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THE GRAND EXPERIMENT: EVALUATING INDIAN LAW IN THE "NEW WORLD"

*Kevin J. Worthen**

When young Charles I ascended to the Spanish throne in 1516, there was perhaps no more vexing problem facing him than the so-called "Indian question." In the slightly more than twenty years since Columbus had first returned to Spain from the "New World," numerous strongly-held, and directly-contradictory, opinions concerning the policy the Spanish should pursue in interacting with the original inhabitants of the Americas had been expressed and expounded by the royal advisors.

The early Spanish debate largely centered on the nature of the indigenous peoples the Spanish had "discovered." Opinions on this central issue varied widely.¹ According to Gonzalo Hernández de Oviedo, the indigenous people were by nature "lazy and vicious, melancholic, cowardly, and in general a lying shiftless people."² Bartolomé de Las Casas took the opposite position, contending that "God created these simple people without evil and without guile. They are most obedient and faithful to their natural lords and to the Christians whom they serve. They are most submissive, patient, peaceful and virtuous. Nor are they quarrelsome, rancorous, querulous, or vengeful."³

Faced with such widely differing opinions and having little practical experience of his own, the new King, acting through his Regent, Cardinal Cisneros, authorized a series of experiments, whose central object was to determine, in the words of historian Lewis Hanke, "whether the Indians

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1. Historian Lewis Hanke has observed that "[t]hrough more subtle theories were eventually developed, the majority of the Spaniards in the Indies in the first half century of the conquest tended to look upon the natives either as 'noble savages' or as 'dirty dogs.'" LEWIS HANKE, *THE FIRST SOCIAL EXPERIMENTS IN AMERICA: A STUDY IN THE DEVELOPMENT OF SPANISH INDIAN POLICY IN THE SIXTEENTH CENTURY 19-20* (1964).

2. *See id.* at 20.

3. *See id.* at 20 (quoting BARTOLOMÉ DE LAS CASAS, *BREVISSIMA RELACIÓN* (1924)).

had the ability to live alone as free subjects of the King."⁴ Hanke's phraseology was well-chosen. While the Indians were to be left more alone than they had been since the arrival of Columbus, they were not to be given complete independence to form their own society. They were to live as the King's subjects. The royal instructions provided that the Indians were to be settled in towns of 300 families under one cacique or native chief, but the town was to be supervised by the resident priest and by a responsible Spanish administrator.⁵ However, the towns, and the Indian caciques, were given some autonomy to rule themselves. The instructions provided:

[E]ach town is to have jurisdiction within its boundaries, and the said caciques are to have jurisdiction to punish the Indians who transgress in the town where they are superior, not only as regards their own people, but also as regards those of the inferior caciques who live in the towns. This is to comprehend those who deserve punishment up to whipping and no more. And upon these they are not to execute punishment on their own order alone, but at least with the supervisory advice and consent of the friar or priest who is there. The rest is to be in the hands of the ordinary justice. If the caciques should do what they ought not, they are to be punished by our ordinary justice.⁶

4. See *id.* at 24. The actual experiments were not undertaken until after the regent, Cardinal Cisneros, dispatched three Jeronymite friars to the Indies to gather information on the matter. See *id.* at 26-27. The friars were armed with a list of seven series of questions they were to ask of the colonists, the third of which provided:

Does the witness know, believe, or has he heard it said, or observed, that these Indians, especially those of Española and women as well as men, are all of such knowledge and capacity that they should be given complete liberty? Would they be able to live *políticamente* as do the Spaniards? Would they know how to support themselves by their own efforts, each Indian mining gold or tilling the soil, or maintaining himself by other daily labor? Do they know how to care for what they may acquire by this labor, spending only for necessities, as a Castilian laborer would?

Id. at 29. Tellingly, not one of the colonists considered the Indians capable of living in freedom. See *id.* Perhaps equally tellingly, the questions were framed in a way that assumed that Spanish conduct constituted the appropriate measure for determining the capacity of a person to live without paternal supervision. One cannot wonder which of the two groups of persons is more implicated by Licenciado Cristóval Serrano's assertion that "inasmuch as Indians showed no greediness or desire for wealth . . . they would inevitably lack the necessities of life if not supervised by the Spaniards." *Id.* at 30.

5. See Woodrow Borah, *Justice By Insurance: The General Indian Court Of Colonial Mexico And The Legal Aides Of The Half-Real* 21-22 (1983). As Hanke noted, "[a]pparently even free Indians were thought to need some supervision." HANKE, *supra* note 1, at 45.

6. BORAH, *supra* note 5, at 22 (quoting English Translation of the Instructions from Madrid, Sept. 13, 1516, in SIMPSON, *The Encomienda: Forced Native Labor* 195 (1929)).

Thus, a form of measured autonomy was contemplated for the indigenous peoples subject to the experiments. Their leaders were to have control over their own affairs, subject to limits as to the amount of punishment, and to advisory, and sometimes compulsory, supervision by the King's officers.

The first of these royally-commanded experiments⁷ began in 1519 in Española under the direction of Rodrigo de Figueroa.⁸ Figueroa organized three villages of natives, freed from encomiendas belonging to the Crown, absentee encomenderos, and other Spanish officials,⁹ and the experiments began. From the Spanish standpoint the experiments "soon proved to be a fiasco."¹⁰ Figueroa reported that even though he had carefully chosen the village administrators and visited the villages often in order "to detect any signs of capacity," he had found none.¹¹ Similar experiments in Puerto Rico,¹² Venezuela,¹³ and Cuba,¹⁴ were also declared

7. There had been a few locally initiated efforts to set at liberty a few individual natives of Santo Domingo before this time. See HANKE, *supra* note 1, at 36; Robert Jones Shafer, *A History OF Latin America* at 60. The failure of these efforts was an oft-repeated basis for the pessimistic conclusions of the colonists consulted by the Jeronymite friars. See HANKE, *supra* note 1, at 36-37.

8. Antonio de la Gama was ordered to carry out a similar program in Puerto Rico at approximately the same time. See HANKE, *supra* note 1, at 42, 45.

9. See C. H. Haring, *The Spanish Empire In America* 46 (1963). See also HANKE, *supra* note 1, at 43.

10. Haring, *supra* note 9, at 46.

11. HANKE, *supra* note 1, at 47. Figueroa's failure may have been due in part to the fact that he was apparently more interested in amassing wealth for himself than in helping the experiment succeed. See HANKE, *supra* note 1, at 45. The failure was undoubtedly contributed to by resistance from the colonists who feared that their source of inexpensive labor would evaporate if the experiment succeeded. See HANKE, *supra* note 1, at 45. In response, both Bartolomé de Las Casas (who was in Spain urging the King to move forward with the experiments) and the Jeronymite friars suggested the importation of slaves from Africa to save the natives from destruction. See Haring, *supra* note 9, at 50 n.10.

12. Those in charge of the experiment in Puerto Rico, which commenced the same time as the experiment in Española, "informed the [King] that the experiment there was a failure, that the Indians benefited not at all because they lacked the requisite ability, and that they had much better be put to work building a fortress to ward off the attacks of the warlike Carib Indians." See HANKE, *supra* note 1, at 48.

13. In 1520 Bartolomé de Las Casas obtained permission to start his own self-supporting Indian community near the town of Cumaná. See Haring, *supra* note 9, at 46; Shafer, *supra* note 7, at 61. However, many of the friars assigned to the mission failed to reach the Indies because of storms, most of the farmers Las Casas recruited to join him abandoned the project in Puerto Rico in favor of Ponce de León's Florida expedition. See Shafer, *supra* note 7, at 61. The natives, unable to distinguish between Spanish slavers and Las Casas' followers, killed or scattered those who eventually reached the site. See Haring, *supra* note 9, at 46.

14. At least two efforts were made to initiate free Indian villages in Cuba between 1525-

failures, and having determined that the Indians could not live alone as free subjects of the King, the Spanish eventually developed what one Mexican legal scholar has described as "an official policy of benevolent guardianship" toward the indigenous people.¹⁵

The first "Indian experiments" were over. From the Spanish standpoint they seemed to show that the indigenous people of the Americas were not capable of governing themselves as free subjects of European Kings. Although debate concerning the nature of the indigenous people continued,¹⁶ the general outlines of official Spanish policy toward the indigenous people of America were determined in light of these and other "failed" experiments. Because early British, French, and Portuguese policy all relied to some extent on the early Spanish experience,¹⁷ they too were somewhat influenced by the initial Spanish conclusion that indigenous people could not live alone as free subjects of the European sovereign.

However, it is now increasingly clear that the initial "Indian" experiments did not end in 1535. From one perspective, the past 400 years has really been a continuation of the early Spanish Indian experiments. The experiments have continued in the various countries of the Americas, and indeed, throughout the world. Radically different policies with respect to indigenous people have been adopted in different countries, and even within the same country, over the past 400 years.¹⁸ Each of these

1535. See HANKE, *supra* note 1, at 49-71. At the conclusion of the second of these, the Governor reported that he believed "the Indians in no way capable of living by themselves, and recommended that they be given to some Spaniard in Bayamo." HANKE, *supra* note 1, at 67.

15. See Guillermo Floris Margadant, *Official Mexican Attitudes toward the Indians: An Historical Essay*, 54 Tul. L. Rev. 964, 968 (1980).

16. Among the most notable debates was the 1550 debate between Bartolomé de Las Casas and Juan Ginés de Sepulveda. See Wilcomb E. Washburn, *Red Man's Land/White Man's Law: The Past and Present Status of the American Indian 14-17* (2d ed. 1995).

17. As the noted historian Lyman Tyler explained,

The first European nation to attempt to deal with the problems involved in legalizing the relationships between European-Americans and Indians was Spain, and Spanish law became the basis for French, English, Portuguese, and United States law pertaining to the Indians, as well as that of the republics of Latin America after they gained their independence from Spain and Portugal.

S. Lyman Tyler, *The Indian Cause in Spanish Laws of the Indies* xxxviii (1980).

18. For example, "one of the most striking characteristics of formal federal policy toward Native Americans [in the United States] since the Revolutionary War has been its inconsistency. Massive swings between separatist and assimilationist attitudes, goals, and means have been the norm." Kevin J. Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Associations*, 71 N.C. L. Rev. 595, 629 (1993).

policies was based to some extent on the particular policymakers' answers to the question whether, and to what extent, indigenous people can, and should be permitted, to live alone as free subjects of the nation in which they reside. After more than 500 years of experimentation, it seems appropriate to start evaluating the data that has accumulated.

This article attempts to begin that process, not with the intent of determining what the data shows us about the nature and capacities of indigenous people, the focus of the original Spanish experiments, but with the goal of learning about the legal systems that have developed in the "New World" and their relationship to, and impact on, indigenous people. The article represents only a first step in this process. It focuses on the policies of eight countries¹⁹ with respect to a single, but extremely important, legal issue for indigenous people, their right of sovereignty or self-determination. Four of the countries: the United States, Canada, Australia, and New Zealand, are common-law countries whose policies were shaped to some extent by their English predecessors. The other four countries: Chile, Brazil, Mexico, and Nicaragua, are civil law countries, whose policies are more closely tied to that of their Iberian predecessors, Spain and Portugal.

