easily struck between conflicting claims to "equitable and reasonable" conduct. Tribal self-governance, if we may legitimately claim to understand its status quo from ICRA litigation, variably jeopardized and enhanced opportunities of tribal members and nonmembers alike.

A significant portion of ICRA cases where interests of the tribe were contrasted with those of "outsiders" were related to the management, control and extraction of resources. Conflict was most often cast as the "tribal v. public" interest. Hence with fishing (Settler cases, for instance) it was alleged that state enforcement of ordinances designed to protect the common resource was undermined by the immunity of a small public, tribal members. The tribe, for its part, argued that its exercise of self-governance was intended to protect the right to fish. Measures to ensure the viability of fishing for a future generations of tribal members were not inconsistent with the larger public good. There is an ironic feature of like cases, in that federal "concessions" of treatying -- considered at one time to be marginal (marginal, useless land and rights) in the framework and requirements of national development -- are now the locus of conflict. Cases that touched upon different facets of energy production illustrate the irony where the "public interest" which clamors for limiting tribal discretion, and the tribal interest in unfettered management, are both focused upon what was once felt to be worthless. In Merrion v. Jacarilla Apache Tribe and Amoco v. Jacarilla Apache Tribe (consolidated: 003553), actions testing a severance tax, James Watt [current Secretary of the Interior] argued the federal ("public") interest in Jacarilla Apache Tribal management of gas and oil extraction:

> The Arab Oil Embargo instituted by OPEC in the early 1970's highlighted this nation's dangerous dependence on imported oil. Congress responded with a variety of measures designed both to increase domestic production of fossil fuels and to encourage development of alternative forms of energy . . .

> By 1977, Congress recognized that this country was facing a shortage of nonrenewable energy and, at the same time, was becoming increasingly dependent on foreign energy supplies. . . Realizing that in the context of a fragmented approach to energy matters this disturbing trend constituted a threat to our national security, Congress mandated a comprehensive national energy policy to be implemented by the newly created Department of Energy.
>
> Clearly, the establishment of a comprehensive long-range national energy policy is an overriding federal interest.
>
> Indian tribes in this country control a significant amount of energy reserves. . . As of 1977, forty separate tribal governments in seventeen different states controlled a portion of these reserves. From a logistical standpoint alone, the evaluation and coordination effort needed to integrate forty separate regimes of energy-related taxation into a comprehensive national strategy is staggering.
>
> In arguing the case below, the Secretary of Interior asserted that the tribes could use their purported sovereign right to tax as a tool to restrict development of their reserves even under existing leases. . . Moreover, it is not speculative to assume that if the ordinance at issue in this case is upheld, other tribal governments will follow suit. . . Therefore, this Court must consider whether in light of these ramifications and the desire to establish a comprehensive energy plan, it is in the national interest to have forty separate enclaves that can not only tie up future development, but also stall existing production under previously negotiated leases by unilaterally increasing, in potentially unrestrained amounts, the cost of production. 51/

In Lake v. Peabody Coal Company (001492), customary use is contrasted with development (which ostensibly included tribal development) where plaintiffs argued that stripmining prevented the exercise of

surface rights, including use of land for grazing, use of water from natural sources and wells for livestock, farm and domestic use, use of land for homesites, farming, and the like. Similarly, in the intertribal dispute of Tso v. The Hopi Tribe (002882) the customary use of land by Navajo individuals is usurped by the larger public (the Hopi Tribe) who, it was alleged, was contemplating the development of the contested land (at the corners of two major highways) into a prime commercial site.

Boundary conditions stipulated by tribes had variable impact as well upon segments of the non-Indian "public" who resided within the reservation. Businesses, whose affairs were checked by tribal entities (purportedly in the best interest of the tribe) appeared subject to substantial costs in the transaction of their affairs. Tribal restriction of alcohol on the reservation, such as in Berry v. Arapahoe and Shoshone Tribes (003108), affected interests who would benefit from a lodge (including tribal members) and those whose stake in the tribal interest favored less alcohol. In Dry Creek Lodge the cost of non-Indian residents, and to tribal members employed by them, is detailed:

> The business of the Lodge was immediately ruined due to fear of armed violence along the road. The Small Business Administration loan went into default. . .the internal actions of the "Tribes" have made the Plaintiffs destitute and close to bankruptcy and have caused foreclosure of the Lodge properties by the United States Government. The relative wealth of the parties is without comparison inasmuch as the Defendant Tribes are relatively wealthy Tribes and the Plaintiffs now have been reduced to bankruptcy. 52/

Tribal boundary conditions also variably affected different member classes. Criteria for voting, for instance, limit who will have access to the agenda: hence, females in some cases and eighteen year olds in some cases will be excluded. Political factions which might be threatened by enfranchising excluded groups are enhanced (a perception which extends as well to the exclusion of non-members, such the business interests cited above, from the vote). Criteria for candidacy also entail various and completing interests. A residency requirement of elective office candidacy may suit the purpose of members who want officials to have as complete knowledge of the constituent area as possible, but it will not be in favor with those who, after military service, college, or working away from the reservation, find themselves excluded from eligibility. Membership criteria may enhance some interests in the tribe who view exclusion or selective inclusion as a mechanism for controlling distribution (and depletion) of tribal resources. Excluded individuals, however, may feel deprived of their Indian heritage and its concommitant rights.[53/]

Tribal individuals and entities who pursue federal remedy have a number of interests at stake, as discussed. The impact of such action is not limited specifically to litigants, but can also be distributed to all tribal members. For instance, a variety of costs are entailed with due process hearings, a court structure, jury trial, etc. which tax tribal (communal) resources that could, alternatively, be used for other purposes. Individuals who bring action against tribal officials incur more than their own costs. In White v. Tribal Council, Red Lake Band of Chippewa Indians (003376), an election dispute, plaintiff tribal members point this out:

> Under a contract entered into between the law firm . . . and defendants, acting for the Red Lake Band of Chippewa Indians . . . Edwards & Bodin are general counsel to the Red Band of Chippewa Indians and to the Tribal Council . . . The firm receives $15,000 per year plus expenses in that capacity. Presumably, it is under this contract that it represents the defendants here. Thus, the plaintiffs will have their money (i.e., the Tribe's money) spent to contest their rights to a fair election. 54/

Individuals, in particular indigent members who bring actions against the tribe, in essense tap federal monies (which fund legal aid services and programs) in litigation which requires expenditure of tribal resources. Another type of cost distribution is represented in United States, ex rel. Cobell where plaintiff Cobell, a non-member, incurs added cost by virtue of his status as a resident of Montana:

> As the record will show, the Blackfeet Tribal Court is represented through the Indian Law Program at the the University of Montana School of Law. Apparently that representation is being furnished through the expense of public funds and at no expense to the Blackfeet Tribal Court. . . we certainly question the propriety of a State agency, to-wit, the University of Montana School of Law, involving itself in an adversary proceeding of this nature, especially when it concerns the question of whether or not the State of Montana has jurisdiction over the issue at hand . . . 54/

Factors such as these, and their endless permutations,have a bearing on interests-at-risk and project the impacts of the ICRA. To augment the various discussions of this chapter, three ICRA cases are briefly reviewed. Each of these is representative of various dimensions of litigated (ICRA) conflict in tribal settings.

1. Dodge v. Nakai

> "An obnoxious guest has been evicted by his hosts." 56/

Dodge v. Nakai (001037) was the first ICRA litigation in federal court and its outcome was significant for ICRA litigation for the next decade. In August, 1968 Theodore Mitchell, a non-Indian attorney, was removed from the Navajo Reservation by order of the Advisory Committee of the Navajo Tribal Council. The events which immediately preceeded his expulsion involved his conduct and that of a council member at two Advisory Committee meetings where, ironically, representatives of the Department of the Interior were discussing the 1968 Civil Rights Act. A query by tribal council member Annie Wauneka regarding rights of the tribe to remove a non-Indian from the reservation drew some laughter, as it was apparent that Wauneka had Mitchell in mind based upon a history of frictions between Mitchell and tribal officials. Wauneka singled out Mitchell's laughter, and admonished him for his conduct in Council chambers. The same meeting continued the next day and in the afternoon session, Wauneka approached Mitchell, exchanged some words with him, and struck him several times. Mitchell left the meeting. The following day, the Advisory Committee adopted a resolution expelling Mitchell from the reservation, which was executed.

Mitchell was the program director of Dinebeinna Nahiilna Bo Agaditahe, Inc. (DNA), a legal aid corporation which is located on the Navajo Reservation. DNA was federally funded (OEO) to provide legal assistance to indigent tribal members: most individuals

of the tribe qualified for service. The legal program of DNA was unsettling to a number of interests on the reservation: its involvement in a particular case, a recall petition in a reservation school district, result in Advisory Committee Action to remove Mitchell from DNA (this and similar efforts in the months preceeding his expulsion were not successful). Plaintiffs[57/] characterized the nature of the incipient conflict between DNA and the tribe:

> Friction arose on the Navajo Reservation in connection with these legal services. The plain fact is that as desperately poor Navajos began to get legal services, they began to assert legal rights which were upsetting to those who had previously gained from the fact that Navajos, for all practical purposes, had enjoyed no legal rights. The immediate consequence was that the powers that be of the Navajo administration sought first to extinguish the program. Failing in this, they sought to achieve the same result by excluding Mitchell from the Reservation. 58/

Plaintiffs argued that the exclusion of Mitchell had several adverse consequences, among these the denial of Mitchell's legal expertise and counsel to tribal members, a "chilling effect" on the right and obligations of DNA to provide independent services to indigent Navajo members, and denial of basic civil rights.

In response, the tribe argued that the treaty of 1868 gave the Navajo tribe the right to determine who "shall ever be permitted to pass over, settled upon, or reside in the territory"[59/] of the Navajo tribe. Further, defendants argued that Mitchell should exhaust tribal remedies, and in any case, the ICRA did not apply

to non-Indian Mitchell. Where plaintiffs located the significance of the conflicts in the removal of Mitchell, defendants focused on the gravity of his conduct:

> Deponent specifically denies that there was general laughter from the audience after Mrs. Wauneka asked the above referred to question. Only one person in the chamber laughed. That person was Theodore R. Mitchell, and that laugh was not merely a laugh. It was a Guffaw. It was an expression of scorn, ridicule, and derision directed toward Mrs. Wauneka and the entire legislative body.
>
> . . . Mr. Mitchell was ordered excluded, solely as a result of his obnoxious conduct during the legislative session. . . as well as his subsequent obnoxious conduct. . . which provoked Mrs. Wauneka into striking Mitchell in defense of the honor and dignity of the Navajo people.
>
> . . . It was Mr. Mitchell's obnoxious conduct, that caused him to be declared a trespasser, labeled "person-non-grata" and led directly to his being evicted from the private property and special reserve of the Navajo Tribe. 60/

The broader context of his actions was proposed in the resolution which excluded him from the reservation:

> Such defiance, ridicule, tensions and violence seems destined to continue and grow worse, thus threatening the peace and well-being of the Navajo people and manifestly leading to grave danger to the life and health of members of the Navajo Tribe. 61/

Plaintiffs retorted that Mitchell's lifetime exclusion, inconsistent as it was under the grounds for exclusion of the Navajo Tribal Code, was the culmination of defendants' efforts to harrass the DNA.