A broader cross-sample of legal issues²⁰ and countries will have to be considered before any final conclusions can be reached. Yet, this paper focuses on what may be the central issue for indigenous peoples; the right of self-determination or sovereignty.²¹ The eight country sample is suffi-

19. The author does not profess to be an expert on the Indian laws of all eight countries. While having considerable experience addressing issues involving U.S. Indian law and some prior experience working with and studying Chilean law on the subject, the author's knowledge of the laws of other countries are limited to research performed for this paper. Moreover, while the author had some access to materials from all eight countries, information from the Latin American countries, with the exception of Chile, was limited primarily to secondary materials. Finally, the reader should note that little effort has been made at this point to determine how the law on the books has actually been implemented in the real world. In short, what has been said about any comparative law endeavor that it is to some extent "necessarily superficial." See also Bernhard Grossfeld, *The Strengths and Weaknesses of Comparative Law* 41 (1990).

20. At a bare minimum, any full evaluation would have to consider a country's policy with respect to ownership and use of indigenous lands, indigenous control over membership in the indigenous group, and language rights.

21. The depth of indigenous sentiment with regard to the topic is illustrated by the following report on the sixth session of the Working Group of Indigenous Populations.

[A]ccording to the overwhelming majority of indigenous representatives, self-determination and self-government should be amongst the fundamental principles of the draft declaration [of indigenous rights] . . . Many speakers underlined that it was essential for the draft declaration to guarantee in the strongest language possible free and genuine indigenous institutions.

ciently broad to include civil and common law systems, and yet the scope is sufficiently narrow in that all the countries were influenced by the early Spanish experience in the new world. Each state developed at roughly the same time period and under similar conditions. From these circumstances we may draw a few general observations.

I. SOVEREIGNTY: THE RIGHT OF SELF DETERMINATION²²

From a practical standpoint, the indigenous people of the "New World" exercised sovereignty over all the lands they occupied prior to the arrival of the Europeans.²³ The key question for the European governments and their Western successors has how much of that power would be recognized. The ability to govern themselves - to determine their own future has also long been a key component of indigenous people's concept of themselves.²⁴ Thus, it is not surprising that a great deal of the

Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study of the Problem of Discrimination Against Indigenous Populations, Report of the Working Group on Indigenous Populations on Its Sixth Session, U.N. Doc. E/CN.4/Sub.2/1988/24 p. 80 (1988), quoted in Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 Yale J. Int'l L. 127 (1991).

22. A variety of terms could be used to describe the right of indigenous people to establish and enforce their own standards of conduct within some political or territorial community. While some have argued against use of the term sovereignty in this context. See Garth Nettheim, *Peoples and Populations - Indigenous Peoples and the Rights of Peoples*, in *The Rights of Peoples* 118 (1988). The author has chosen to use the term "sovereignty" because of its prominence in U.S. Indian law. Moreover, despite its controversial status, "possibly no other word carries better with it the fundamental desire of peoples culturally in tune to exercise the maximum possible degree of control over their own destinies according to their own cultural dictates." Peter Grose, *The Indigenous Sovereignty Question and the Australian Response*, 3 Austl J. of Hum. Rts. 40, 63 (1996).

23. As Patrick Macklem has noted when speaking of the indigenous people of Canada and the United States, "[n]ot only were they 'here first,' but when they were here first, they exercised sovereign authority. A claim of prior occupancy, in other words, often serves as a proxy for a claim of prior sovereignty." Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 Stan. L. Rev. 1311, 1333-34 (1993).

24. In the words of one U.S. scholar,

[T]he [Native American] tribes wanted to be left to themselves Several treaties provided that the tribes would be guaranteed 'absolute and undisturbed use and occupation' or that 'no persons except those herein so authorized to do ... shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 16 (1987).

contention, both physically and legally, between the various nation-states and indigenous people has surrounded the issue of the extent to which indigenous people would be allowed to retain the sovereignty they previously enjoyed.

One of the essential components of sovereignty is the ability to establish and enforce norms of conduct within the political or territorial community.²⁵ That aspect of sovereignty is the focus of this article. While it is impossible in this article to describe in any detail the various policies adopted by the eight countries on that issue over time, it is clear that three main kinds of responses have been adopted at a national level by these countries: (1) formal recognition of an aboriginal right of sovereignty, (2) delegation of governmental authority to indigenous groups, and (3) refusal to give any formal governmental power to the indigenous people. Moreover, a variety of approaches have been adopted within each of these three main categories.

A. Recognition of Inherent Sovereignty

Only one of the eight countries - the United States - has formally recognized and made a part of its formal law, the inherent right of indigenous people to govern themselves. In one of its earliest Indian law cases, the U.S. Supreme Court recognized that each Indian tribe or nation was "a distinct political society, separated from others, capable of managing its own affairs and governing itself."²⁶ Subsequently, the Court made clear that the tribes powers to govern "are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'"²⁷ This recognition was in some respects the logical extension of the British, and then U.S., policy of dealing with indigenous people through formal treaties,²⁸ because it was assumed at the time that "both parties to treaties were sovereign powers."²⁹

However, inherent tribal sovereignty in the United States is not with-

25. "All the characteristics of sovereignty," said [Jean] Bodin, "are contained in this, to have power to give laws to each and everyone of his subjects, and to receive none from them." Harold J. Laski, *The Foundations of Sovereignty and Other Essays* 17 (1921).

26. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). The issue involved in *Cherokee Nation* was whether article III of the U.S. Constitution, which granted the Supreme Court authority to exercise original jurisdiction over cases between a State of the Union and a foreign State, authorized the Supreme Court to hear a suit filed by the Cherokee Nation against the state of Georgia. The Court concluded that while the Cherokee Nation was a "state," it was not a foreign State, but rather a "domestic dependant nation." *Id.* Accordingly, the Court dismissed the case.

27. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, Felix S. Cohen's *Handbook of Federal Indian Law* 122 (1941)).

28. See Francis Paul Prucha, *American Indian Treaties* 21 (1994).

29. Felix S. Cohen, Felix S. Cohen's *Handbook of Federal Indian Law* 53 (1982).

out its limits. As the Supreme Court made clear in *Cherokee Nation*, Tribes are not independent foreign states, but rather "domestic dependant nations,"³⁰ whose sovereignty is of a "unique and limited character,"³¹ subject to limitations from three sources. First, "Congress, has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."³² Second, tribes can, and have relinquished some of their sovereignty through treaties with the U.S. government.³³ Finally, federal common law prohibits a tribe from exercising governmental authority which is "inconsistent with the dependant status of the tribes."³⁴ Thus, as the U.S. Supreme Court has noted, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, and or by implication as a necessary result of their dependent

30. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

31. *Wheeler*, 435 U.S. at 323.

32. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). See also *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984) ("[A]ll aspects of Indian sovereignty are subject to defeasance by Congress."). Congress has exercised that authority in the most extreme form, complete elimination of tribal sovereignty, during the Termination Era of the 1950's. See generally Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139 (1977).

33. "Obvious examples are provided by the vast land cessions made by treaty which ended tribal power over the ceded areas. Some treaties also contain clauses requiring tribes to permit federal supervision within their territories." Cohen, *supra* note 30, at 242.

34. *Montana v. United States*, 450 U.S. 544, 564 (1981). The two common-law limits that courts originally placed on tribes were the inability to freely alienate tribal land and a prohibition against entering into direct diplomatic or commercial relations with foreign nations. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18. More recently, the Supreme Court has held that tribes lack the authority to exercise criminal jurisdiction over non-Indians, and that it can exercise civil jurisdiction over non-tribal members on non-tribal lands within the reservation only when those "nonmembers enter consensual relationships with the tribe or its members" or engage in activity that "threatens or has some direct effect on the political..." 191 (1978); *Montana*, 450 U.S. at 565-566, 559 (holding that a tribe has no authority to regulate hunting and integrity, the economic security, or health of the tribe.) *Oliphant v. Suquamish Indian Tribe*, 435 U.S. fishing on fee lands owned by non-tribal members); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding that a tribe cannot regulate hunting and fishing on federal land); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that a tribe cannot exercise zoning authority over lands owned by non-tribal member on portion of the reservation opened up to public access); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that a tribe cannot exercise jurisdiction over civil law suit arising out of automobile accident between two non-Indians on state road located on the reservation). The Supreme Court has also ruled that tribes have no inherent authority to exercise criminal jurisdiction over Indians who are not members of the tribe, but Congress subsequently overrode the decision. See *Duro v. Reina*, 495 U.S. 676 (1990); Pub.L. No. 101-511, §8077 (b)-(d), 104 Stat. 1892 (1990); Pub.L. No. 102-137, 105 Stat. 646 (1991).

status."³⁵

This inherent sovereignty includes the power to regulate the domestic relations of tribal members³⁶ and to tax³⁷ tribal members and non-members who enter on tribal lands in "Indian Country."³⁸ However, U.S. courts have recently narrowed the reach of tribal authority over non-members,³⁹ so that the tribes' inherent sovereignty is more and more being limited to authority over tribal members themselves.⁴⁰ Still, the inherent sovereignty of the tribe to regulate its own affairs, and even the affairs of others to some extent, is significant.

While none of the other seven countries surveyed has formally recognized any aspect of their indigenous people's inherent sovereignty,⁴¹ recent events in Canada and New Zealand have opened the way for such recognition. In both countries the seeds for such recognition were planted long ago when the governments entered into treaties with the indigenous people, an act which, as noted above, seems to imply some recognition of the sovereign status of the indigenous entity with whom the treaty is made.

Following the British practice adopted by the United States, Canada's government recognized some "native governments for the purpose of signing treaties and surrendering land,"⁴² but there was no subsequent express recognition of this indigenous sovereignty in any judicial or leg-

35. *Wheeler*, 435 U.S. at 323.

36. Jurisdiction over the divorce of two tribal members who reside on the reservation is vested exclusively in the tribe. See *Whyte v. District Court*, 346 P.2d. 1012 (Colo. 1959), *cert. denied*, 363 U.S. 829 (1960). Tribal authority over the adoption of tribal members residing on the reservation is, with minor exceptions, also exclusive, 25 U.S.C. §§ 1901-1903 (1988); *Fisher v. District Court*, 424 U.S. 382 (1976). Tribes also retain limited authority over adoptions involving tribal members who do not reside on the reservation. 25 U.S.C. § 1911 (1988).

37. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

38. Tribal criminal and civil jurisdiction exists only in "Indian country." See 18 U.S.C. §§ 1151-52 (1988) (criminal jurisdiction); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2 (1975) (civil jurisdiction). "Indian country" includes all lands within a reservation, regardless of the form of ownership, 18 U.S.C. § 1151(a), as well as some limited areas outside the reservation, 18 U.S.C. § 1151(b)-(c) (stating that lands which are "dependent Indian communities" or "Indian allotments, the Indian titles to which have not been extinguished").

39. See *Wheeler*, 435 U.S. at 323.

40. See *South Dakota v. Bourland*, 508 U.S. 679, at 695 n.15 (stating that with the two limited exceptions, "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation'" (quoting *Montana v. United States*, 450 U.S. at 564)).

41. It is possible to argue that Australia has done so on a very limited basis. See *infra* note 145.

42. Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 Wash. L. Rev. 643, 709 (1991).

islative action in the 19th century.⁴³ Instead, the government enacted the Indian Act,⁴⁴ which sought to impose on the natives a form of municipal government under which Tribal Band Councils elected according to Canadian standards,⁴⁵ were delegated authority over a few minor matters.⁴⁶ This express delegation of authority, which is discussed in more detail below,⁴⁷ seemed to curtail any other serious governmental discussion of inherent sovereignty.

However, neither Parliament nor the Canadian Supreme Court definitely closed the door on the possibility that First Nations might still possess some form of inherent sovereignty, and several scholars have suggested that the door is now open.⁴⁸ The vehicle for such recognition may be section 35 of the 1982 Constitution Act, which provides that "existing

43. As one scholar has noted, "the Crown officers utilized the traditional government only for land surrenders and treaties, and otherwise deprived that traditional government of any powers of management or control." Richard H. Bartlett, *The Indian Act of Canada*, 27 *Buff. L. Rev.* 581, 593 (1978).

44. The Indian Act was first passed in 1876 as a consolidation of Indian legislation then in force. *See* Indian Act, ch. 18 (1876) (Can.); Bartlett, *supra* note 44, at 584-85. The concept of the Tribal Band Council was first enacted in 1869. Gradual Enfranchisement of Indians and the Better Management of Indian Affairs Act, c. VI, § 10 (1869); *see also* Bartlett, *supra* note 44, at 569; Johnson, *supra* note 43, at 709.

45. The original provision, section ten of the 1869 Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs provided:

The Governor may order that the Chiefs of any tribe, band, or body of Indians shall be elected by the male members of each Indian settlement of the full age of twenty-one years at such time and place, and in such manner, as the Superintendent General of Indian Affairs may direct, and they shall in such case be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, or immorality, and they shall be in the proportion of one Chief and two Second Chiefs for every two hundred people

Gradual Enfranchisement of Indians and the Better Management of Indian Affairs Act c. VI, § 10. The provision has been only slightly altered since that time. *See* Bartlett, *supra* note 44, at 594; Johnson, *supra* note 43, at 709.

46. According to one scholar, "[t]he Indian-elected governments were given only trivial powers, and generally were subjected to stifling supervision by government." Johnson, *supra* note 43, at 709.

47. *See infra* text related to notes 86-88.

48. "Many experts assert that First Nations still have sovereign governmental powers, even though seldom used and yet unrecognized by the federal government. Some suggest that it is not the sovereign governmental powers of Indigenous peoples that are ill-defined, but the recognition of these powers in Canadian law." Johnson, *supra* note 43, at 710 (citing Canada House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada* 42-43 (1983)).

aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."⁴⁹ Whether section 35 creates the necessary legal mechanism for recognizing and revitalizing inherent aboriginal sovereignty, as some advocate,⁵⁰ remains to be seen.⁵¹ In the meantime, several bands of First Nations are in the process of negotiating self-government agreements with the federal government,⁵² an action which could lead to formal recognition of some form of inherent sovereignty in at least some areas of Canada.⁵³

A similar, though less-advanced, trend toward formal recognition of some form of inherent sovereignty for indigenous peoples can be seen in New Zealand. Again, the seeds of the current trend were sown more than a century ago when Great Britain entered into a treaty with the Maori - the indigenous people of New Zealand. The mere fact that the British entered into the Treaty of Waitangi with a number of Maori chiefs in 1840, would seem to provide some basis for an argument that the British

49. CAN. CONST. (Constitution Act, 1982) pt. II, § 35(1).

50. See, e.g., Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, 29 Alta. L. Rev. 492 (1991); Patrick Macklem, *First Nations Self Government and the Borders of the Canadian Legal Imagination*, 36 McGill L. J. 382 (1991); John Burrows, *A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government*, 30 Osgoode Hall L. J. 1 (1992); Bob Freedman, *The Space for Aboriginal Rights of Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in Delgamuukw v. British Columbia*, 28 U.B.C. L. Rev. 49 (1994).

51. In *Delgamuukw v. British Columbia*, the British Columbia Court of Appeal held that while First Nations may possess some powers of self-government, aboriginal powers of sovereignty were extinguished at the time that British Columbia joined the Canadian Confederation in 1871. See *Delgamuukw v. British Columbia* [1993] 5 W.W.R. 97. Any powers of self-government that remain, according to the court, are in the nature of internal rights of self-regulation. See Bob Freedman, *Models for Aboriginal Rights of Self-Government in British Columbia: Inherent Rights, Contingent Rights or Illusory Rights*, in IX Sovereignty Symposium 365, 366 (1996).

In 1995, however, the federal government's Department of Indian Affairs and Northern Development issued a policy paper stating its position that the inherent right of self-government is an "existing right" within the meaning of section 35. *Id.* at 373 (citing Department of Indian Affairs and Northern Development, Federal Policy Guide: Aboriginal Self-Government- The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (1995)).

52. See Freedman, *supra* note 52, at 367-77; David H. Getches et al., *Federal Indian Law: Cases and Materials* 997 (3d ed. 1993).

53. In a nationwide referendum held in the fall of 1992, Canadian voters defeated the Charlottetown Accord which would have amended the Canadian Constitution. Among the provisions that would have been adopted had the Accord been ratified was an amendment to section 35 that would have recognized that "the Aboriginal peoples of Canada have the inherent right of self-government within Canada." Freedman, *supra* note 52, at 377-78.

recognized the sovereign status of the Maori people. However, that position was not adopted by New Zealand for two primary reasons.

First, in 1872, the New Zealand Supreme Court in *Wi Parata v. Bishop of Wellington*,⁵⁴ rejected a contention that a grant from the Crown to a third party violated the Treaty of Waitangi by ruling that "the Maori Tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilized community."⁵⁵ Similar subsequent rulings⁵⁶ caused one writer in 1971 to declare that "the Treaty of Waitangi is worthless and of no effect. It is a non-treaty."⁵⁷ Of equal, if not more importance, the English version of the Treaty text provides that the Maori "cede to her Majesty the Queen of England absolutely and without reservation all the right and powers of Sovereignty which [they] respectively exercise or possess, or may be supposed to exercise or possess over their respective Territories as the sole Sovereigns thereof."⁵⁸

Given this treaty language and rulings like *Wi Parata*, it is understandable why the concept of inherent Maori sovereignty did not advance very far in New Zealand until recently. However, the 1975 Treaty of Waitangi Act, which resulted from increasingly vigorous Maori protest about their treatment under New Zealand law⁵⁹, addressed both barriers in ways that have left the door somewhat open for future recognition of some aspects of inherent sovereignty for the Maori.

First, without rendering the Treaty a legally enforceable limit on

54. See *Wi Parata v. Bishop of Wellington* [1877] 3 N.Z.L.R. 72 (N.Z.).

55. *Id.* at 77.

56. In *Nireaha Tamaki v. Baker*, the New Zealand Court of Appeal rejected the efforts of a Maori to challenge the grant of lands by the Crown to a third party. See *Nireaha Tamaki v. Baker* [1894] 12 N.Z.L.R. 483. While that specific decision was reversed by the Board, its decision was immediately nullified by an Act of Parliament. See David C. Williams, *The Constitutional Status of the Treaty of Waitangi: An Historical Perspective*, 14 N.Z.U. L. Rev. 9, 14 (1990).

57. Mulloy, *The Non-Treaty of Waitangi*, N.Z. L.J. 193, 196 (1971), quoted in Williams, *supra* note 57, at 15. This observation reflected the Court's view in *Wi Parata* that the treaty was a "simple nullity." *Wi Parata* [1877] 3 N.Z.L.R. at 78.

58. Treaty of Waitangi Act, sched. 1, art. 1 (1975) (N.Z.).

59. As two members of the original Waitangi Tribunal observed:

Maori protest, about land and fishing losses, the destruction of their tribal ways and the failure to provide for their culture, was continued with barely a pause and before every forum until, in the heady days of the 1960s, it was taken to the streets. The Waitangi Tribunal was established in response, in 1975.

E. Taihakurei Durie & Gordon S. Orr, *The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence*, 14 N.Z.U. L. Rev. 62 (1990).

state authority,⁶⁰ the 1975 Act created a special tribunal authorized to investigate and report on legislative or executive actions that violate the principles of the Treaty.⁶¹ While the Tribunal has no enforcement powers, its recommendations have affected both legislative⁶² and judicial decisions.⁶³ Moreover, as a result of the increasing attention given to the

60. Without express legislation making the Treaty binding on the government, the Treaty is not legally enforceable in New Zealand courts because of the well-established principle of New Zealand law that "legislation is required to make a treaty part of domestic law." W. K. Hastings, *New Zealand Treaty Practice With Particular Reference to the Treaty of Waitangi*, 38 Int'l & Comp. L. Q. 668 (1989); see also Kenneth Keith, *The Treaty of Waitangi in the Courts*, 14 N.Z.U. L. Rev. 37-46 (1990). This principle is in large part due to the lack of any need to obtain legislative approval of a treaty in the first instance. As one scholar explains: "This principle is a necessary counterweight to the executive's treaty-making power, for without it the executive would be able to circumvent the legislature and change the law of the land by adoption." Hastings, *supra*, at 668.

61. Under the Act, Maori persons "prejudicially affected" have the right to petition the Tribunal concerning any past or proposed governmental policies, legislation or practices which they believe to be inconsistent with the principles of the Treaty. The Treaty of Waitangi Act 1975, No. 114, § 6(1), 33 R.S. 907, 911-912 (1995). The Tribunal then investigates that claim and if it determines that the claim is "well-founded," it "recommend[s] to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future." *Id.* § 6(3), 33 R.S. at 912.

62. For example:

[A]t the Tribunal's request, New Zealand's State-Owned Enterprise Act of 1986, which authorizes transfer of Crown land to state-created enterprises, was amended to include a stipulation that "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

Getches et. al., *supra* note 53, at 1006.

63. In *Huakina Development Trust v. Waikato Valley Authority*, the court held that the Planning Tribunal should consider the spiritual and cultural relationship of the Maori people to the waters of the region when deciding whether to approve a permit for the discharge of treated dairy water and waste into the waters. See *Huakina Development Trust v. Waikato Valley Authority* [1988] 2 N.S.L.R. 188. After reviewing the Tribunal's recommendation in a similar case, the court noted:

While, so far as the present case is concerned, no report of that Tribunal is in any way binding on this Court, its considered opinions, within the area of its expert functions, ought to be accorded due weight in this Court. The way in which the Waitangi Tribunal has dealt with the concept of Maori spiritual values in regard to water establishes, sufficiently for the determination of this branch of the appellant's case, that those values cannot be dismissed in a general sort of way. . . .

Id. at 223.

Treaty, Parliament has, on its own, adopted provisions requiring state actors to adhere to the principles of the Treaty in some situations.⁶⁴ Thus, the viability of the Treaty has been restored.⁶⁵

The 1975 Act also provides an opening for overcoming the seemingly clear cession of Maori sovereignty in the Treaty by noting that "the text of the Treaty in the English language differs from the text of the Treaty in the Maori language."⁶⁶ In the Maori text, the term "kawana-tanga" is used for sovereignty - a missionary Maori word for "government."⁶⁷ As noted by the New Zealand Court of Appeals in 1987, an English version of the text developed by translating from Maori into English could provide that the chiefs "give absolutely to the Queen of England forever the complete government of their land."⁶⁸ From this version, it is possible to argue that the Maori chiefs simply recognized the right of the Queen to legislate, without completely diminishing their right to set and enforce rules for their own tribal members.⁶⁹ The 1975 Act

64. For example, The Conservation Act of 1987 requires that the Act "be interpreted and administered as to give effect to the principles of the Treaty of Waitangi." Kenneth Keith, *supra*, note 61 at 56. Similarly, the title to the Environment Act of 1986, provides that it is enacted, in part, to "ensure that, in the management of natural and physical resources, full and balanced account is taken of . . . The principles of the Treaty of Waitangi." *Id.*

65. Indeed, the *Huakina Development Trust* court referred to the Treaty as part of the "fabric of New Zealand society." Getches et al., *supra* note 53, at 1007. However, it should be kept in mind that even if valid, the Treaty is not directly enforceable in New Zealand courts in the absence of implementing legislation. See *supra* note 61.