The district court, ruling that it had jurisdiction of the matter, held that Mitchell had been denied due process, and that defendants' actions had abridged freedom of speech. The court dismissed the argument by defendants that the Navajo tribe's right to exclude a non-member was based upon its inherent sovereignty. The ICRA, it said, imposed constraints upon tribal exercise of power. The court held that invocation of the power to exclude, on the basis of personal dislike for the conduct of Mitchell, was unreasonable. In addition,

> . . . non-Navajos living on the Navajo Reservation look to the tribal government for goods and services normally provided by state and local governments; the quality of life for all persons living on the Reservation is directly affected by the actions taken by tribal agencies. Under 24 U.S.C. 1302 (1) these individuals possess the right to express views as to the wisdom and propriety of the policies and programs adopted by tribal governmental agencies. 62/

The court settled upon its own interpretation of the basis of the dispute, namely, that tribal officials felt that the DNA program should be directed to protection of tribal members in their extra-tribal relations, while DNA wished to focus a large part of its efforts to representation of indigent tribal members before tribal agencies. Concluding that the resolution to exclude Mitchell was an unlawful bill of attainder and as such violated the ICRA, the court enjoined the defendants from implementing the exclusion order.

In reaction to the district court order, the Advisory Committee of the Navajo Tribal Council passed a resolution to refuse federal

funds (OEO) for the purpose of operating the DNA program. The Advisory Committee's rationale (stipulated in resolution) included, in part, items related directly to the federal litigation:

> On August 8, 1968, the Advisory Committee permanently excluded Mr. Mitchell from all lands of the Navajo Tribe for his personal obnoxious conduct before the Advisory Committee, and
>
> Following his exclusion, Mr. Mitchell brought a lawsuit against the Chairman of the Navajo Tribal Council in Federal Court, in which he challenged the right of the Navajo Tribe, under the Treaty of 1868, to evict non-Navajos from the private property of the Navajo Tribe, and
>
> As a result of this lawsuit, the sovereignty of the Navajo Tribe, and the absolute right of the Navajo people to be secure from outsiders on their reservation, has been placed in jeopardy, and
>
> This lawsuit has injured not only the Navajo Tribe, but every individual Navajo, and . . . 63/

The interests-at-risk in Dodge v. Nakai[64/] stood in stark contrast to each other, and included the following:

1. The power of the tribe to control the domain of legal advocacy (and deflect interference from the exercise of tribal self-governance) versus the power of advocacy on behalf of tribal individuals to control the administrative agencies of the tribe;

2. The immunity from suit of a tribe in its exercise of sovereign powers versus the rights of individuals adversely affected by tribal self-governance to have redress and remedy;

3. The power of the tribe to control the activities of non-members on the reservation versus the rights of non-members to conduct, within the contraints of the constitution and laws of the tribe, their affairs unfettered; and

4. The power of the tribe to exclude a non-member from the reservation versus the rights of the non-member to due process and equal protection.

Each of these conflicts involve distinct boundary conditions. Their resolutions, imposed and sanctioned by the federal court were decidely skewed to an interpretation of the ICRA as license for federal intervention in tribal affairs.

2. Peoples Committee of Taos Pueblo v. Tribal Council of Taos Pueblo

In August, 1974 the Taos Pueblo Council enacted a zoning measure entitled "Ordiance Governing the Installation of Electrical Service on Taos Pueblo Lands." The enactment set specific boundaries within which installation of service lines was prohibited. Generally, electric service line agreements were to be subject to review and approval of the General Council, construction of service lines required the consent of individual Taos members whose land assignments such lines would cross, all power lines were to be installed underground, and pre-existing service in the newly designated restricted zones was exempted from the Ordinance until such time that the property is sold (the exemption shall cease). The stipulated purpose of the Ordinance is as follows:

> Taos Pueblo is unique in having preserved through the centuries the natural beauty of the community and its lands, and the cultural and religious heritage of its people associated with certain areas of traditional activities. This ordinance is intended to protect these unique values for future generations by establishing zones and regulations for the installation of electrical service. 65/

A complaint was lodged in federal court by individual members (an unincorporated group, Peoples Committee of Taos Pueblo) alleging that the ordinance was, and was applied in an arbitrary and capricious manner. Plaintiffs, representing a class of individual Taos members within the restricted zone who desired electricity, cited violations of basic civil rights, due process and equal protection. It was claimed that some interests within the restricted area had electricity, that other interests had been specifically allowed by Council to have electricity, and that the plaintiffs were summarily denied electrical service. The federal court was asked to intervene and enjoin defendants from refusing or failing to grant service permits to residents of the restricted zone, and to declare the Ordinance, which as enacted violated the ICRA, null and void.

The controversy over zoning in Peoples Committee of Taos Pueblo v. Tribal Council of Taos Pueblo (002850) appears conspicuous, in that Taos society is highly structured both physically and socially. Contending parties readily admitted to this. Plaintiffs and defendants were far apart in their basic contention in the case, regarding the impact of electricity on Taos culture, particularly religion. In addition,

> . . . Plaintiffs believe that in this day and age, electricity and electrical services have become a necessity. While the Council is within constitutional bounds in regulating the placement of power lines (underground) for aesthetic and cultural reasons, they are surely outside those bounds in denying these services to certain tribal members while allowing them to many others. 66/

Defendants responded to allegations that the enactment and enforcement of the Ordinance was arbitrary by reviewing the history of electrical services on the Pueblo. In the 1930's, the BIA had requested to install an electrical line to service the BIA day school in the Pueblo. They were initially refused permission, but after the BIA threatened to remove Taos children to a BIA boarding school a considerable distance away, the Pueblo relented. The Pueblo attempted, some years later, to remove the electrical line but were prevented from doing so by residents who had connected to the BIA line "in violation of the customary, unwritten, prohibition of electricity."[67/] In 1969, the Pueblo Council authorized electricity for the western zone of the Pueblo, away from the sacred wall which circles the inner village of Taos Pueblo.

Defendants were careful to make the distinction between a prohibition against electricity and a prohibition against the construction and installation of electric lines. The Ordinance, designed to accomplish the latter within restricted areas, did not terminate the use of electricity from butane generators, car batteries, or existing electrical lines (most of which were connected twenty-five or more years previous). In retort to plaintiffs' allegations that the general welfare of the Pueblo was compromised by the Council's action (e.g., children are denied adequate light to study with at night), defendants posed an alternative interpretation of the general welfare of the Pueblo:

> The prohibition of electric service lines in the restricted zone is necessary to protect a religious area containing numerous shrines and sacred places from desecration or

> destruction as a result of the disturbance of earth required to install and maintain the lines and incidental equipment and of the intrusion of an uncontrolled and continuous commercial activity which is inconsistent with ceremonies based upon the natural environment. Home generators or portable equipment do not threaten destruction of shrines and they may be turned off during religious ceremonies. 68/

The court's findings regarding the merits of the case were straightforward: the impact of electrical service on Pueblo religion was a matter for tribal (Pueblo Council) interpretation:

> It is inappropriate to call upon a civil tribunal to determine the religious significance of electricity. . . . The legislative intent of the I.C.R.A. was to preserve theocratic forms of government and not to force a separation of religious and secular functions in the Pueblos. 69/

The substantive allegations by plaintiffs, the court noted, failed as well; the Ordinance which zones the Pueblo into eastern and western zones and treats them differently is reasonable, and evidence to indicate arbitrary application and enforcement of the Ordinance is lacking.

Though unique in some superficial respects, the Peoples Committee of Taos Pueblo case is representative of a larger proportion of ICRA cases which involve intratribal disputes. It is distinctive, however, in its pointed illustration of a subtle boundary condition, information. Consider a disclaimer of the court:

> Little is known about the Taos religion. Neither plaintiffs nor defendants are

> willing to talk about religion beyond stating opinions on the ultimate issue and a few basic tenets. I do respect this view, but must observe that the evidentiary loss will tend to fall on the party who carries the risk of non-persuasion on an issue.

Plaintiffs and defendants contested the impact of electrical service on Taos religion without specifying in any detail the constituent elements (beliefs and practices) under consideration. The proposals before the court were that electrical service would have an adverse effect upon religion, or it would not have an adverse effect. Non-Indian experts at the trial also lacked information of Taos religion and could only speak generally to its importance in the daily life and vitality of the Pueblo. Withholding such information on the part of the Pueblo effectively defines "outsiders" who are excluded by their ignorance. In federal litigation, the reluctance or refusal of disclosure of this genre underscores the imposed nature of sanctions such as the ICRA. Litigants, in choosing not to reveal information, took the risk that their case might fail on merits because such information was vital. Their alternative posture might have been to disclose information concerning Taos religion, thereby decreasing the risk of an unfavorable court ruling. But there is cost involved here as well, namely, coerced disclosure (i.e., the risk factor -- Anglo courts value "discovery" and comprehensive displays of information). It appears as well that the federal court perceived an information cost as non-disclosure impinged upon the substantive material facts of the case from which a ruling had to be based. The lack of information did not, however, prevent the court from rendering a decision regarding an intra-tribal

dispute which may not have been, to an appreciable degree, specified for the court. Information -- be it knowledge of the particulars of a case, or tribal history and customs, or an understanding generally of the indigenous milieu -- is a basic boundary condition. Figuratively, the distance between the federal court and the intra-tribal affairs it portended to regulate, varied with the level of information. If the implication here is that better information will yield better court decisions, one must objectively consider the refusal of disclosure coupled with the lack receptivity to types of information (e.g., historical incorporation of indigenous groups) as rather dismal indicators of the thrust of imposed sanction.

3. Santa Clara Pueblo v. Martinez

The Santa Clara Pueblo, reacting to the increasing number of mixed marriages and a general increase in tribal population, enacted the following ordinace in 1939:

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
>
> 1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
>
> 2. All children born of marriages between male and members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
>
> 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.