66. The Treaty of Waitangi Act, (1975) (N.Z.).

67. Getches et. al., *supra* note 53, at 1002.

68. Robert MacDonald, *The Maori of Aotearora-New Zealand* 8, 11(Minority Rights Group Report 1990).

69. This view of the Treaty is confirmed by the Maori version of the Second Article of the Treaty. The official English version states:

Her Majesty the Queen . . . confirms and guarantees to the Chiefs and Tribes . . . and to their respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

Treaty of Waitangi Act sch. 1. For the term "undisturbed possession," the Maori text uses the term "*te tino rangatiratanga*" - translated as "chieftainship." Treaty of Waitangi sch. 2. The English translation of the Maori text provides that the Queen agrees "to protect the chiefs . . . in the unqualified exercise of their chieftainship over their lands, villages and all their treasures." MacDonald, *supra* note 69, at 11. The use of the Maori term "*te tino rangatiratanga*" in the second article was especially likely to lead to confusion given the contemporary usage of the term among the Maori. As Claudia Orange explains:

[T]he Maori understood the word to mean far more than "possession," as in the English text. In fact, it was a better approximation to sovereignty than

provides that, for purposes of the Act, the Tribunal has "exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them."⁷⁰ The Tribunal has indicated that the Maori text will ordinarily prevail in cases of conflict between the two versions.⁷¹ Thus, there is some opening for the position that the Treaty did not extinguish all rights of inherent Maori sovereignty, and the Chairman of the Waitangi Tribunal has advocated creation of a right of "tribal self-government" for the Maori.⁷² While significant obstacles remain, not the least of which is New Zealand's adoption of the Austinian theory of indivisible sovereignty,⁷³

kawanatanga [the term used for sovereignty in the First Article]. Although both words implied an exercise of power, authority and jurisdiction, *rangatiratanga* was of Maori derivation, with connotations of chiefly power that were familiar to Maori. *Kawanatanga*, on the other hand, derived from *kawana* (governor) and had associations with Pontius Pilate, Roman governor in the Bible, or with governors of New South Wales. It tended to imply authority in an abstract rather than a concrete sense.

Contemporary use of the words in scripture and liturgy reinforced this implication. In the decade before 1840, the dispersion of thousands of biblical texts, translated by . . . missionaries . . . had familiarized many Maori with the nuances of the meaning which they debated exhaustively. *Rangatiratanga* expressed God's "kingdom" in translations of the Lord's Prayer, daily evening prayers, in the burial prayers and in the gospels, whereas *kawanatanga* most often referred to rulership or principality in a vaguer sense. . . . *Rangatiratanga*, moreover, had been used in the 1835 Declaration of Independence to refer to New Zealand's "independence" which Britain had acknowledged. The Maori might well have assumed, therefore, that their sovereign rights were actually being confirmed in return for a limited concession of power in *kawanatanga*.

Id.

70. Treaty of Waitangi Act § 5(2), 33 R.S. at 911 (1995).

71. See R.P. Boast, *New Zealand Maori Council v. Attorney General: The Case of the Century?*, N.Z. L.J. 240, 243 (1987). Boast states that although the Tribunal refers to the general rule of international law that no text of a treaty in two or more languages has superiority, it then refers to the U.S. rule that treaties should be understood "in the sense in which they would naturally be understood by the Indians." *Id.* at 245, 248 n.6 (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).

72. E. Taihakurei Durie, *Protection of Minorities*, N.Z. L.J. 260 (Aug. 1987).

73. As one scholar has noted, Austin's condemnation of "half of imperfectly sovereign states" . . . laid the basis of English legal theory's mid-nineteenth century pre-occupation with the indivisibility of sovereignty. This pre-occupation gravely hamstrung British colonial policy in the Pacific." P. G. McHugh, *Maori Fishing Rights and the North American Indian*, 6 Otago L. Rev. 62, 89 (1985) (quoting John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* 252-56 (5th ed. 1911)). See also Robert N. Clinton et al., *American Indian Law: Cases and Materials* 1229-30 (3d ed. 1991) ("Most commonwealth courts have refused to accept the theory of inherent sovereignty of aboriginal peoples . . . [in part as a result of the influence] of Austin's theory of indivisible sovereignty on English jurisprudence in the early twentieth century.").

the clear trend is toward some sort of recognition of sovereign rights.⁷⁴

In summary, while the United States is the only country which has so far clearly recognized inherent sovereignty, Canada seems on the verge of doing so, and New Zealand has taken the initial steps in that direction.

B. Authority Delegated From the National Government

Without necessarily recognizing the inherent right of indigenous people to govern themselves, several countries in the survey have expressly authorized indigenous groups within their borders to exercise some governmental authority.⁷⁵ This "delegation" of governing authority

74. This trend is further evidenced by delegation of some governmental authority to Maori *iwi*. See *infra* text accompanying notes 91-96.

75. Because the kind of inherent sovereignty recognized by the United States is subject to modification, and even complete elimination, by the national legislature, and because that national legislature is also the body that generally determines the extent of delegated powers in the United States and other countries, the distinction between inherent sovereignty and delegated authority may seem overly formalistic. While the limits of indigenous sovereignty is ultimately determined by the national political process under either approach, there are reasons why the inherent sovereignty approach may be more beneficial to indigenous peoples.

First, the notion of inherent sovereignty is not necessarily linked, as it is in the United States, to Congress' plenary power to override it. In countries such as Canada, where aboriginal rights are constitutionally protected, recognizing autonomy as an inherent right would insulate it from arbitrary legislative modification or elimination.

See Freedman, *supra* note 52, at 370-71.

Second, even when inherent sovereignty is subject to complete legislative defeasance, as in the United States, the basis for the exercise of power may be important because, under U.S. law, exercises of inherent tribal sovereignty are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Thus, courts have held that neither the Fifth, Fourteenth nor First amendments to the U.S. Constitution apply to a Tribe's exercise of inherent sovereignty. *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (Fifth amendment provision requiring indictment by grand jury); *Mission Indians v. American Management & Amusement, Inc.* 840 F.2d 1394, 1405 (9th Cir. 1987) (takings clause of Fifth Amendment); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) (freedom of religion under the First and Fourteenth Amendments); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 557 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959) (Fourteenth Amendment). Tribal exercises of delegated federal-authority presumably would be. Thus, exercises of inherent authority are likely to be more unrestrained than those of delegated authority, even if they are not themselves constitutionally protected from the political process.

Finally, at a more practical level, it is likely to be easier to prevent Congress from harming one's interests (the action Tribes with inherent authority would seek to avoid) than it is to get Congress to act in one's favor at the expense of others (the action Tribes wanting delegated authority would have to seek). See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* 55 (2d ed. 1995) (suggesting that elected representatives will try to avoid voting against the interest of any group because "a

has taken a variety of forms, including (1) delegation of governmental authority to an already existing indigenous entity, (2) delegation of authority to a state-created unit of government for indigenous people, (3) creation of an autonomous subunit of government in an area in which indigenous people constitute a majority of the voters who control the subunit, and (4) delegation of ability to determine the laws and customs to be applied by national courts in actions involving indigenous people. Each of these actions formally grants the indigenous people some authority to establish or enforce norms of conduct for themselves and, in some instances, others.

1. Delegation to an Existing Indigenous Entity

A governmental delegation of power to an already existing indigenous entity may carry with it an implicit recognition that the indigenous entity has at least some pre-existing sovereignty.⁷⁶ Thus, it is not surprising that the only clear delegation of authority to an existing indigenous entity is found in the United States, where the inherent sovereignty of Indian tribal governments has been expressly recognized. The U.S. Indian tribes have been given federal authority to regulate and prohibit the sale of alcohol in Indian country.⁷⁷ In addition, U.S. Indian tribes are authorized to exercise governmental authority, including the power to set water effluent⁷⁸ and air quality standards,⁷⁹ under a number of federal environmental statutes.⁸⁰ In many of these statutes, Tribes are treated similarly, if

vote in favor of an interest group's preferences is weighted less than a vote against those same preferences"). Thus, inherent rights are likely to be more extensive than delegated rights even when the former are not constitutionally protected or limited.

76. In *United States v. Mazurie*, the U.S. Supreme Court upheld congressional delegation to tribal governments of authority to regulate liquor sales by non-Indians. See *United States v. Mazurie*, 419 U.S. 544 (1975). The Court rejected the Court of Appeals' conclusion that the delegation was an unconstitutional delegation of lawmaking authority to a non-government entity, noting that "Indian tribes . . . are a good deal more than 'private voluntary organizations'" and that they are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Id.* at 557.

77. 18 U.S.C. § 1154 (1988) prohibits the introduction of alcoholic beverages into Indian country. However, under 18 U.S.C. § 1161, the proscription does not apply to any act in conformity with the laws of the state, "and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country." 18 U.S.C. § 1161 (1988).

78. Under the Clean Water Act, the EPA is authorized to delegate implementation of the discharge permit system to an Indian tribe. 33 U.S.C. §§ 1342(a)-(b), 1377(e) (1988).

79. Under the Clean Air Act, tribes can redesignate or change air quality standards on an Indian reservation. The tribe can also object to a new emission source outside the reservation that contributes to air pollution on the reservation greater than that permitted by the tribe. 42 U.S.C. § 7474 (1988).

80. Tribes are given implementation and standard setting authority under the Safe Drink-

not identically, to states.⁸¹

These delegations of authority arguably extend the scope of tribal autonomy beyond the limits of the inherent right of sovereignty.⁸² They also confirm the principle that tribal entities are capable of governing themselves and others in their territories.

A similar kind of delegation is found in the Indian Act of Canada, which grants to Band Councils, including those "chosen according to the custom of the band, or where there is no council, the chief of the band chosen according to the custom of the band,"⁸³ authority to enact regulations governing certain matters on the Band's reserve. While these customary Band Councils are not necessarily the same entities that traditionally governed the people under their authority, and while the Minister is authorized to replace them at any time with an elected council,⁸⁴ they are still indigenous entities that were not created entirely by statute.

The Indian Act of Canada lists nearly twenty specific matters on which the Band Council can adopt by-laws,⁸⁵ largely confined to matters with which "a rural municipality might normally be concerned."⁸⁶

ing Water Act, 42 U.S.C. § 300h-1(e) (1988); the Comprehensive Environmental Response, Compensation and Liability Act (the Superfund Act), 42 U.S.C. § 9604(d)(1) (amended 1986); the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(u) (1988) and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(k) (1988). See Johnson, *supra* note 43, at 704-6.

81. See, e.g., 33 U.S.C. 1377(e) ("The [EPA] is authorized to treat an Indian tribe as a State" for purposes of several chapters of the Clean Water Act); 30 U.S.C. § 1235(k) (1988) (holding that tribes are to be treated as states under most provisions of the Surface Mining Control and Reclamation Act).

82. For example, in *Rice v. Rehner*, the Supreme Court indicated that the "tribes have long ago been divested of any inherent self-government over liquor regulation." See *Rice v. Rehner*, 463 U.S. 713, 726 (1983). Yet in *United States v. Mazurie*, the Court upheld the Tribe's authority to regulate on-reservation liquor sales by non-Indians because Congress had expressly delegated that authority to the tribes under 18 U.S.C. § 1161 (1970). See *United States v. Mazurie*, 419 U.S. 544 (1975).

83. Indian Act c. I-5, § 2(c) (R.S.C. 1985). The Act also authorizes Band Councils elected under procedures set forth in the Act. See *supra* note 46. According to one source, approximately 35% of the Band Councils are selected by customary means; the remaining 65% are selected under elections authorized by the Act. Johnson, *supra* note 43, at 709 (citing J. Woodward, *Native Law* 164 (1990)).

84. Section 73 of the Indian Act provides that the Governor in Council may declare that the Band Council "shall be selected by elections to be held in accordance with this Act" whenever "he deems it advisable for the good government of the band." Indian Act c. I-5, § 73. See also Macklem, *supra* note 24, at 1321 n.55 ("The Minister is authorized to replace a band council selected by custom with an elected council.")

85. Indian Act c. I-5, § 81.

86. Bartlett, *supra* note 44, at 599. See also, Macklem, *supra* note 24, at 1321; Johnson, *supra* note 43, at 710.

Moreover, the by-laws must be consistent with the Act and any regulation made by the Minister.⁸⁷ Thus, the delegation of sovereignty is far from complete. Still, this portion of the Indian Act can be viewed as a delegation to an already existing customary form of indigenous government of some authority to set and enforce norms within the community.

The recent Canadian practice of entering into agreements with specific First Nations can also be characterized as delegation of authority to existing indigenous governmental structures. The James Bay agreement, for example, grants rights of self-government that far exceed those contained in the Indian Act to the Cree, Inuit, and Naskapi peoples of northern Quebec in exchange for extinguishment of any aboriginal title claims.⁸⁸ As noted above, such agreements may also result in some kind of recognition of aboriginal or inherent sovereignty.

2. Delegation of Authority to a State-Created Unit of Government for Indigenous Peoples

Canada, New Zealand, and Chile, have all delegated some governmental authority to state-created units of indigenous peoples. What distinguishes these grants from those described in section 1, is that the indigenous entity must take the form designated by the government before it is eligible to exercise the delegated power.⁸⁹

The extent of authority delegated to the entity and the extent to which the government dictates the exact form the entity must take in order to receive that authority vary from country to country. For example, New Zealand's 1990 Runanga Iwi Act⁹⁰ authorizes iwi, or traditional units of Maori government,⁹¹ to incorporate a runanga, or council,⁹² which

87. Indian Act c. I-5, § 81.

88. Macklem, *supra* note 24, at 1322.

89. The difference between categories one (already existing unit) and two (state-created unit) is not as great as at first might appear because U.S. law with respect to Indian tribes applies only to tribes officially recognized by the United States. More than 200 tribes in the United States are not currently recognized, including 70 whose relationship with the federal government was terminated in the 1950s. Getches et al., *supra* note 53, at 394. Thus, even in the United States, tribes must meet some criteria before being eligible to receive a delegation of authority. What distinguishes the U.S. delegation laws from those of other countries (those in section 2) is that the U.S. tribes do not need to assume a specific form of government mandated by the United States in order to qualify for federal recognition (and hence delegation of federal authority).

90. Runanga Iwi Act 125, (1990) (N.Z.).

91. Prior to contact with the Europeans, traditional Maori life was generally organized by three principal social units, the whanau (extended family), the hapu (the sub-tribe), and the iwi (tribe). See Janet M. Davidson, *The Polynesian Foundation*, in *The Oxford History of New Zealand* 3, 11 (2d ed. 1992).

92. Runanga Iwi Act 125 § 2.

is then authorized to enter into contracts with the Crown or other agencies "relating to the provision of services, or the disbursement of funds, to members of the iwi"⁹³ and to act as the "authorized voice of the iwi" for "any enactment that requires consultation with any iwi."⁹⁴ By recognizing the traditional iwi as "an enduring, traditional, and significant form of social, political and economic organization for Maori," and by electing not to require any specific form of election or decision-making process for the runanga,⁹⁵ the law comes close to using existing indigenous entities. On the other hand, the powers of the runanga are extremely limited. They are not given any specific governmental authority. They are to act as contractors or consultants to government entities.

By contrast, the majority of Band Councils recognized under the Indian Act of Canada must be organized and selected in the manner prescribed by the statute.⁹⁶ They are more clearly a state-created unit than are the runanga iwi. On the other hand, the power they receive from the Indian Act, while still limited,⁹⁷ extends to a much wider variety of matters than being a contractor or consultant on individual projects.⁹⁸

The 1993 Chilean Indian Law,⁹⁹ like the New Zealand Runanga Iwi Act, allows great flexibility in the structure of the indigenous unit to which responsibilities are delegated. While the indigenous "Community" is required to follow a certain procedure in order to be recognized as a legal entity,¹⁰⁰ there is no prescribed form of leadership or governance. These indigenous Communities are apparently free to organize themselves according to their customs, traditions, and desires. However, the authority delegated to these Communities is almost as limited as that given to the Runanga Iwi. Indigenous communities are authorized to receive title to indigenous lands¹⁰¹ - which under the law are exempt from

93. *See id.* § 27.

94. *See id.* § 26.

95. The Act provides that the Runanga charter must include "[t]he principles by which the runanga will be guided in the conduct of its affairs . . . the manner in which the runanga is to be accountable to iwi . . . [and] the basis on which members of the runanga are to be elected or appointed," but it does not provide a prescribed form for any of these matters. Runanga Iwi Act 125 § 9.

96. *See supra* notes 46, 84-85.

97. *See supra* text accompanying note 88.

98. *See supra* text related to notes 86-87.

99. Ley Indígena, (1993).

100. The Community must be organized at a meeting at which at least one-third of the eligible members are present. A Notary Public, Civil Register Officer, or Municipal Secretary must be present as well. Minutes of the meeting must be taken, and the incorporation agreement must be filed with the National Association for Indigenous Development. *See* Ley Indígena art. 10.

101. Ley Indígena art. 12.

taxation¹⁰² and subject to a different set of transfer rules than other lands.¹⁰³ But, the only matter over which they are given any real authority is the succession of such lands, which under the law is to be determined in the first instance by ethnic or tribal custom and usage.¹⁰⁴ This allows the indigenous Community some "law making" ability with respect to this narrow issue,¹⁰⁵ but no other governing authority is expressly granted to it.¹⁰⁶

3. Creation of an Autonomous Subunit of Government in an Area in Which Indigenous People Constitute a Majority of the Voters Who Control the Subunit

In the past ten years, two countries - Canada and Nicaragua - have adopted legislation that authorizes a new form of delegation of sovereignty to indigenous people, the creation of subunits of government in geographic areas where indigenous people constitute a clear majority. Unlike the laws discussed in section 1, these laws do not rely on existing units of indigenous government. They also differ from the laws discussed in section 2 in that participation in the government is not limited to members of the indigenous community. Moreover, the laws of the two countries themselves vary with respect to important details.

The Nicaraguan law, the *Autonomy Statute of the Atlantic Coast*

102. *See id.*

103. With limited exception, the lands may not be conveyed, seized, encumbered or acquired by prescription, except by indigenous Communities, or people of the same ethnic group or tribe. *See id.* art. 13.

104. *See id.* art. 18. The official translation of the law provides that succession "shall be subject to the usages and customs of each ethnos in respect of estate matters, and alternatively, to the ordinary law." *Id.*

105. Apparently, the indigenous custom will be enforced only to the extent it is not in conflict with the ethics, moral sensitivities and public order of Chilean society. *See id.* art. 7 ("The State recognizes the right of indigenes to keep and develop their own cultural expressions, as far as those do not conflict with the ethics, moral conventions, and public order.").

106. In 1989, Australia enacted legislation creating the Aboriginal and Torres Strait Islanders Commission. *Aboriginal and Torres Strait Islander Commission Act, No. 150 (1989) (Austl.)*. The Commission is composed of seventeen representatives elected by indigenous persons from different areas of the country and two members appointed by the Minister. *See id.* §§ 27, 101. It acts to aid the government in formulating and implementing government programs for the indigenous people of Australia. *See id.* § 7. While the Australian government has cited the Commission as an example of self-determination, aboriginal organizations tend to dispute that claim. Garth Nettheim, *The Consent of the Native: Mabo and Indigenous Political Rights*, 15 *Sydney L. Rev.* 223, 234 (1993). Because the Commission has no formal governing power and because it is a pan-indigenous group that does not serve or represent any particular community or area, it is far from clear that it can really be cited as an example of delegation of sovereign authority to an indigenous group.

Regions,¹⁰⁷ was adopted by the Sandinista government in the late 1980s as a means of settling the uprising of the Miskito Indians. The Miskito resisted, violently at times, Sandinista efforts to consolidate them into the national economy and culture.¹⁰⁸ The law creates two autonomous regions on the Atlantic coast of Nicaragua, one of which is dominated by the Miskito Indians.¹⁰⁹ The statute implements several provisions of the 1986 Constitution,¹¹⁰ including provisions recognizing that the "Communities of the Atlantic Coast have the right to . . . be granted their own forms of social organization, and to administer their own local affairs according to their traditions,"¹¹¹ obligating the state to "implement a law which establishes autonomous governments in the regions inhabited by the communities of the Atlantic Coast to guarantee the exercise of their rights."¹¹² The Act creates several levels of government, including a Regional

107. Autonomy Statute for the Regions of the Atlantic Coast of Nicaragua, Law No. 28, (Sept. 7 1987), reprinted in Hurst Hannum, Documents on Autonomy and Minority Rights 386-395 (1993).

108. As one author explained:

Prior to 1979, most of the indigenous . . . peoples [in the northern part of Nicaragua's Atlantic coast] had exercised de facto control over the lands they used for subsistence. After the Sandinista revolution, the government sought to exert much more direct control over the indigenous coastal populations. This was resisted by the Miskitos, in particular, and various factors led to open hostilities between many indigenous groups and the Sandinista government in the early 1980s. . . .

Although the indigenous peoples were themselves divided between those who supported the *contras* and those who viewed their struggle as largely independent of the left-right battle for control of Managua, demands for autonomy and self-determination were fundamental to both groups.

Hannum, *supra* note 108, at 381; see also Theodore MacDonald, *The Moral Economy of the Miskito Indians: Local Roots of a Geopolitical Conflict*, in *Ethnicities and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia, and the Pacific* 107, 122-144 (1988) (discussing the events leading up to the conflict and its settlement).

109. See Hannum, *supra* note 108, at 381.

110. The Preamble to the Autonomy Statute cites articles 8, 11, 49, 89, 90, 91, 121, 180 and 181 of the Constitution. Autonomy Statute of the Atlantic Coast Region, art. VIII; Hannum, *supra* note 108, at 387.

111. NICAR. CONST. art. 89 (reprinted in Hannum, *supra* note 108, at 383).

112. *Id.* The 1986 Constitution also provides that "the state recognizes the communal form of land ownership of the Communities of the Atlantic Coast," and the Communities have the "right to free expression and preservation of their languages, art and culture," they have "access in their region to education in their native language" and they have "the right to live and develop under the forms of social organization that correspond to their historic and cultural traditions," including guarantees of "the benefits of their natural resources, the legitimacy of their forms of communal property and the free election of their authorities and representatives, and the preservation of their cultures and languages, religion and customs." See Hannum, *supra* note 108, at 383-85.