4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances. 71/

At issue were dwindling tribal resources and increasing tribal membership: the limited amount of grazing land available to support viable livelihoods was the most acute manifestation of these factors. Individual members of the Santa Clara Pueblo, Julia Martinez (representing herself and females who were members of the Pueblo who had married males who were not members of the Pueblo) and Audrey Martinez (representing herself and children born of a marriage between a female member of the Pueblo and a male who is not a member of the Pueblo) initiated a complaint in federal court in 1972 against the Pueblo alleging that the membership rules discriminated on the basis of both sex (Julia) and ancestry (Audrey) in violation of the ICRA. Julia Martinez had married a Navajo Indian and settled at the Pueblo in 1941, two years after the tribal ordinance was enacted. She had ten children who were born and raised on the Pueblo, eight of whom were living. These children spoke the Tewa language, participated in all aspects of Pueblo life (including religion), and considered themselves Pueblo. However, they were not members of the Pueblo by virtue of the tribal ordinance which excluded children of a female member who marries a non-Santa Claran. Hence, the Martinez children could not vote in tribal elections, could not hold office in the tribe, could not inherit their mother's home or interests in the communal lands, nor (it was alleged by plaintiffs) would they be entitled to remain at the Pueblo in the event of their mother's death.

Since 1946, Julia Martinez had attempted to enroll her children (or to have her husband naturalized, which would accomplish the same) by purusing tribal remedies, and appeals to the BIA and a U. S. Senator. These efforts were without success. The initial complaint in federal court was precipitated by a Housing and Urban Development program to which plaintiffs were denied benefits as a result of the exclusion of the Martinez children from tribal membership. The housing controversy was settled out of court, but plaintiffs pursued a legal remedy for the enrollment question. Enrollment criteria prior to 1939 held that children of mixed marriages could be recognized and adopted by the council, and that persons could be naturalized and hence gain membership (e. g., the non-member spouse). Plaintiffs alleged that the new criteria which adversely affected them was a significant departure from Pueblo tradition, based upon economic factors and not custom. The Santa Clara Pueblo responded with four arguments to support their compelling interests, based upon preservation of the cultural and religious heritage of the Pueblo. They asserted that the Santa Clara Pueblo society was partilineal (e. g., it was customary for females to accompany and settle at their husband's home), that male parents were more important than female parents in the religious rearing of Santa Claran children, that the 1939 Ordinance was a codification of pre-existing rules, and that the 1939 Ordinance was fully integrated into the religious life of the Pueblo. Despite considerable challenge to the authenticity of such assertions by the plaintiffs (who drew, for example, from the research of a Santa Claran and other Tewa member anthropologists), the district court -- which accepted jurisdiction -- held in favor of the Pueblo:

> . . . the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and 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. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group . . .
>
> . . . to abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it. . . .72/

The court of appeals disagreed with the district court on the merits of the case, and reversed the decision: "There is evidence that the ordinance was the product of economies and pragmatics."73/ It could find no reason why the invideous distinction on the basis of gender was justified by a compelling tribal interest, "patriarchial traditions" and the need to protect Pueblo resources notwithstanding. Santa Clara Pueblo pursued the case, and in 1978, the Supreme Court reversed in favor of the Pueblo. Its opinion would end the majority of intratribal litigation in federal court. The court ruled that congressional intent regarding the ICRA limited intervention in tribal affairs to habeas corpus ("Congress' failure to provide remedies other than habeas corpus was a deliberate one" 74/) and that suits against the tribe under the ICRA are barred by its sovereign immunity from suit. It appears appropriate that the issue of Martinez, a most basic boundary condition of tribal

membership, was the occasion for such a decisive ruling. The seven Amicus briefs filed with the Supreme Court, representing some fourteen tribes and Pueblos, and several organizations and entities, juxtaposed the right of a tribe to define itself and its appropriate conduct with the limitations upon tribal self-governance which derive from individual civil rights.

The clear message of the Supreme Court was that the ICRA was binding upon Indian tribes, but that tribes and not federal courts (except for habeas corpus) were responsible for its enforcement. By implication, the adjudication of intratribal disputes was left to the exercise of tribal self-governance. In the absence of federal court intervention between Indian tribes and their members, one might argue that risks and costs are redistributed, and are far less of an impediment to tribal exercise of sovereignty than in the decade preceeding Martinez. The court's ruling, however, contained a somber warning which suggests an alternative interpretation:

> . . . Congress' authority over Indian matters is extraordinarily broad . . . Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. 75/

Notes

1. See Chapter One, pp. 10-14.

2. Include among these proposals where natural parents have no standing before the law with regards to their children. See, for example, "Suggestions for Some Provisions of a Child Placement Code" at para. 10.4, in Goldstein, Freud and Solnit, Before the Best Interests of the Child (New York: The Free Press, 1979).

3. Senator Ervin, upon introducing amendment No. 430 to the Senate:

> Mr. President, this will be a very interesting amendment in its present context. It gives the Senate an opportunity to show whether it believes in constitutional rights for the red man.
>
> The reservation Indian now has no constitutional rights. The purpose of the amendment is to give these Indians constitutional rights which other Americans enjoy.
>
> 114 Congressional Record 5836 (1968).

4. 1960's civil rights legislation (of which the ICRA is one example) would include the Civil Rights Act of 1960 (74 Stat. 86), the Civil Rights Act of 1964 (78 Stat. 241), the Voting Rights Act of 1965 (79 Stat. 437), and the Civil Rights Act of 1968 (82 Stat. 73).

5. See Chapter Five, p. 125.

6. The research did not reveal instances where attorney and court fees prevented the initiation or continuance of litigation. Obviously, however, an examination of court case files would not reveal the conflict which was not amplified in a federal case because of monetary considerations. Hence, the impact of this type of cost cannot be summarily discounted.

7. Hall's conclusions, based upon approximately seventy-five ICRA cases, are in most respects consistent with the author's findings. The specific strength of Hall's research is his explication of the implications for tribes, particularly tribal courts, of the Martinez decision.

8. The adequacy of these remedies was often passed upon, however, and in some cases the exhaustion requirement was waived because tribal remedies were judged inconsistent, contrived, not available in an instant case (e.g., where litigation involved the conduct of tribal judges), or absent altogether.

Notes (cont'd)

9. This authority is given in Section 16 of the Indian Reorganization Act (48 Stat. 984).

10. Complaint for Declaratory Judgment, Injunction, and Damages (001206-A).

11. Complaint For Declaratory Relief; For Temporary Restraining Order; For Preliminary and Permanent Injunction; For Damages; and for Other Relief (002002-A).

12. Ibid., Attachment 1.

13. Brief of Appellees (002901-D).

14. Over one-third of ICRA cases were heard in the Eighth Circuit.

15. Memorandum Opinion (003535-A).

16. Verified Complain (001015-A).

17. The Navajo Tribe was later named a party defendant.

18. Opinion and Order (District Court) (001492-0).

19. Brief of Washington Department of Fisheries and Washington Department of Game, Amicus Curiae (001213-P).

20. Opening Brief of Appelants (001213-Y).

21. Opinion (001213-FF).

22. Amicus Curiae Brief of the State of Montana (001601-W).

23. Memorandum in Support of Motion for Preliminary Injunction (002367-C).

24. Amended Complaint (002438-E).

25. Memorandum in Support of Right to Seek Election (001107-F).

26. Various class actions against tribal officials represent coalitions as well. For example, Wopsock v. Uintah and Ouray Tribal Business Committee (002478) was an action concerning petitions of one-third of the tribes to recall the entire Business Committee.

27. Memorandum Opinion (003697-A).

27a. Brief in Support of Motion to Dismiss (001060-F).

Notes (cont'd)

28. Memorandum and Order (003050-Q).

29. Brief for the Honorable John A. Sharp and the Blackfeet Tribal Court (001601-Q).

30. Memorandum Decision and Order (003147-A).

31. In Williams v. Chippewa Cree Tribe (003536) plaintiff alleged that the tribe had retroactively applied an ordinance which effectively denied her application for enrollment. The tribe, arguing that it alone had authority to establish a current enrollment for distribution of tribal assets, was rebuffed by the federal court:

> A decision concerning the substantive right to be enrolled, the requisite indicia of Indian heritage having been established, is a matter which cannot be treated lightly by the tribe. The right to enrollment is itself a property right . . . (Memorandum and Order (003536-O)).

32. Memorandum Opinion and Order (001601-H).

33. Plaintiff's Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Injunction Pendente Lite (001015-C).

34. Brief of Appellant Gilbert Cliff (002924-D).

35. Memorandum Opinion (003083-E).

36. Brief in Opposition to Dismissal of Petition for Writ of Habeas Corpus (003591-G).

37. Memorandum Opinion (002857-A).

38. Brief Amicus Curiae of Marvin J. Sonosky (002137-H).

39. Petitioner's Reply Brief (003083-D).

40. Plaintiff's Brief on Issues Raised at Argument on October 29, 1974 (003376-C).

41. Appellant Brief on Appeal (002835-A).

42. Memorandum of Law in Support of Petition for Habeas Corpus Relief (001077-B).

Notes (cont'd)

43. Memorandum Opinion (003623-A).

44. Complaint (002189-A).

45. Memorandum in Support of Motion to Dismiss or for Partial Summary Judgment (003001-B).

46. Brief for Appellees (002506-H).

47. Memorandum Decision (001149-D).

48. Memorandum Decision (002261-A).

49. Reply Brief of Appellants (002438-M).

50. Brief of Appellants (002137-E).

51. Brief of the Mountain States Legal Foundation -- Amicus Curiae in Support of Petitioners (003553-HH).

52. Brief of Appellants (002438-K).

53. Some of these rights are given monetary value, as in Markovich v. The Puyallup Indian Tribe (003001) where plaintiffs asked for $50,000,000 damages because they were denied status as members of the tribe. Claims in all areas of ICRA litigation included declaratory and injunctive relief, damages (compensatory and punitive), and costs. The change in status quo (the interpretation of Congressional intent regarding ICRA that tribes were no longer immune from suit) had new implications for judgments against the tribes. When these involved money, for instance, the cost was absorbed by all tribal members, irrespective of their degree of culpability.

54. Plaintiffs Brief on the Issues of . . . (003376-A).

55. Brief in Opposition to Motion to Stay Proceedings and in Opposition to Motion to Dispense with Appropriate Bond (001601-N).

56. Brief of Appellant (001037-PP).

57. The three plaintiffs were a class of indigent tribal members who receive services from DNA, DNA and eight Navajo Indians were serve on its board of directors, and Mitchell. The defendants were Nakai, Chairman of the Navajo Tribal Council, the Superintendent of the Navajo Police Department, and the Area Director (BIA).

58. Brief of Appellees (001037-QQ).

Notes (cont'd)

59. 15 Stat. 667.

60. Admission of Facts and of Genuineness of Documents (001037-A).

61. Brief of Appellees (001037-QQ).

62. Opinion, Findings of Fact, Conclusion of Law and Judgment (001037-KK).

63. Plaintiffs Supplemental Bill (001037-MM). The program was funded directly to DNA in the program year 1968-1969 without going through the Office of Navajo Economic Opportunity.

64. Defendants appealed the district court decision, but appellants and appellees later stipulated to dismissal of appeal.