Council and other administrative entities such as municipalities.¹¹³ All Nicaraguan citizens who reside in the region for the requisite time are eligible to vote for members of the Regional Council.¹¹⁴ But, because of the demographics of the region, "the vast majority of these new positions [are] filled by Miskito Indians."¹¹⁵

The municipalities in the Region possess authority given to other municipalities under Nicaraguan law, as well as authority granted them by the Regional Council.¹¹⁶ The Regional Council is given authority to participate in the creation and administration of various economic, cultural, health, and educational programs of the national government and to impose regional taxes, within limits.¹¹⁷ However, all resolutions adopted by the Regional Council must be in harmony with the constitution and other laws of the country,¹¹⁸ and the Act makes clear that the communities of the area are an indissoluble part of the unitary and indivisible state of Nicaragua.¹¹⁹ Moreover, as of 1992, the North Atlantic Regional Council had yet to approve any resolutions involving the region.¹²⁰ Thus, as one scholar has noted, these areas may more accurately be called "participatory administrative regions ... rather than truly autonomous institutions."¹²¹ Still, in a country committed to the notion of a unitary indivisible state, the statute can be viewed as a substantial first step toward granting a measure of sovereignty to indigenous people.¹²²

113. See Autonomy Statute art. 15.

114. See *id.* art. 22. Citizens born in the region, or whose parents were born there, must reside in the region for three months before they are eligible to vote. All other citizens must reside in the region for one year. See *id.*

115. Lynda Frost, *Human Rights Education Programs for Indigenous Peoples: Teaching Whose Human Rights?*, 7 St. Thom. L. Rev. 699, 716 (1995).

116. See Autonomy Statute art. 17.

117. See *id.* arts. 8, 23.

118. See *id.* art. 24.

119. See *id.* art. 2.

120. See Frost, *supra* note 116, at 716.

121. Hannum, *supra* note 108, at 382.

122. In one respect, the Act is not so much a break from the tradition of a unitary Nicaraguan state as a recognition of the *de facto* autonomy exercised by the Miskito in the area since the 1600s. "[T]he Atlantic Coast of Nicaragua has been historically separate from the western portion of the state." Frost, *supra* note 116, at 714. It is separated from the Pacific side by "significant geographic barriers and has long been relatively isolated." Hannum, *supra* note 108, at 381. "As a result of these conditions, the Atlantic Coast had a large degree of *de facto* autonomy for centuries." Frost, *supra* note 116, at 715. Moreover, the inhabitants of the region had extensive contact and were heavily influenced by the English during the first centuries after European contact. MacDonald, *supra* note 109, at 115-16. Indeed, the English established formal relations with a Miskito King in 1687 and maintained that relationship until the late 19th century. See Michael D. Olien, *The Miskito Kings and the Line of Succession*, 39 J. Anthropological Res. 198, 200 (1983). The provisions of the 1860 Treaty

The Canadian statute creating the Nunavut¹²³ Territory from the Northwest Territories, like the Autonomy Statute of Nicaragua, creates a governmental unit in which a majority of the voters are indigenous people. Like the Autonomy Statute, the Nunavut Act is part of a settlement of a larger ongoing dispute between indigenous people and the national government.¹²⁴ However, the Canadian statute grants the new unit, the Nunavut Territory, considerable more sovereignty than that given to the North Atlantic Regional Council in Nicaragua.

The Nunavut Territory will come into existence as a government in 1999, following an implementation plan outlined in the Nunavut Act.¹²⁵ The Territorial government will take the same form as that currently in use in the Northwest Territories, with a publicly elected legislature in control.¹²⁶ Although all residents in the Territory are eligible to vote, the Inuit are likely to control the legislature since they constitute eighty percent of the population in the Territory.¹²⁷ Subject to superceding acts of Parliament, the Nunavut Territorial legislature will have authority to make laws relating to a variety of subjects, including the administration of justice, property and civil rights, education, marriage, taxation, and the

of Managua between Britain and Nicaragua provided that the Miskito would be considered an autonomous political entity within the borders of Nicaragua and that they would "enjoy the right of governing, according to their own customs . . . not inconsistent with the sovereign rights of the Republic of Nicaragua." *Id.* at 230. The "reincorporation" of the east coast into Nicaragua in 1894 ended the formal political autonomy of the Miskito, but prior to the Sandinista revolution in 1979, the Miskitos continued to exercise "de facto control over the lands they used for subsistence." *Id.* at 198; Hannum, *supra* note 108, at 381.

123. In Inuktitu, the language of the Inuit indigenous people of the area, Nunavut means "our land" or "the people's land." See Nigel Bankes, *Nunavut*, 5 Nat'l Res. L. Inst. News 2, 16 (1994).

124. Negotiations leading up to the Nunavut Land Claim Agreement lasted sixteen years, from 1976-1992. See Alexandra Kersey, Comment, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, 11 Ariz. J. Int'l & Comp. L. 429, 435-41 (1994). An agreement in principle, addressing such issues as "land title, economic development, wildlife management and conservation, land, resource and environmental management, social and cultural provisions, and political development," was signed on April 30, 1990. *Id.* at 439, 440 (quoting Thomas Issac, *The Nunavut Agreement-in-Principle and Section 35 of the Constitution Act, 1982*, 21 Manitoba L. J. 309, 392 (1991)). Pursuant to that agreement in principle, Canadian Prime Minister Brian Mulroney and Inuit tribal leaders signed the Nunavut Land Claim Agreement on May 25, 1993. See Kersey, *supra*, at 429. That agreement in turn required the negotiation of a political accord between the federal government and the Northwest Territories to establish the new territory of Nunavut. See *id.* at 441. This Accord was formally signed in 1993. The agreement and the accord received royal assent from Parliament on June 10, 1993. See *id.*; Nunavut Act, 40-41-42 Eliz. II, ch. 28, 29 (1993).

125. See Kersey, *supra* note 125, at 454-55. See generally Nunavut Act pt. III.

126. See Kersey, *supra* note 125, at 455. See Nunavut Act pt. I.

127. See Kersey, *supra* note 125, at 455; Bankes, *supra* note 124, at 18.

preservation of game.¹²⁸ However, the Chief Executive of the Territory will be a Commissioner appointed by, and answerable to, the Governor in Council.¹²⁹

The creation of non-native governmental units in which a majority of the voters are indigenous people will undoubtedly raise some new and interesting challenges to those involved in the process, especially those interested in using the new governmental units to preserve and develop indigenous cultures and traditions. First, there is some doubt that such Western-European structures can be used effectively to preserve and develop indigenous cultures, one of the principle purposes of granting self-determination to indigenous people.¹³⁰ Furthermore, the fact that the indigenous majority in the governing subunit is a small minority in the larger nation-state which retains direct control over the subunit¹³¹ makes some skeptical about the amount of autonomy that will actually be allowed.¹³²

This particular type of delegation may also be of limited utility as a model for other countries. In both Nicaragua and Canada, it is being implemented in areas historically isolated from the rest of the nation, both geographically and culturally.¹³³ Although there may be other areas in which similar conditions exist,¹³⁴ it may well be that, as one reporter ob-

128. See Nunavut Act pt. I, § 23.

129. See *id.* pt. I, §§ 5, 6.

130. Some commentators have criticized indigenous peoples' use of "European-western-type philosophies and structures of authority and decision making," arguing that such use does violence to traditional indigenous values such as "the reaching of decision by consensus, institutionalized sharing, respect for personal autonomy, and a preference for impersonal controls and behavior." Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians*, in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* 333, 334 (1985), *quoted in* Macklem, *supra* note 24, at 1349.

131. The approximately 80,000 Miskitos in Nicaragua represent less than 3% of the more than 4 million Nicaraguan population. Hannum, *supra* note 108, at 381; *The World Almanac Book of Facts* 804 (1997). The nearly 50,000 Inuit in Canada represent less than .18% of the more than 29 million Canadians. See *The 1997 Canadian Global Almanac* 54 (1997).

132. "One commentator has suggested that, 'the fact that Nunavut would be ultimately subject to federal jurisdiction seriously curtails Aboriginal aspirations for self-government.'" Issac, *supra* note 125, at 399, *quoted in* Kersey, *supra* note 125, at 456.

133. "Due to their location in the climactically and geographically inhospitable North, the Inuit remained completely isolated from Southern Canada until the late 1890s Until the 1920s, the Inuit had little contact with people other than fur traders, missionaries, whalers and the Royal Northwest Mounted Police" Kersey *supra* note 125, at 432. As a result the Inuit were not subject to the vast majority of Canadian policies regarding other First Nations. See *id.* at 432-34. The Miskito Indians in Nicaragua were similarly isolated from the rest of the country. See *supra* text accompanying note 123.

134. For example, the majority of Brazil's indigenous population live in the largely un-

served with respect to the Nunavut Act, the area is "too big, too remote, too wildly extraordinary to be imitated."¹³⁵ Still, developments in the Nunavut Territory and the North Atlantic Autonomous Region will likely teach us much about the way in which law in the "New World" will develop with respect to rights of indigenous sovereignty.

4. Delegation of Ability to Determine the Laws and Customs to be Applied by the National Courts in Actions Involving Indigenous Persons.

One final form of delegation that can be found in the countries under review, perhaps the oldest, is delegation of the ability to determine some of the norms applied by the national courts in actions involving indigenous persons. In 1542, Charles I decreed that "[l]awsuits among the Indians are to be decided . . . according to their usage and custom."¹³⁶ This "choice of law" provision did not necessarily authorize indigenous people to enforce their own norms, but it did give them some ability to decide what norms would be enforced by others.

The 1993 Ley Indígena adopted in Chile contains such a grant of lawmaking (but not enforcing) authority. Article 54 of that law provides that at the request of one of the parties to a lawsuit involving members of the same indigenous ethnos or tribe, the custom enforced among the indigenous tribe shall be the applicable law.¹³⁷ This provision gives the indigenous people of Chile some control over the conduct of members of their indigenous groups by extending state enforcement powers to norms adopted by the group.

A similar, though more limited, grant of law-making authority seems to have been delegated to the indigenous people of Australia by the Australian High Court's decision in *Mabo v. Queensland*.¹³⁸ In *Mabo*, six of the seven members of the Court agreed that "the common law of this country recognizes a form of native title which, in the cases where it has

populated and isolated Amazon region. See Marc Pallemmaerts, *Development, Conservation, and Indigenous Rights in Brazil*, 8 Hum. Rights Q. 374 (1986).

135. *Welcome Nunavut*, Toronto Star, May 30, 1993, at B2, quoted in Kersey, *supra* note 125, at 465.

136. Cohen, *supra* note 30, at 52 n.15 (quoting DARCY MCNICKLE, *They Came Here First* 125-26 (1975)). Similar decrees were issued in 1530, 1542, 1555, 1556 and in the *Recopilación de Leyes de Indias* of 1680. See James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. Int'l & Comp. L. Rev. 55, 62 (1997).

137. See Ley Indígena art. 54. The use of indigenous customary law authorized by article 54 is clearly subject to the limitation that the custom not be "inconsistent with" the Chilean Constitution. See *id.* It may also be subject to the article's seven limitations on the right of indigenous people to develop their own cultural expressions, as long as they do not conflict with "ethics, moral conventions, and public order." See CHILE CONST. art. 7.

138. *Mabo v. Queensland* [1992] 107 A.L.R. 1 (Austl.).

not been extinguished, reflects the entitlement of the indigenous inhabitants, *in accordance with their laws or customs*, to their traditional lands."¹³⁹ While this native title is subject to extinguishment and modification by the Crown, Justice Brennan's leading opinion¹⁴⁰ explained the following in reference to such action taken by the crown:

[t]he incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld.¹⁴¹

Thus, as one commentator noted, "[t]he High Court's decision in the *Mabo* case amounts to an implied legal recognition of Aboriginal customary law."¹⁴² The aborigines clearly have the authority to determine the incidents of native title in their communities, and Australian courts are committed to enforcing those norms, at least against others than the Crown, "by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence."¹⁴³ This is a limited - but very real - delegation¹⁴⁴ of law-making authority.¹⁴⁵

139. *Id.* at 7 (emphasis added). The preamble to the Native Title Act of 1993, recognized that the High Court had "held that the common law of Australia recognizes a form of native title that reflects the entitlement of indigenous inhabitants of Australia, *in accordance with their laws and customs*, to their traditional lands." Native Title Act, No. 110 (1993) (Austl.) (preamble at 2130). The Act then made clear that "[s]ubject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth." *Id.* § 12.

140. Justice Brennan authored an opinion with which Chief Justice Mason and Justice McHugh agreed. See *Mabo* [1992] 107 A.L.R. at 7. Those three differed from the other three justices in the majority principally on the issue of whether "extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages." *Id.*

141. *Id.* at 44.

142. H.A. Amankwah, *Post-Mabo: The Prospect of the Recognition of a Regime of Customary (Indigenous) Law in Australia*, 18 U. Queensland L. J. 15, 32 (1994). See also Di Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 Syracuse J. Int'l L. Com. 65, 71 (1995) ("Aboriginal law and custom is now recognized as a formal source of law in Australia.").

143. *Mabo* [1992] 107 A.L.R. at 44 (Brennan, J.).

144. Since the native title is based on aboriginal rights, it might be argued that this law-making power is an inherent attribute of aboriginal sovereignty. However, in cases before and after *Mabo*, the High Court has consistently rejected the existence of any form of inherent sovereignty.

Such a delegation of law-making authority is not without its limitations and difficulties. First, there is the question of how a non-indigenous judge is to know what tribal customs are. The Chilean statute addresses this by providing that custom can be evidenced by "all means available at law, and especially by an expert report that shall be made by the Association [for Indigenous Development] at the request of the Court."¹⁴⁶ However, there is often considerable disagreement among members of the same indigenous group as to what tribal custom is,¹⁴⁷ and the Association on whose expertise the court will often rely in Chile is a government entity headed by persons who are not necessarily indigenous.¹⁴⁸ Moreover, it may be especially difficult for the civil law trained Chilean judges, who are accustomed to finding all answers in the applicable code, to suddenly begin applying oral or newly written standards developed on a more case-by-case basis by various indigenous groups. The earlier Spanish experience suggests that the tendency for a judge faced with these difficulties may be to conclude that the indigenous custom is re-

Mabo is . . . at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth, the State of New South Wales and the common law

Walker v. State [1994] 126 A.L.R. 321 (Mason, C.J.) (quoting Isabel Coe on behalf of the Wiradjuri Tribe v. Commonwealth of Australia and State of New South Wales [1993] 68 A.L.J.R. 110); see also Coe v. Commonwealth [1979] 53 A.L.J.R. 403 ("The Aboriginal people . . . have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or the state or territory, might confer upon them.").

145. A similar form of indigenous law-making authority has been recognized in some Canadian case law, although there are cases to the contrary, as well. See John Burrows, *With or Without You: First Nations Law (in Canada)*, 41 McGill L. J. 629, 635-36 (1996). Burrows discusses the challenges Canadian judges face in discovering and interpreting customary law. See *id.* at 646-64.

146. *Ley Indígena* art. 54.

147. In 1994, the author worked with one group of indigenous people who were making an effort to "codify" Mapuche custom for use in judicial proceedings under article 54. Among other difficulties encountered were the lack of consensus as to what Mapuche custom was (it seemed to vary from village to village), and the concern that translating the custom from Mapudugún (the native language of the Mapuche) into Spanish and from an oral, flexible form to a written form would change the custom in unacceptable ways.

148. The Association is governed by a National Council composed of seventeen members, eight of whom must be representatives of the various indigenous groups in Chile. The other nine are various government officials, who serve at the pleasure of the President. See *Ley Indígena* art. 41.

markably similar to the existing codified law on the subject.¹⁴⁹ Once again, the results of these “experiments” may be revealing as to the course the law with respect to indigenous peoples will take in the “New World.”¹⁵⁰

C. No Formal National Action Recognizing or Delegating Sovereignty

The author was unable to find¹⁵¹ any formal national¹⁵² legal docu-

149. “Ultimately, the Spanish were unable to understand traditional Indian law, and used Spanish law in the Juzagdo General de Indios, despite the royal command to guard and execute the laws of Indians. The Spanish municipal-judicial form was thus imposed on Indian communities.” Zion & Yazzie, *supra* note 137, at 64.

150. Article 4 of the Mexican Constitution, added in 1992, seems to authorize a similar form of law-making authority for indigenous peoples.

The Mexican nation has a pluriethnic composition originally based on its indigenous peoples. The law shall protect and promote the development of their languages, cultures, uses, customs, resources and specific forms of social organization, guaranteeing to their individual members an effective access to the jurisdiction of the State. *In agrarian suits and proceeding in which those members are a party, their legal practices and customs shall be taken into account in the terms established by the law.* (emphasis added).

MEX. CONST. art 4, quoted in Jorge A. Vargas, *NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 Cal. West'n Int'l L. J. 1, 44 (1994).

It is unclear from the provision itself whether the indigenous custom is to be applied directly or is only a factor to be taken into account by the judge. More importantly, the provision does not appear to be self-executing because it requires that the customs be taken into account “in the terms established by the law.” At least as of 1995, “the corresponding federal statute needed to implement [article 4] at the domestic legal and judicial levels had not yet been enacted.” Vargas, *supra*, at 63. *See also, id.* at 66-67 (indicating that the article was completed in 1995). Thus, while some law-making authority seems to be contemplated, it may be premature to say that it has actually been authorized. Accordingly, Mexico is placed in category C.

151. Since the author did not have access to all government documents in Mexico and Brazil, it is possible that there exists some formal recognition of delegated or inherent authority on some matters in these countries. However, secondary materials seem to confirm the results of the author's initial survey of the available information. *See, e.g.*, L. Roberto Barroso, *The Saga of Indigenous People in Brazil: Constitution, Law and Politics*, 7 St. Thomas L. Rev. 645, 667 (1975) (Indigenous people of Brazil “have no political autonomy, nor are they treated as state members of the Brazilian federation. The Indian leadership has never claimed . . . any sort of . . . sovereignty.”);

Despite the recent change to the Constitution, the indigenous people of Mexico continue to wait for the enactment of domestic legislation which will detail their rights, both as individuals and as members of a number of ethnic minorities, regarding their own territory, language, culture, religion, justice system, economic base, and form of government.

Vargas, *supra* note 151, at 44; *id.* at 50-51 (“indigenous customary law or ‘Mexican Ethnic Law’ is not officially recognized”).

ment recognizing or delegating sovereign authority to indigenous people in Mexico¹⁵³ or Brazil.¹⁵⁴ This absence of any formal recognition of indigenous sovereignty in the two countries largely results from two vastly different views about indigenous people reflected in the laws of those nations. In Brazil, the lack may well be due to the perceived incapacity of indigenous people to exercise sovereign power. The Brazilian Código Civil reflects the view that indigenous people are relatively incapable of practicing the acts of civil life and that they are in need of tutorship until they become completely integrated into Brazilian society.¹⁵⁵ Any act or

152. It appears that state law in the state of Puebla, Mexico, authorizes local government on some matters in Indian communities. See María Teresa Sierra, *Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla*, 29 L. & Soc. Rev. 227, 235 (1995). A *junta auxiliar* composed of three officials elected by the community is responsible for regulating and coordinating community affairs and resolving local disputes and small offenses. See *id.* Although the state constitution does not recognize the validity of customs in judicial procedures, the state apparently allows the junta officials considerable leeway. See *id.* at 235-36. More in depth consideration of this form of delegated sovereignty was not undertaken because it does not represent national policy - the focus of this paper. See Garth Nettheim, *Australian Aborigines and the Law* in 2 L. & Anth. 371 (1987) (discussing state law delegation of authority to aboriginal groups in Australia), reprinted in CLINTON ET AL., *supra* note 74, at 1235-36 (describing Queensland system of Aboriginal or Islander Councils "with a range of local government powers").

153. As previously mentioned, a 1992 amendment to the Mexican constitution seems to contemplate some delegation of some form of law-making ability (the ability to determine custom to be considered in agrarian suits in which indigenous peoples are involved), but in the absence of implementing legislation, the provision has no practical effect.

154. This does not mean that these countries have not developed laws and policies on other critical issues involving indigenous peoples. Indeed, land issues involving indigenous peoples are one of the most widely discussed legal issues in Brazil. At least four provisions of the 1988 Constitution of Brazil relate to lands occupied by indigenous peoples. BRAZ. CONST. arts. 20(XI), 49(XVI), 176, 231. Article 231 contains seven sections defining and protecting the right of indigenous peoples to occupy "Indian lands." Several other provisions of the Constitution also expressly refer to indigenous people. BRAZ. CONST. arts. 22(XIV), 109 (XI), 129(V), 232. Controversy over the government's efforts to demarcate Indian lands has been extensive over the past few years.

Issues involving indigenous peoples have also dominated political discussions in Mexico ranging from demands forwarded during the uprising in Chiapas, including indigenous claims to self-determination, to concerns about the impact on indigenous people of revisions to the *ejido* land system. See Vargas, *supra* note 151, at 19, 20-22; see also James J. Kelly, Jr., *Article 27 and Mexican Land Reform: The Legacy of Zapata's Dream*, 25 Colum. Hum. Rts. L. Rev. 541 (1994). The sole focus of this paper, however, is on the various countries' policies with respect to indigenous people's right of sovereignty.

155. See Marc Pallemarts, *Development, Conservation, and Indigenous Rights in Brazil*, 8 Hum. Rights Q. 374, 378 (1986); Barroso, *supra* note 152, at 652. Indians are placed into three categories under the Civil Code: 1) those who are "isolated," who "live in unknown groups or groups of which there is little and vague data through scattered contacts with ele-

contract entered into by a "non-integrated" indigenous person without the approval of the governmental tutor - the Fundação Nacional do Índio (FUNAI) - "is held void and of no effect, unless the Indian had the consciousness and knowledge of his attitude and it is not harmful to him in any way."¹⁵⁶ This extremely paternalistic view of indigenous peoples, which is not without its analog in other systems, including the United States,¹⁵⁷ would naturally be an obstacle to the exercise of self-governing powers on a larger scale.

In Mexico, the lack of formal recognition of any form of indigenous sovereignty may well reflect just the opposite view concerning indigenous people. Indigenous people have, from the outset of Mexican independence, been considered citizens of the Mexican nation "equal to all others in the eyes of the law."¹⁵⁸ Given this deep-seated commitment to treat all groups the same, it is not surprising that the 1917 Constitution, the fundamental charter of 20th century Mexico, "did not mention the words 'Indian' or 'indigenous peoples,' or any similar reference to convey the idea that Mexico is composed of a variety of autochthonous ethnic groups."¹⁵⁹ Nor is it surprising that this aversion to any racial or ethnic

ments of national society," (2) those who are "in the process of being integrated," who have established "intermittent or permanent contacts with the civilization," but "keep some of their native life style" while accepting "progressively, some of the habits and life styles of the national society," and (3) those who are "integrated," who "are incorporated to the national society, and granted full civil rights, although they may preserve uses, customs, and traditions of their culture." Estatute Do Índio, C.C. 6.001, Título I, art. 4, *English translation reprinted in Barroso, supra* note 152, at 652 n. 25.