65. Complaint (002850-A).

66. Brief in Opposition to Defendant's Motion to Dismiss (002850-C).

67. Memorandum Opinion (002850-P).

68. Motion for Summary Judgment (002850-M).

69. Memorandum Opinion (002850-P).

70. Ibid.

71. See Memorandum Opinion on Jurisdiction (001565-D).

72. Ibid.

73. Memorandum Opinion (001565-K).

74. Opinion of the Court (001565-Z).

75. Ibid.

CHAPTER SEVEN

SUMMARY AND CONCLUSIONS

The foregoing analysis addresses several general themes which bear upon the historical and contemporary relations between indigenous peoples, and tribal and extra-tribal social matrices. Types of conflict which are projected in adjudication of the ICRA involve a variety of tribal institutions and individuals, and non-tribal entities and individuals variably affected by and affecting tribal self-governance. However, these themes (proposed in Chapter One) are not limited to a single legislative enactment, but are applicable to a broader genre of socio-legal interdependence: they may be summarized as follows.

The legal system is a social construction which embodies relations between socially-defined human aggregates on the basis of the historical development of material conditions. The opportunity structure of a legal system articulates avenues of social action which are adequate for the satisfaction or operationalization of some interests, and less adequate for other interests. A legal system is a sociocultural formation, a product of processes whose distributional manifestations define the opportunity structure. The accelerated development of European ethnic colonial peoples, and the concomitant progressive underdevelopment of indigenous peoples in the territorial United States is aptly chronicled in

the elaboration of a legal system which reflects 1) the production and reproduction of the material requisites of a type of development, 2) the regulation of human conduct condusive to such development, and 3) the transcription of this preferred societal development into beliefs and values (legitimation).

The legal system, which projects competing interests, ensures not only that some interests are dominant and other interests are less dominant, but that a subset of interests in a legal system are buoyed at the expense and exclusion of other interests. Hence, human conduct in pursuit of some interests is sanctioned and prescribed, while other types of human conduct, in pursuit of less salient interests, are proscribed. The historical incorporation of indigenous peoples into U. S. development has subverted a broad spectrum of interests, values and behaviors adjudged inconsistent with national development strategies. Generally, indigenous peoples lost control of their own destinies and increasingly became dependent upon others [include here dependence on imposed tribal structures, such as tribal councils and court systems tailored to values exogenous to tribal custom] for basic survival. Tribal enthocentric values, ways of thinking and behaving, and tribal institutions were undermined and abandoned in the wake of domination, and were redefined and externally sanctioned as the requisites of national development changed.

The progression of accelerated national development which required underdevelopment of tribal peoples is a dialectic embodied in the historical exposition of international and national law and policy regarding indigenous populations. The crux of the dialectic in the sphere of law is legitimation of authority i. e., where

mechanisms for ensuring compliant behavior and for restricting the very definition of the universe of possible human action are institutionalized to present a reasonable, natural and functioning social environ. The converse, delegitimation of forms of authority which threaten to encumber the preferred status quo (or trajectory of societal development), is equally vital. The relative power of competing indigenous peoples and European ethnic colonial groups was determinant for whose defintion of legitimate social order and authority was to prevail. The elaboration and impact of imposed law and policy, integral to the historical incorporation of indigenous populations, is developmentally consistent and represents a continual erosion of tribal sovereignty and jurisdiction. Even momentary disjunctive interludes, where law and policy deviate from the progressive delegitimation of tribal sovereignty and jurisdiction, are spawned by the (uneven) development of sociocultural formations and are crucial to their long-term maintenance.

Far from integrating indigenous peoples into national societies (as 20th century policy-oriented research and action purports to do) the proliferation of laws and legal institutions consolidate narrow interests, mitigate against or frustrate competing interests, exacerbate cleavages -- in short, undermine tribal self-governance by imposing exogenous prescriptions of social order that create prevalent disorder in tribal life and maintain the marginal socio-legal status of indigenous peoples in transnational and national development. It is this system of law which projects inequalities among socially defined racial and ethnic groups, consistent with the terms of their participation in developmental processes. Such inequalities are not aberrant social forms, but are rather

manifestations of 1) the transplantation of relatively homogeneous, concentrated European ethnic groups who substituted themselves for indigenous populations, and to varying degrees decimated tribal peoples and their institutions rather than absorbing them, and 2) the interest of indigenous peoples in aspects of their own survival (physical, cultural, etc.) which extends beyond the parameters of sanctioned conduct and goals -- this removes indigenous peoples from the arena of effective determination and execution of their interests. The ascendency of some racial and ethnic groups within developmental processes has been assured through a legal system which facilitates the underdevelopment of other racial and ethnic groups whose interests and power are in relative decline. Inequality is endemic to such a legal system: the social history of indigenous peoples illuminates the instrumental role of the rule of law in the processes of underdevelopment which embody it.

From the sphere of social action emerges sets of rights and institutions which orchestrate human conduct. Civil Rights, most often framed as emancipatory and immutable, are delimited by the social system which accelerates the development of some groups at the expense of other groups. Civil rights specify arrangements of rights and institutions which regulate human interdependence: the resulting opportunity structures are compatible with dominant conceptions of human order and control which reflect little of -- and actually mitigate against -- alternative (and competing) formulations of human institutions. Civil rights are arbitrary to the extent they legislate the preferred boundaries of sanctioned human conduct. The Indian Civil Rights Act, pursuing a general theme of federal

incursion into the affairs of tribal self-governance, stipulates not only the diminuations in the exercise of tribal sovereignty and jurisdiction, but regulates a wide arc of human relations. ICRA adjudication highlights the conflicting interests of tribal and non-tribal individuals and entities in disparate interpretations of the public good, in basic boundary conditions such as membership, eligibility for tribal office, and the vote, and in the exercise of authority and administration of justice. The emancipatory and repressive impacts of the ICRA are causally linked: within a logic of societal development and concomitant underdevelopment, the Act protects some interests at the expense of other interests, and sanctions and regulates the opportunity structure within which human interdependence takes its course.

Socio-Legal Impact: Supplementary Strategies

In the best of all possible worlds, decisions regarding institutional design and institutional performance would be based upon at least three broad categories of information. These would include knowledge of 1) the performance of existing institutions and their evolution, 2) alternative methods of affecting performance, and 3) consequences that may result from each alternative. The preceeding discussion has only partially satisfied this regimen by examining a single alternative -- one which is legally sanctioned -- and exploring some dimensions of its impact. Socio-legal impact is significantly more complex, and additional areas of requisite inquiry are proposed.

It is apparent that omnibus legislation, such as the ICRA, when

imposed upon tribes in the United States, will not have a singular impact upon all indigenous peoples. The point, of course, is the variability of Indian tribes regarding methods of self-governance, court structure, systems of control, and the like. Omnibus legislation, prevalent in federal Indian law, is not designed to speak to the variability among tribes, but rather legislates against it. Disparate institutional performance should be expected. For example, we might wish to contrast "traditional civil liberties" (customary law) with the "alien imposition of civil rights" (ICRA) as a means of establishing existing institutions and their evolution. This would, to a degree, underscore many substantive distinctions between tribal groups: however, the polarity (customary law or imposed law) belies complexity in tribal practice. There are, to be sure, a number of tribal groups who may be said to function within a customary, traditional framework of social order (e.g., Pueblos). Here, institutional maintenance is not predicated upon civil rights or liberties, but may in fact be threatened by the pressures of such rights. In these tribes, the individual has no meaning beyond the group identity and welfare. "Power" or the "state" are not removed from individual members where it must be "checked" by individual rights. The best interests of the tribe are pre-eminent: civil rights are non-tribal and anti-tribal (a la Clastres, 1977, society against the state -- see Chapter Three). By and large, however, the contemporary status of most indigenous tribes is skewed to an Anglo or colonial model of social control:

> Obviously, it is difficult, if not impossible, to talk about traditional law or traditional order apart from or independent of the influence of Anglo law and order. These societies have changed and changed immensely over the last hundred and two-

> hundred years. Tribal councils are often a creation of American imposition as is the tribe itself. What are deemed to be traditional methods and traditional functions may only be patterns which have arisen within a community over the last forty or fifty years all under the direction or suggestion of Anglo intervenors. 1/

The Anglo model 2/ has been incorporated to varing degrees, from the Navajo Tribe with its elaborate court system and proposed Department of Justice to tribes who have lost, as a result of domination, indigenous institutions (a prerequsite of the Anglo model) but which have not substituted anything in their place. It is reasonable to suggest that the ICRA will have different types of impacts and receptions across this range of tribal differences. In some situations, the ICRA is not particularly foreign to the status quo of tribal self-governance where tribal structures mirror counterparts in the dominant society. It is suggested 3/ that where the federal government imposed the Indian Reorganization Act, tribal codes written by the Department of the Interior, etc. but offered no way to control entities such as tribal councils, that even traditional members of tribes may have applauded the ICRA as a type of needed limitation on tribal governance. In more traditional tribal settings, the ICRA was an outrage as definitions of fundamental fairness in an Anglo tradition were at serious odds with equally stylized precepts of traditional groups. In summary, the elaboration of these and similar points contributes to a more realistic display of status quo performance and establishes a framework from which to assess variable impact of omnibus imposed law.

The impacts of the ICRA, as proposed (Chapter Six) suggest several areas of further inquiry which may add to the inventory and extent of

consequences for institutional performance. With regards to evolving tribal structures, it would be useful to establish what changes in tribal substantive law may have occurred as a result of the threat of federal intervention. For instance, the relationship of tribal entities to non-tribal interests should have eased considerably with enactment of the ICRA e.g., the requisite upgrading of tribal courts and the federal remedy may have encouraged non-member business endeavors on reservations, as legal remedies appeared more accessibly or resembled more closely Anglo counterparts. In the wake of Martinez (affirmation of tribal sovereignty; limitation of the federal remedy) it may be possible to determine if demands by non-member businesses have increased (e.g., negotiation becomes much tougher, tribes are expected to relinquish some sovereign control) because federal remedies appear again to be unavailable.

The relationship of the ICRA to tribal sovereignty and jurisdiction might be specified more clearly by establishing its variable impact upon tribes along a continuum, ranging from undermining self-determination to strengthening self-determination. Self-determination, to the very limited extent it represents a federal Indian policy, appears compromised because decisions on how to protect individual rights are legislated to the tribes and sanctioned by the federal courts. On the other hand, for tribes without any types of checks upon imposed tribal governance, the ICRA, despite its flaws, functioned as a limitation on the powers of self-governance: hence, in absence of traditional internal controls, the Act may in the long run strengthen self-governance (e.g., improve by coercion). For instance, faced with the possibility of additional federal intervention in tribal affairs,[4/] tribal courts

may deem previously excluded or discounted interests more salient.

Similarly, the impact of the ICRA on the tenor of intratribal affairs may be further investigated by isolating consequences which undermine tribal unity by encouraging intratribal disputes, and/or consequences which strengthen tribal unity by mitigating abuses of power and authority. Some factors which appear to undermine tribal unity have been discussed, such as intratribal boundary disputes, delegitimation of authority, and the like. The role of the ICRA in curbing abuse and excess in tribal self-governance should be carefully considered as well. In some instances the ICRA may have offered a remedy which defused a volitile intratribal situation which, without an available avenue to vent hostilities, may have resulted in a violent confrontation. That intratribal affairs reach such a pitch (as they did on Pine Ridge and Red Lake, for example) should not be surprising. Where the federal government designates a tribal structure (tribal council), dispenses funds through increasingly powerful tribal councils (and in the process funds the problem) and refuses to do anything to curb abuses by those it empowers, Indian regimes often run roughshod over tribal members, particularly those who oppose their control of tribal affairs. Previously (Chapter Six), these were labeled "political disputes." In actuality, such relations are immeasurably more complex and derive from the historical incorporation of indigenous peoples. Robert Thomas, quoted in Schusky (1970) describes Pine Ridge:

> Nearly all former (Pine Ridge Sioux) institutions on the local level have disappeared. The small Sioux community is hardly even a community. It is a kin group without the aboriginal institutions which once related them to their environment, and no substitute institutions have developed in their

> place. New institutions have been preempted by outsiders. The old Chief's Council is non-functional. The warriors' societies have long since disappeared and the local police force is seen as a foreign and illegitimate coercive force. Thus, few (practically no) means of social control are left to the local Sioux community.
> ...
> A major institution, which has been in recent years introduced into the community by the federal authorities, is the tribal government. From the viewpoint of the country Sioux, this new institution is "The Tribe." In many ways they look at it in the same way that many urban working class people look at the police force and city government. They see it as a foreign coercive feature of their daily lives. To the older Sioux, the tribal government gets in the way of their personal approach to the powerful and benevolent federal government. The country Sioux certainly do not see the tribal council as representing them nor as making decisions for them. Tribal councilmen are elected to "get something" from the Bureau of Indian Affairs.
> ...
> But the main difference between Sioux tribal government and government in other American communities is that the Sioux tribal government is, in effect, without power. Most of the day to day decisions about Sioux life, about roads, schools, relief, are made by Bureau personnel. And information about such decisions are in Bureau files. Further, what decision the tribal council makes is subject to approval by the Secretary of the Interior. (43-44)

Even within such a bleak context, it is argued that the ICRA can have a positive impact of tribal affairs. David Getches elaborates:

> The Indian Civil Rights Act can actually strengthen tribal governments if it is used properly because it will give them greater respect from their own members. In many places, on the Sioux Reservations, for instance, the individual tribal members do not have alot of respect for their tribal government because they have either been mistreated or they see people, who they believe are ripping-off benefits of money from the tribe as a result of their position, indulging in nepotism , and the like. The straighter the tribal governments are the more they are going

> to command the respect of tribal members and be enduring institutions. 5/

A sobering point, however, is that the ICRA does not appear to mitigate abuses of power and authority by strong regimes. Though they may not prevail on some points, they more than compensate for their losses within the system of opportunities. Of the total sphere of opportunities, the ICRA affects only a portion of that structure: the interconnectedness of rules and laws -- which warrants rigorous analysis -- will have considerable bearing on the socio-legal impact of any single legislative enactment.

Notes

1. Monroe Price.(Personal correspondence, 26 July 1981).

2. Alvin Ziontz proposes that the bases of difference between Anglo and traditional tribal perceptions of law (due process and equal protection) are formalism, individualism, lawyers, and subtle reasoning.(Personal correspondence, 30 June 1981).

3. Tim Coulter. (Personal correspondence, 30 June 1981).

4. The Supreme Court decision in Martinez implied such a threat (see Chapter Six, p. 203).

5. David Getches. (Personal correspondence, 25 June 1981).

APPENDICES

APPENDIX I

A. Convention 107

Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO)

B. Recommendation 104

Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO)

C. Final Resolution

(International NGO Conference on Discrimination Against Indigenous Populations in the Americas)

D. Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere

(International NGO Conference on Discrimination Against Indigenous Populations in the Americas)

E. Declaration of the Indigenous Peoples

(Fourth Russell Tribunal)

A. Convention 107

Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO)

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Fortieth Session on 5 June 1957, and

Having decided upon the adoption of certain proposals with regard to the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, which is the sixth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and

Considering that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population, and

Considering it desirable both for humanitarian reasons and in the interest of the countries concerned to promote continued action to improve the living and working conditions of these populations by simultaneous action in respect of all the factors which have hitherto prevented them from sharing fully in the progress of the national community of which they form part, and

Considering that the adoption of general international standards on the subject will facilitate action to assure the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions, and

Noting that these standards have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, at appropriate levels and in their respective fields, and that it is proposed to seek their continuing co-operation in promoting and securing the application of these standards,

adopts this twenty-sixth day of June of the year one thousand nine hundred and fifty-seven the following Convention, which may be cited as the Indigenous and Tribal Populations Convention, 1957:

PART I. GENERAL POLICY

Article I

1. This Convention applies to --
   (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.
2. For the purposes of this Convention, the term "semi-tribal" includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.
3. The indigenous and other tribal or semi-tribal populations mentioned in paragraphs 1 and 2 of this Article are referred to hereinafter as "the populations concerned."

Article II

1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.
2. Such action shall include measures for --
   (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;
   (b) promoting the social, economic and cultural development of these populations and raising their standard of living;
   (c) creating possiblities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations.
3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.
4. Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.

Article 3

1. So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.
2. Care shall be taken to ensure that such special measures of protection --
   (a) are not used as a means of creating or prolonging a state of segregation; and
   (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures of protection.

Article 4

In applying the provisions of this Convention relating to the integration of the populations concerned --

(a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change;
(b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised;
(c) policies aimed at mitigating the difficulties experienced by these populations in adjusting themselves to new conditions of life and work shall be adopted.

Article 5

In applying the provisions of this Convention relating to the protection and integration of the populations concerned, governments shall --

(a) seek the collaboration of these populations and of their representatives;
(b) provide these populations with opportunities for the full development of their initiative;
(c) stimulate by all possible means the development among these populations of civil liberties and the establishment of or participation in elective institutions.

Article 6

The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations.

Special projects for the economic development of the areas in question shall also be so designed as to promote such improvement.

Article 7

1. In defining the rights and duties of the populations concerned regard shall be had to their customary laws.
2. These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes.
3. The application of the preceding paragraphs of this Article shall not prevent members of these populations from exercising, according to their individual capacity, the rights granted to all citizens and from assuming the corresponding duties.

Article 8

To the extent consistent with the interests of the national community and with the national legal system --

(a) the methods of social control practised by the populations concerned shall be used as far as possible for dealing with crimes or offences commited by members of these populations;
(b) where use of such methods of social control is not feasible, the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases.

Article 9

Except in cases prescribed by law for all citizens the exaction from the members of the populations concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law.

Article 10

1. Persons belonging to the populations concerned shall be specially safeguarded against the improper application of preventive detention and shall be able to take legal proceedings for the effective protection of their fundamental rights.
2. In imposing penalities laid down by general law on members of these populations account shall be taken of the degree of cultural development of the populations concerned.
3. Preference shall be given to methods of rehabilitation rather than confinement in prison.

PART II. LAND

Article 11

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 12

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.
3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.
2. Arrangements shall be made to prevent persons who are not members of the population concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14

National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to --

(a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) the provision of the means required to promote the development of the lands which these populations already possess.

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 15

1. Each Member shall, within the framework of national laws and regulations, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to the populations concerned so long as they are not in a position to enjoy the protection granted by law to workers in general.
2. Each Member shall do everything possible to prevent all discrimination between workers belonging to the populations concerned and other workers, in particular as regards --
   (a) admission to employment, including skilled employment;
   (b) equal remuneration for work of equal value;
   (c) medical and social assistance, the prevention of employment injuries, workmen's compensation, industrial hygiene and housing;
   (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 16

Persons belonging to the populations concerned shall enjoy the same opportunities as other citizens in respect of vocational training facilities.

Article 17

1. Whenever programmes of vocational training of general application do not meet the special needs of persons belonging to the populations concerned governments shall provide special training facilities for such persons.
2. These special training facilities shall be based on a careful study of the economic environment, stage of cultural development and practical needs of the various occupational groups among the said populations; they shall, in particular, enable the persons concerned to receive the training necessary for occupations for which these populations have traditionally shown aptitude.
3. These special training facilities shall be provided only so long as the stage of cultural development of the populations concerned requires them; with the advance of the process of integration they shall be replaced by the facilities provided for other citizens.

Article 18

1. Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.
2. Handicrafts and rural industries shall be developed in a manner which preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

PART V. SOCIAL SECURITY AND HEALTH

Article 19

Existing social security schemes shall be extended progressively, where practicable, to cover --

(a) wage earners belonging to the populations concerned;
(b) other persons belonging to these populations.

Article 20

1. Governments shall assume the responsibility for providing adequate health services for the populations concerned.
2. The organisation of such services shall be based on systematic studies of the social, economic and cultural conditions of the populations concerned.
3. The development of such services shall be co-ordinated with general measures of social, economic and cultural development.

PART VI. EDUCATION AND MEANS OF COMMUNICATION

Article 21

Measures shall be taken to ensure that members of the populations concerned have the opportunity to acquire education at all levels on an equal footing with the rest of the national community.

Article 22

1. Education programmes for the populations concerned shall be adapted, as regards methods and techniques, to the stage these populations have reached in the process of social, economic and cultural integration into the national community.
2. The formulation of such programmes shall normally be preceded by ethnological surveys.

Article 23

1. Children belonging to the populations concerned shall be taught to read and write in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong.
2. Provision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country.
3. Appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language.

Article 24

The imparting of general knowledge and skills that will help children to become integrated into the national community shall be an aim of primary education for the populations concerned.

Article 25

Educational measures shall be taken among other sections of the national community and particularly among those that are in most direct contact with the populations concerned with the object of eliminating prejudices that they may harbour in respect of these populations.

Article 26

1. Governments shall adopt measures, appropriate to the social and cultural characteristics of the populations concerned, to make known to them their rights and duties, especially in regard to labour and social welfare.
2. If necessary this shall be done by means of written translations and through the use of media of mass communication in the languages of these populations.

PART VII. ADMINISTRATION

Article 27

1. The governmental authority responsible for the matters covered in this Convention shall create or develop agencies to administer the programmes involved.
2. These programmes shall include --
   (a) planning, co-ordination and execution of appropriate measures for the social, economic and cultural development of the populations concerned;
   (b) proposing of legislative and other measures to the competent authorities;
   (c) supervision of the application of these measures.

PART VIII. GENERAL PROVISIONS

Article 28

The nature and the scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 29

The application of the provisions of this Convention shall not affect benefits conferred on the populations concerned in pursuance of other Conventions and Recommendations.

Article 30

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 31

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registerd with the Director-General.
3. Thereafter, the Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 32

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 33

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 34

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 35

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 36

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides --
   (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 32 above, if and when the new revising Convention shall have come into force;
   (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 37

The English and French versions of the text of this Convention are equally authoritative.

B. Recommendation 104

Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO)

The General Conference of the International Labour Organisation

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Fortieth Session on 5th June 1957, and

Having decided upon the adoption of certain proposals with regard to the protection and integration of indigneous and other tribal and semi-tribal populations in independent countries, which is the sixth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation, supplementing the Indigenous and Tribal Populations Convention, 1957, and

Noting that the following standards have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, at appropriate levels and in their respective fields, and that it is proposed to seek their continuing co-operation in promoting and securing the application of these standards,

adopts this twenty-sixth day of June of the year one thousand nine hundred and fifty-seven the following Recommendation, which may be cited as the Indigenous and Tribal Populations Recommendation, 1957:

The Conference recommends that each Member should apply the following provisions:

I. PRELIMINARY PROVISIONS

1. (1) This Recommendation applies to --
   (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage then the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social,

economic and cultural institutions of that time than with the institutions of the nation of which they belong.

(2) For the purposes of this Recommendation, the term "semi-tribal" includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.

(3) The indigenous and other tribal or semi-tribal populations mentioned in subparagraphs (1) and (2) of this Paragraph are referred to hereinafter as "the populations concerned."

II. LAND

2. Legislative or administrative measures should be adopted for the regulation of the conditions, de facto or de jure, in which the populations concerned use the land.

3. (1) The populations concerned should be assured of a land reserve adequate for the needs of shifting cultivation so long as no better system of cultivation can be introduced.

(2) Pending the attainment of the objectives of a settlement policy for semi-nomadic groups, zones should be established within which the livestock of such groups can graze without hindrance.

4. Members of the populations concerned should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth.

5. (1) Save in exceptional circumstances defined by law the direct or indirect lease of lands owned by members of the populations concerned to persons or bodies not belonging to these populations should be restricted.

(2) In cases in which such lease is allowed, arrangements should be made to ensure that the owners will be paid equitable rents. Rents paid in respect of collectively owned land should be used, under appropriate regulations, for the benefit of the group which owns it.

6. The mortgaging of land owned by members of the populations concerned to a person or body not belonging to these populations should be restricted.

7. Appropriate measures should be taken for the elimination of indebtedness among farmers belonging to the populations concerned. Co-operative systems of credit should be organised, and low-interest loans, technical aid and, where appropriate, subsidies, should be extended to these farmers to enable them to develop their lands.

8. When appropriate, modern methods of co-operative production, supply and marketing should be adapted to the traditional forms of communal ownership and use of land and production implements among the populations concerned and to their traditional systems of community service and mutual aid.

III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

9. So long as the populations concerned are not in a position to enjoy the protection granted by law to workers in general, recruitment of workers belonging to these populations should be regulated by providing, in particular for --
   (a) licensing of private recruiting agents and supervision of their activities;
   (b) safeguards against the disruptive influence of the recruitment of workers on their family and community life, including measures --
      (i) prohibiting recruitment during specific periods and in specified areas;
      (ii) enabling workers to maintain contact with, and participate in important tribal activities of, their communities of origin; and
      (iii) ensuring protection of the dependants of recruited workers;
   (c) fixing the minimum age for recruitment and establishing special conditions for the recruitment of non-adult workers;
   (d) establishing health criteria to be fulfilled by workers at the time of recruitment;
   (e) establishing standards for the transport of recruited workers;
   (f) ensuring that the worker --
      (i) understands the conditions of his employment, as a result of explanation of his mother tongue;
      (ii) freely and knowingly accepts the conditions of his employment.

10. So long as the populations concerned are not in a position to enjoy the protection granted by law to workers in general, the wages and the personal liberty of workers belonging to these populations should be protected, in particular, by providing that --
   (a) wages shall normally be paid only in legal tender;
   (b) the payment of any part of wages in the form of alcohol or other spirituous beverages or noxious drugs shall be prohibited;
   (c) the payment of wages in taverns or stores, except in the case of workers employed therein, shall be prohibited;
   (d) the maximum amounts and manner of repayment of advances on wages and the extent to which and conditions under which deductions from wages may be permitted shall be regulated;
   (e) work stores or similar services operated in connection with the undertaking shall be supervised;
   (f) the withholding or confiscation of effects and tools which workers commonly use, on the ground of debt or unfulfilled labour contract, without prior approval of the competent judicial or administrative authority shall be prohibited;
   (g) interference with the personal liberty of workers on the ground of debt shall be prohibited.

11. The right to repatriation to the community of origin, at the expense of the recruiter or the employer, should be ensured in all cases where the worker --

(a) becomes incapacitated by sickness or accident during the journey to the place of employment or in the course of employment;
(b) is found on medical examination to be unfit for employment;
(c) is not engaged, after having been sent forward for engagement, for a reason for which he is not responsible;
(d) is found by the competent authority to have been recruited by misrepresentation or mistake.

12. (1) Measures should be taken to facilitate the adaptation of workers belonging to the populations concerned to the concepts and methods of industrial relations in a modern society.
(2) Where necessary, standard contracts of employment should be drawn up in consultation with representatives of the workers and employers concerned. Such contracts should set out the respective rights and obligations of workers and employers, together with the conditions under which the contracts may be terminated. Adequate measures should be taken to ensure observance of these contracts.

13. (1) Measures should be adopted, in conformity with the law, to promote the stabilisation of workers and their families in or near employment centres, where such stabilisation is in the interest of the workers and of the economy of the countries concerned.
(2) in applying such measures, special attention should be paid to the problems involved in the adjustment of workers belonging to the populations concerned and their families to the forms of life and work of their new social and economic environment.

14. The migration of workers belonging to the populations concerned should, when considered to be contrary to the interests of these workers and of their communities, be discouraged by measures designed to raise the standards of living in the areas which they traditionally occupy.

15. (1) Governments should establish public employment services, stationary or mobile, in areas in which workers belonging to the populations concerned are recruited in large numbers.
(2) Such services should, in addition to assisting workers to find employment and assisting employers to find workers --
(a) determine the extent to which manpower shortages existing in other regions of the country could be met by manpower available in areas inhabited by the populations concerned without social or economic disturbances in these areas;
(b) advise workers and their employers on provisions concerning them contained in laws, regulations and contracts, relating to wages, housing, benefits for employment injuries, transportation and other conditions of employment;
(c) co-operate with the authorities responsible for the enforcement of laws or regulations ensuring the protection of the populations concerned and, where necessary, be entrusted with responsibility for the control of procedures connected with the recruitment and conditions of employment of workers belonging to these populations.

IV. VOCATIONAL TRAINING

16. Programmes for the vocational training of the populations concerned should include provision for the training of members of these populations as instructors. Instructors should be conversant with such techniques, including where possible an understanding of anthropological and psychological factors, as would enable them to adapt their teaching to the particular conditions and needs of these populations.
17. The vocational training of members of the populations concerned should, as far as practicable, be carried out near the place where they live or in the place where they work.
18. During the early stages of integration this training should be given, as far as possible, in the vernacular langauge of the group concerned.
19. Programmes for the vocational training of the populations concerned should be co-ordinated with measures of assistance enabling independent workers to acquire the necessary materials and equipment and assisting wage earners in finding employment appropriate to their qualifications.
20. Programmes and methods of vocational training for the populations concerned should be co-ordinated with programmes and methods of fundamental education.
21. During the period of vocational training of members of the populations concerned, they should be given all possible assistance to enable them to take advantage of the facilities provided, including, where feasible, scholarships.

V. HANDICRAFTS AND RURAL INDUSTRIES

22. Programmes for the promotion of handicrafts and rural industries among the populations concerned should, in particular, aim at --
    (a) improving techniques and methods of work as well as working conditions;
    (b) developing all aspects of production and marketing, including credit facilities, protection against monopoly controls and against exploitation by middlemen, provision of raw materials at equitable prices, establishment of standards of craftsmanship, and protection of designs and of special aesthetic features of products; and
    (c) encouraging the formation of co-operatives.

VI. SOCIAL SECURITY AND MEASURES OF ASSISTANCE

23. The extension of social security schemes to workers belonging to the populations concerned should be preceded or accompanied, as conditions may require, by measures to improve their general social and economic conditions.
24. In the case of independent primary producers provision should be made for --
    (a) instruction in modern methods of farming;
    (b) supply of equipment, for example implements, stock, seeds; and

(c) protection against the loss of livelihood resulting from natural hazards to crops or stock.

VII. HEALTH

25. The populations concerned should be encouarged to organise in their communities local health boards or committees to look after the health of their members. The formation of these bodies should be accompanied by a suitable educational effort to ensure that full advantage is taken of them.

26. (1) Special facilities should be provided for the training of members of the populations concerned as auxiliary health workers and professional medical and sanitary personnel, where these members are not in a position to acquire such training through the ordinary facilities of the country.
(2) Care should be taken to ensure that the provision of special facilities does not have the effect of depriving members of the populations concerned of the opportunity to obtain their training through the ordinary facilities.

27. The professional health personnel working among the populations concerned should have training in anthropological and psychological techniques which will enable them to adapt their work to the cultural characteristics of these populations.

VIII. EDUCATION

28. Scientific research should be organised and financed with a view to determining the most appropriate methods for the teaching of reading and writing to the children belonging to the populations concerned and for the utilisation of the mother tongue or the vernacular language as a vehicle of instruction.

29. Teachers working among the populations concerned should have training in anthropological and psychological techniques which will enable them to adapt their work to the cultural characteristics of these populations. These teachers should, as far as possible, be recruited from among such populations.

30. Pre-vocational instruction, with emphasis on the teaching of subjects relating to agriculture, handicrafts, rural industries and home economics, should be introduced in the programmes of primary education intended for the populations concerned.

31. Elementary health instruction should be included in the programmes of primary education intended for the populations concerned.

32. The primary education of the populations concerned should be supplemented, as far as possible, by campaings of fundamental education. These campaigns should be desinged to help children and adults to understand the problems of their environment and their rights and duties as citizens and individuals, thereby enabling them to participate with effectively in the economic and social progress of their community.

IX. LANGUAGES AND OTHER MEANS OF COMMUNICATION

33. Where appropriate the integration of the populations concerned should be facilitied by --
    (a) enriching the technical and juridical vocabulary of their vernacular languages and dialects;
    (b) establishing alphabets for the writing of these languages and dialects;
    (c) publishing in these languages and dialects readers adapted to the educational and cultural level of the populations concerned; and
    (d) publishing bilingual dictionaries.

34. Methods of audio-visual communication should be employed as means of information among the populations concerned.

X. TRIBAL GROUPS IN FRONTIER ZONES

35. (1) Where appropriate and practicable, intergovernmental action should be taken, by means of agreements between the governments concerned, to protect semi-nomadic tribal groups whose traditional territories lie across international boundaries.
    (2) Such action should aim in particular at --
        (a) ensuring that members of these groups who work in another country receive fair wages in accordance with the standards in operation in the region of employment;
        (b) assisting these workers to improve their conditions of life without discrimination on account of their nationality or of their semi-nomadic character.

XI. ADMINISTRATION

36. Administration arrangements should be made, either through government agencies specially created for the purpose or through appropriate co-ordination of the activities of other government agencies, for --
    (a) ensuring enforcement of legislative and administrative provisions for the protection and integration of the populations concerned;
    (b) ensuring effective possession of land and use of other natural resources by members of these populations;
    (c) administering the property and income of these populations when necessary in their interests;
    (d) providing free aid for the members of the populations concerned that may need legal aid but cannot affort it;
    (e) establishing and maintaining educational and health services for the populations concerned;
    (f) promoting research designed to facilitiate understanding of the way of life of such populations and of the process of their integration into the national community;
    (g) preventing the exploitation of workers belonging to the populations concerned on account of their unfamiliarity with the industrial environment to which they are introduced;

(h) where appropriate, supervising and co-ordinating, within the framework of the programmes of protection and integration, the activities, whether philanthropic or profit-making, carried out by individuals and corporate bodies, public or private, in regions inhabited by the populations concerned.

37. (1) National agencies specifically responsible for the protection and integration of the populations concerned should be provided with regional centres, situated in areas where these populations are numerous.

(2) These agencies should be staffed by officials selected and trained for the special tasks they have to perform. As far as possible, these officials should be recruited from among the members of the populations concerned.

C. Final Resolution

(International NGO Conference on Discrimination Against Indigenous Populations in the Americas)

The International Non-Governmental Organizations' Conference on Discrimination against Indigenous Populations - 1977 - in the Americas brought together more than 250 delegates, observers and guests at the Palais des Nations, Geneva, from 20-23 September, including representatives of more than 50 international non-governmental organizations.

For the first time, the widest and most united representation of indigenous nations and peoples, from the Northern to the most Southern tip and from the far West to the East of the Americas took part in the Conference. They included representatives of more than 60 Nations and peoples, from fifteen countries (Argentina, Bolivia, Canada, Chile, Costa Rica, Guatemala, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, United States of American, Venezuela).

It is regretted that some delegates were prevented by their governments from attending.

The Director of the United Nations Division on Human Rights addressed the participants on behalf of the United Nations Secretary-General. Representatives of the United Nations, the International Labour Organisation and UNESCO addressed and participated in the Conference. The representative of the Conseil d'Etat of the Canton of Geneva welcomed the participants. Observers from 27 UN Member States followed the proceedings.

The Conference was the fourth such event organized by the Geneva NGO Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization of the Special NGO Committee on Human Rights. Previous conferences, all organized within the framework of the United Nations

Decade for Action to Combat Racism and Racial Discrimination were, in 1974, against aparatheid and colonialism in Africa; in 1975, on discrimination against migrant workers in Europe; in 1975, on the situation of political prisoners in Southern Africa.

The representatives of the indigenous peoples gave evidence to the international community of the ways in which discrimination, genocide and ethnocide operated. While the situation may vary from country to country, the roots are common to all: they include the brutal colonization to open the way for the plunder of their land and resources by commercial interests seeking maximum profits; the massacres of millions of native peoples for centuries and the continuous grabbing of their land which deprives them of the possibility of developing their own resources and means of livelihood; the denial of self-determination of indigenous nations and peoples, destroying their traditional value system and their social and cultural fabric. The evidence pointed to the continuation of this oppression resulting in the further destruction of the indigenous nations.

Many participants expressed support for and solidarity with the indigenous nations and peoples.

Three commissions dealth specifically with the legal, economic and social and cultural aspects of discrimination and formulated recommendations for actions in support of indigenous peoples. Based on these reports, the Conference established a programme of actions to be carried out by non-governmental organizations in accordance with their mandates and possibilities.

PROGRAMME OF ACTIONS

The Conference recommends:

-to observe October 12, the day of the so-called "discovery" of America, as an international Day of Solidarity with the Indigenous Peoples of the Americas;

-to present the Conference documentation to the United Nations Secretary-General and to submit the conclusions and recommendations of the Conference to the appropriate organs of the United Nations;

-to study and foster the discussion of the attached Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere, elaborated by indigenous peoples' representatives;

-to take all possible measures to support and defend any participants in the Conference who may face harassment and persecution on their return;

-to express to ICEM* the concerns of the Conference about the continued settlement of immigrants on the land of indigenous peoples in the

*Intergovernmental Committee for European Migration

Americas and urge strongly that the resources of ICEM should not be used in support of such immigrants, particularly when coming from the racist regimes of Southern Africa.

In the Legal Field:

-that international instruments, particularly ILO Convention 107, be revised to remove the emphasis on integration as the main approach to indigenous problems and to reinforce the provisions in the Convention for special measures in favour of indigenous peoples;

-that the traditional law and customs of indigenous peoples should be respected, including the jurisdiction of their own forums and procedures for applying their law and customs;

-that the special relationship of indigenous peoples to their land should be understood and recognized as basic to all their beliefs, customs, traditions and culture;

-that the right should be recognized of all indigenous nations or peoples to the return and control, as a minimum, of sufficient and suitable land to enable them to live an economically viable existence in accordance with their own customs and traditions, and to make possible their full development at their own pace; in some cases larger areas may be completely valid and possible of achievement;

-that the ownership of land by indigneous peoples should be unrestricted, and should include the ownership and control of all natural resources. The lands, land rights and natural resources of indigenous peoples should not be taken, and their land rights should not be terminated or extinguished without their full and informed consent;

-that the right of indigneous peoples to own their land communally and to manage it in accordance with their own traditions and culture should be recognized internationally and nationally, and fully protected by law;

-that in appropriate cases aid should be provided to assist indigenous peoples in acquiring the land which they require;

-that legal services should be made available to indigenous peoples to assist them in establishing and maintaining their land rights;

-that all governments should grant recognition to the organization of indigenous peoples and should enter into meaningful negotiations with them to resolve their land problems;

-that an appeal should be made to all governments of the Western Hemisphere to ratify and apply the following Conventions:

(i) Genocide Convention
(ii) Anti-Slavery Conventions
(iii) Convention on the Elimination of all Forms of Racial Discrimination
(iv) International Covenant on Civil and Political Rights
(v) International Covenant on Economic, Social and Cultural Rights
(vi) American Convention on Human Rights

In the Economic Field:

-that the non-governmental organizations widely publicize the results of this Conference in order to mobilize support and aid for the indigenous peoples of the Western Hemisphere in their homelands;

-that conferences, seminars and colloquia be organized by NGOs, by intergovernmental bodies on all levels - regional, national, global - with the full participation of indigenous people to keep alive the issues that have come to world-wide attention at this Conference, and to hear new testimony that will be presented in the future;

-to promote the establishment of a working group on the indigenous populations under the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights;

-that the United Nations Special Committee on Decolonization be requested to hold hearings on all issues affecting indigenous populations;

-that the United Nations Committee On Trans-National Corporations conduct investigations into the role of multinational corporations in the plunder and exploitation of native lands, resources, and peoples in the Americas.

In the Social and Cultural Field:

-to promote respect for the cultural and social integrity of indigenous populations of the Americas; such respect should be especially promoted among local and national governments and appropriate intergovernmental organizations, and be based on the conclusions enunciated in the commission report;

-to give all possible financial and moral support to efforts initiated by American Indians in defense of their culture and society, and in particular to the various education programmes launched by Indian movements; solidarity is also requested for political prisoners and other victims of persecution on account of their participation in such indigenous movements;

Many other proposals and recommendations were made by the Conference commissions. It is suggested that they be studied by NGOs for the formulation of possible action programmes by them.

The Conference requests the officers of the Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization to promote the decisions of the Conference and to receive and circulate information from NGOs about the implementation of these decisions.

D. Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere

(International NGO Conference on Discrimination Against Indigenous Populations in the Americas)

Preamble:

Having considered the problems relating to the activities of the United Nations for the promotion and encouragement of respect for human rights and fundamental freedoms,

Noting that the Universal Declaration of Human Rights and related international covenants have the individual as their primary concern, and

Recognizing that individuals are the foundation of cultures, societies, and nations, and

Whereas, it is a fundamental right of any individual to practice and perpetuate the cultures, societies and nations into which they are born, and

Recognizing that conditions are imposed upon peoples that supress, deny, or destroy the cultures, societies, or nations in which they believe or of which they are members,

Be it affirmed, that,

1. Recognition of indigenous nations

Indigenous peoples shall be accorded recognition as nations, and proper subjects of international law, provided the people concerned desire to be recognized as a nation and meet the fundamental requirements of nationhood, namely:

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*International NGO Conference on Discrimination Against Indigneous Populations in the Americas -- 1977 (20-23 September 1977, Geneva): Statements and Final Documents, pp. 4-5.

a. Having a permanent population
b. Having a defined territory
c. Having a government
d. Having the ability to enter into relations with other states.

2. Subjects of International Law

Indigenous groups not meeting the requirements of nationhood are hereby declared to be subjects of international law and are entitled to the protection of this Declaration, provided they are identifiable groups having bonds of language, heritage, tradition, or other common identity.

3. Guarantee of Rights

No indigenous nation or group shall be deemed to have fewer rights, or lesser status for the sole reason that the nation or group has not entered into recorded treaties or agreements with any state.

4. Accordance of Independence

Indigenous nations or groups shall be accorded such degree of independence as they may desire in accordance with international law.

5. Treaties and Agreements

Treaties and other agreements entered into by indigenous nations or groups with other states, whether denominated as treaties or otherwise, shall be recognized and applied in the same manner and according to the same international laws and principles as the treaties and agreements entered into by other states.

6. Abrogation of Treaties and Other Rights

Treaties and agreements made with indigenous nations or groups shall not be subject to unilateral abrogation. In no event may the municipal law of any state serve as a defense to the failure to adhere to and perform the terms of treaties and agreements made with indigenous nations or groups. Nor shall any state refuse to recognize and adhere to treaties or other agreements due to changed circumstances where the change in circumstances has been substantially caused by the state asserting that such change has occurred.

7. Jurisdiction

No state shall assert or claim or exercise any right or jurisdiction over any indigenous nation or group or the territory of such indigenous nation or group unless pursuant to a valid treaty or other agreement freely made with the lawful representatives of the indigenous nation or group concerned. All actions on the part of any state which derogate from the indigenous nations' or groups' right to exercise self-determination shall be the proper concern of existing international bodies.

8. Claims to Territory

No state shall claim or retain, by right of discovery or otherwise, the territories of an indigenous nation or group, except such lands as may have been lawfully acquired by valid treaty or other cession freely made.

9. Settlement of Disputes

All states in the Western Hemisphere shall establish through negotiation or other appropriate means of procedure for the binding settlement of disputes, claims, or other matters relating to indigenous nations or groups. Such procedures shall be mutually acceptable to the parties, fundamentally fair, and consistent with international law. All procedures presently in existence which do not have the endorsement of the indigenous nations or groups concerned shall be ended, and new procedures shall be instituted consistent with this Declaration.

10. National and Cultural Integrity

It shall be unlawful for any state to take or permit any action or course of conduct with respect to an indigenous nation or group which will directly or indirectly result in the destruction or disintegration of such indigenous nation or group or otherwise threaten the national or cultural integrity of such nation or group, including, but not limited to, the imposition and support of illegitimate governments and the introduction of non-indigenous religions to indigenous peoples by non-indigenous missionaries.

11. Environmental Protection

It shall be unlawful for any state to make or permit any action or course of conduct with respect to the territories of an indigenous nation or group which will directly or indirectly result in the destruction or deterioration of an indigenous nation or group through the effects of pollution of earth, air, water, or which in any way depletes, displaces or destroys any natural resource or other resources under the dominion of, or vital to the livelihood of an indigenous nation or group.

12. Indigenous Membership

No state, through legislation, regulation, or other means, shall take actions that interfere with the sovereign power of an indigenous nation or group to determine its own membership.

13. Conclusion

All of the rights and obligations declared herein shall be in addition to all rights and obligations existing under international law.

E. Declaration of the Indigenous Peoples

(Fourth Russell Tribunal)

The Fourth Russell Tribunal held in Rotterdam in 1980, arose in response to a need expressed at the International Conference Against the Discrimination of Indigenous Peoples of the Western Hemisphere held in Geneva, Switzerland in 1977. The Geneva Conference demonstrated that certain Nation-States of the Western Hemisphere practice gross violations of the rights of the Indigenous Peoples. The Indigenous Peoples represented at the Conference recommended that a Tribunal be formed in order that cases may be presented and witnessed heard to inform the world of the nature and effect of those abuses.

We have witnessed the accusations brought before the Fourth Tribunal. We have heard our brothers and sisters speak of mass executions, kidnappings, tortures, rapes and assassinations committed and permitted by the governments of Nation-States with political acts of terriorism and oppression against Indigenous Peoples, organizations and Nations. We believe that the charges brought before the Tribunal provide the most eloquent testimony that Nation-States have adopted national policies of ethnocide and genocide of Indigenous Peoples and that such policies are unacceptable to the conscience of humanity. We condemn genocide and ethnocide in all forms.

The Indigenous Peoples suffer the most outrageous abuses of their rights. Nation-States have adopted national policies designed to deny peoples their rights to exist as distinct peoples of the world, including the right to practice their culture, to speak their language, to the peaceful possession of their national territory and their right to a national identity. In almost every case Indigenous Peoples suffer from the unlawful taking of their lands through national policies which are designed to deny Indigenous Peoples of their right to their lands.

The municipal laws of many Nation-States do not provide justice to the Indigenous Peoples.

The accusations and the testimonies of the Indigenous Peoples at the Tribunal have affirmed that Nation-States are not the sole instruments of dispossession and genocide. Certain religious organizations, especially missions of Christian denominations, act in partnership with governments in policies intended to dispossess peoples and destroy their langauges and other elements of their culture. There has been conclusive demonstration, that the economic interests or ruling classes of the Nation-States as well as the economic interests of the ruling classes of industrialized countries, as represented by the activities of transnational corporations, have been instrumental in dispossessing peoples of their lands and freedom.

Because of the power of these economic interests in influencing and determining national policies, whole peoples have been forced into economic slavery on the plantations, in the mines, and in the factories of the oppressors. People are being driven from their homelands and forced to live in poverty and despair on the margins of their rightful territories, as exiles in their own land. Those of our people who express opposition to the policies which create those horrifying conditions are subjected to the brutal repression, persecution and discriminations which are the tools by which the people are denied their rights to exist as distinct people of the world.

We, the Indigenous Peoples gathered here at this Fourth Russell Tribunal, call upon the people of the world to take action to right these horrible wrongs. We reaffirm our support of the principles set forth in the Declaration of the Rights of the Indigenous Peoples of the Western Hemisphere adopted by the Geneva Conference of 1977 and we call upon the people of the world to work for the rights of Indigenous Peoples to exist as distinct peoples of the world and to condemn genocide and ethnocide.

We support the principles that Indigenous Peoples have the right to exist as distinct peoples of the world, and that they have a right to possession of their territories and the right to sovereign self-determination. We call upon the people of the world to join us in asserting that the genocide and dispossession of Indigenous Peoples is a matter of rightful concern to the world community, as are matters involving a consistent pattern of gross violations of the rights of the Indigenous Peoples and Nations Under principles established by International Law and that action must be taken by the world organisations and specifically the United Nations.

Finally, we call upon the people of conscience to join us in our call for recognition of Indigenous Peoples and Nations as full members of the world community of nations and peoples with a right to representation and membership in world organisations and especially the United Nations.

We, the Indigenous Peoples, representatives at the Fourth International Russell Tribunal, 1980, resolve with respect to the following:

1. Genocide

That the Tribunal denounce the physical extermination which is is instrumental through the repression of Indigenous Leaders, many of whom have been assassinated, tortured, kidnapped and exiled.

2. Ethnocide

That the Tribunal denounce the campaign of destruction directed against the Indigenous Nations through the denial of their culture, language and traditions, this being the instrument used by the Western colonialists for the ruling classes of whom they are intermediaries.

3. Transnational Corporations

That the Tribunal denounce the transnational corporations which exploit our resources (minerals, petroleum, forests, etc.), destroying at the same time the ecology of our territories, and for which they count upon the complicity of governments and their instruments of repression.

4. Emigration of White Racists

That the Tribunal denounce the South American governments which would attempt to relocate racist Rhodesians to regions of majority Indigenous populations, as in the case of Bolivia, with the express purpose of strengthening western domination.

5. Sterilization

That the Tribunal denounce the sterilization campaigns, direct and indirect, against the Indigenous populations, with the purpose of impeding the population growth of Indigenous Nations, heightening their potential for struggle and thus threatening the western societies' economic and political interests.

6. Missionaries

Because Indigenous peoples have their own traditional religions and that those religions are consistently under attack by western religions, that the Tribunal in the future look closely at programs conducted by missionary groups belonging to the Roman Catholic Church, Protestant and Evangelical denominations because of their obvious complicity in the genocidal processes carried out against Indigenous Peoples. This would not indict these missionaries who have committed themselves to helping our people. In particular we would ask the Tribunal to immediately condemn,

and in the future, completely investigate the activities of that great common danger, The Summer Institute of Linguistics.

7. Definitions and Boundaries

We condemn all Nation-States, such as Canada, that have divided our various peoples by legislative definitions, different modes of land settlements and imposed boundaries in continuing violation of Articles 10 and 12 of the "Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere," Geneva Conference, 1977.

Before the tragedy of genocide and ethnocide on the part of the dominant societies and governments, we value the solidarity of those organisms, Nation-States and institutions that identify with our cause, but at the same time we reject those organizations which, under the pretext of defending the rights of Indigenous Peoples, foment division by supporting groups and organizations driven by political interest not based on our own history.

8. Declaration

That the Fourth International Russell Tribunal adopt the 1977 "Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere" and the subsequent "Declaration of the Indigenous Peoples at the Fourth International Russell Tribunal," 1980.

9. 1948 Convention

That the Fourth Russell Tribunal take into consideration the 1948 "Convention on the Prevention and Punishment of the Crime of Genocide" in relation to the violations against our peoples and nations.

10. Protection of Our Relatives

That the Tribunal condemn activities and enterprises that are destructive of our relatives, the four-legged of the land, the winged-ones of the air, the occupants of the waters and the creatures of the bottom of the seas, including all other life forms necessary to their survival and a clean, healthy and renewal environment within which they may flourish.

11. Bolivia

That the Fourth Russell Tribunal condemn the military dictatorship of General Garcia and his Minister of the Interior, General Luis Arce Gomez, as responsible for the massacre carried out

against the Indian miners, campesino communities and the marginal areas of the cities. Many of their representatives have been assassinated, imprisoned in concentration camps, kidnapped, persecuted and exiled.

12. Guatemala

That the Fourth Russell Tribunal condemn the government of General Lucas Garcia de Guatemala for the continual massacre and ethnocide of Indigenous Peoples there, a majority population. Also that the Tribunal should request the immediate withdrawal of the military troops which presently occupy vast areas of the country.

13. El Salvador

That the Fourth Russell Tribunal condemn and repudiate the military Junta of El Salvador for its obvious involvement in the numerous massacred of Indigenous Peoples in that country, a tactic utilized to maintain the privilege of a minority which despoils the country and oppresses the population.

14. Chile

That the Russell Tribunal repudiate the Military Junta of Chile for its continuous violation of the rights of the Mapuche Nation and the repression of its leadership since the military coup of 1973. Also, the ethnocide Law 2568/78 which divides the Mapuche communities into small parcels of land, therefore destroying the Indigenous concept of life.

Suggestions for Future Work

We propose that a mechanism should be installed so the Tribunal and its results should be continuous. Permanent observation of, continual media dissemination as well as continuous challenges to the accused dominant governments, institutions and individuals must be guaranteed.

Therefore we encouarge our European supporters to maintain their commitment in the future.

These proposed follow-up activities should guarantee the continued monitoring of these voltile situations and should point the way to appropriate measures on the part of the European Support Community.

The Indigenous delegates recommend that such a work be placed under the authority of an Indigenous National Government, namely the Council of Chiefs of the:

> League of the Haudeenosaunee, in consultation with the International Indian Treaty Council, the South American Indian Council and other Traditional Indigenous Bodies.

APPENDIX II

Indian Civil Rights Act Cases, 1968-1978

Guide to Style

"CASES

The line directly below the title gives the state, court(s), tribes(s) and date(s) when applicable. The court, except where shown as a Federal Court, tribal court or administrative agency, is a court of the state indicated at the beginning of the line. The courts listed are not meant to be a history of the case, but only refer to the documents in the library files. The date is that of the earliest document in the case in our files. The date preceded by the letter "d." indicates the date on which the case was settled or decided. If no date preceded by the letter "d." is shown, then the case is undecided, on appeal in another court, or the decision is unreported and we have no record of it. If only a date preceded by the letter "d." is shown, then all of the litigation in our file occurred during the year of the decision. The symbol (C.____) indicates a connected or consolidated case."

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