156. Barroso, *supra* note 152, at 652-53, (citing Estatute Do Índio, C.C. 6.001, Título II, art. 8). The 1988 Constitution does authorize indigenous peoples to "sue to defend their rights and interests" on their own, "with the Public Ministry" having a right to intervene "in all stages of the procedure." BRAZ. CONST. art. 232.

157. Under U.S. law, Native Americans holding title to lands allotted to individual Native Americans during the Allotment Era, are precluded from transferring title or leasing the property without approval of the Secretary of the Interior. 25 U.S.C. § 462 (1988); *see generally* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L. J. 1 (1995) (describing the history and effect of the Allotment Era).

158. Guillermo Floris Margandant, *Official Mexican Attitudes Toward the Indians: An Historical Essay*, 54 Tul. L. Rev. 964, 964 (1980). This concept was expressed well in the Plan de Iguala of February 21, 1821, which declared that all Mexican nationals were citizens without further distinctions. *See id.* at 976. *See also* Vargas, *supra* note 151, at 39 ("As a new republic, Mexico, inspired by the political and legal system of the United States, and by ideas of the French encyclopedists, promptly enacted legislation which introduced the unprecedented notion of legal equality to embrace all the new citizens of Mexico, whether they were criollos, mestizos, Africans, or Indians.").

159. Vargas, *supra* note 151, at 42. As noted above, article four of the 1917 Constitution was amended in 1992 to recognize the pluriethnic nature of Mexican society and specific mention is made of its indigenous culture. *See Id.* at 44.

distinction would result in a lack of formal recognition of any sovereignty for indigenous people.

This lack of formal recognition of any form of indigenous sovereignty in Mexico and Brazil does not mean, however, that indigenous peoples in these countries have no ability to establish and enforce their own norms. As several Mexican scholars have noted, "numerous [Mexican] indigenous peoples continue to regulate social relations within their communities in accordance with traditional rules and norms, which form a special type of customary law."¹⁶⁰ Similar observations have been made with respect to the indigenous people of Australia¹⁶¹ and Canada.¹⁶² There is no reason to believe that the same kind of informal sovereignty is not exercised by the indigenous people of Brazil, especially those who are largely isolated from the rest of Brazilian society.

Unless the national governments consciously and effectively suppress these informal exercises of indigenous sovereignty, indigenous sovereignty will likely continue to exist, even if not formally recognized. Thus, even in those countries where no aspect of indigenous sovereignty has been formally acknowledged, it will likely still exist to some extent.

II. PRELIMINARY OBSERVATIONS AND CONCLUSIONS

This brief overview of the general policies of eight countries with respect to the amount of sovereignty indigenous groups are allowed to exercise does not permit final conclusions about the grand "Indian experiments" that have been on-going for the past 500 years. However, a few tentative observations may be in order.

First, if one were to use the information in this article to rank the eight countries with respect to the amount of sovereignty allowed to indigenous peoples, the ranking would likely be in the following order, proceeding from the country where indigenous peoples enjoy the most

160. See *id.* at 50. See also Salomón Nahmad, *Indigenismo Oficial y Luchas Indígenas en México in, Derecho Indígena y Derechos Humanos en América Latina* 299, 309-12 (1988); Sierra, *supra* note 153, *passim*. The latter two sources contain specific examples of how customary law has been applied and shaped in different indigenous communities in Mexico.

161. See, e.g., Otto, *supra* note 143, at 71 ("Despite the lack of Anglo-Australian legal recognition of Aboriginal and Islander systems of law prior to the *Mabo* case, many indigenous people have continued to live according to their law."); Barbara Hocking, *Aboriginal Law Does Now Run in Australia*, 15 Sydney L. Rev. 187, 196 (1993) ("Despite the findings of fact made [by some of the Justices in *Mabo v. Queensland*], there is no doubt that since time immemorial on the Murray Islands, there has actually been a complex system of land ownership regulated by orally transmitted knowledge and observed by Murray Islanders.").

162. Burrows, *supra* note 146, at 636 n.31 ("During the period of Canadian law's disregard of Aboriginal rights . . . First Nations were able to preserve their laws and rights in spite of the Common law.").

sovereignty to that where they enjoy the least.

1) *United States of America*, where Tribes enjoy both inherent and delegated authority (but where that authority is subject to complete defeasance by Congress and common-law limitations increasingly imposed by the courts).

2) *Canada*, where First Nations have delegated authority (including the Nunavut Territory) and where on-going negotiations and recent constitutional changes have opened the door to a form of inherent sovereignty that may receive constitutional protection.

3) *Nicaragua*, where the largest group of indigenous people have delegated authority to operate, within strict limits, local governmental authority in an area in which they constitute a majority of the population.

4) *New Zealand*, where a minimum of delegated authority has been granted to traditional indigenous governments, but where reconsideration of the Treaty of Waitangi has opened the possibility for even greater autonomy and perhaps inherent sovereignty.

5) *Chile*, where there has been a minimum delegation of authority to state-created indigenous communities, and a grant of law-making, but not enforcing, authority over cases involving members of the same indigenous group.

6) *Australia*, where indigenous people are given authority to determine the content of the law with respect to the incidents of native title to lands, where there is some claim to delegated authority from the national government,¹⁶³ and some actual delegation from state governments.¹⁶⁴

7) *Mexico*, where the constitution has been amended to open the way for indigenous people to play a role in determining the norms to be applied in some agrarian law suits¹⁶⁵ and where there are some indications of delegation by state governments.¹⁶⁶

8) *Brazil*, where indigenous peoples have only informal or de facto law-making and enforcing authority, not officially recognized by the government.

If this admittedly subjective ranking is generally accurate, a few more general observations can be made. First, the existence of treaties between indigenous people and the government increases the likelihood that indigenous people will be given greater sovereignty. This largely unsurprising conclusion,¹⁶⁷ is confirmed by the fact that treaties of some kind were entered into with indigenous people in three of the four high-

163. See *supra* text accompanying note 107.

164. See *supra* text accompanying note 153.

165. See *supra* text accompanying note 151.

166. See *supra* text accompanying note 153.

167. As noted above, *supra* text related to note 30, the mere existence of a treaty relationship implies at least some belief that the indigenous people have some sovereign capacity because treaty making is generally viewed as a sovereign act.

est-ranked countries.¹⁶⁸ This conclusion may provide added hope to the Maori in New Zealand and to the Mapuche in Chile, both of whom entered into treaties with the original European invaders.¹⁶⁹ Moreover, this observation suggests that those who are in the process of redefining indigenous rights may wish to use the treaty mechanism if the desire is to increase indigenous sovereignty on a more permanent basis.¹⁷⁰

Second, and again unsurprisingly, there appears to be a relationship between a stable land base on which indigenous people can reside and the amount of sovereignty they are allowed to exercise. Just as the feudal doctrine of *dominium* came to incorporate both land ownership and governing authority,¹⁷¹ recognition of indigenous sovereignty seems to follow in the wake of recognition of indigenous land rights. The two highest ranked countries are ones in which there are formal reservations or reserves on which indigenous peoples can reside. The recent Nunavut Act in Canada and the Autonomy Statute in Nicaragua were both accompanied by legislative recognition of the land rights of the indigenous people involved. If there is a relationship between land control and sovereignty,¹⁷² the indigenous peoples of Australia, where native title has now been recognized for the first time, and Brazil, where indigenous rights to land are now constitutionalized, may have reason for some long-term optimism with respect to sovereignty. However, those in Mexico, where the *ejidal* form of communal property that has provided a land base for some indigenous groups is becoming more individualized, may have cause for concern.

Third, although there does not appear to be any direct correlation,¹⁷³

168. These countries are: United States, Canada, and New Zealand. Moreover, the Miskito in Nicaragua had entered into formal relations with Great Britain prior to its incorporation into Nicaragua. See *supra* note 123.

169. In a rare departure from their normal practice, the Spanish in 1641 entered into a treaty with the Mapuche at Quillin in which the Spanish recognized the Mapuches as an independent nation and established the River Bío-Bío as a permanent frontier between the two peoples. See Eugene H. Korth, *Spanish Policy in Colonial Chile 175-77* (1968). Although the Treaty has not been formally recognized by the Chilean government as a basis for any indigenous rights, the recent resurrection of the once-moribund Treaty of Waitangi demonstrates that Treaty rights can be revived in a meaningful way.

170. This is clearly the mode currently being used by the Canadian government. See *supra* text related to notes 53-54. Some unsuccessful efforts to negotiate treaties have also recently been made in Australia. See Nettheim, *supra* note 107, at 236.

171. See generally, Joan C. Williams, *The Invention of the Municipal Corporation*, 34 *Am. U.L. Rev.* 369, 373-76 (1985).

172. The existence of a stable land base may not be absolutely essential to the exercise of autonomous law-making and enforcing powers, as evidenced by the use of these powers by the "gypsy" communities of the U.S. See Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the Gypsies*, 103 *Yale L. J.* 323 (1993).

173. The policies of Chile (a civil law country) and Australia (a common law country)

it does appear that indigenous sovereignty tends to be higher in common-law countries than in civil-law countries. Whether this reflects more the differences in early British policy (which favored treaties)¹⁷⁴ and early Spanish policy (which did not) or other factors unrelated to the nature of the legal system is well beyond the scope of this paper. However, it may well be that the increased flexibility of the case-by-case method of law-making that is the hallmark of the common-law system provides more leeway for the recognition of diverse forms of law-making and enforcement.

Finally, since this article is but a first step in a much larger project of evaluating the indigenous policies of the various countries of the "New World," one must ask whether it is worth the effort to go through this seemingly complex process to determine how one narrow area of the law has developed? Are there not more important issues to address? After all, indigenous people make up less than .2% of the population of Brazil,¹⁷⁵ less than 1% of that of the United States,¹⁷⁶ and only a little over 1% in Canada.¹⁷⁷ Should we spend the enormous amount of time needed to consider the issue thoroughly?

My answer is an unequivocal yes, because much more is at stake than the future of a small segment of the population - although that by itself would justify the time and effort involved. At its foundation, the question is not solely whether our legal systems have developed the right answers for Indian law. The real question is whether we have developed legal systems that are capable of governing societies that are increasingly diverse ethnically, religiously, and economically. Can the legal systems in the "New World" be shaped to give diverse groups the freedom they need to satisfy their members' deep-seated desire to determine their own fundamental values while still maintaining allegiance to the nation itself? An examination of the development of Indian policy in the "New World" can provide insights into these critical questions - because in most countries, indigenous people are the most visible and the most diverse of the

appear to be quite similar. In like manner those of Nicaragua and New Zealand seem to be fairly evenly matched.

174. It seems more than coincidental that development of policy in the highest ranked civil law country - Nicaragua - was heavily influenced until the late 19th century by the British influence in the Atlantic Coast area of the country. *See supra* note 123.

175. According to one estimate, the indigenous people of Brazil constituted only .17% of the approximately 133 million population of Brazil in 1988. *See* María Teresa Sierra, *La Lucha Por Los Derechos Indígenas en el Brazil Actual* 18 (1993).

176. The nearly two million Native Americans represented .8% of the total U.S. population in the 1990 census. *See* Getches et. al., *supra* note 53, at 13.

177. The indigenous population of Canada is, according to one source, 1.5% of the approximately 29 million Canadian population. *The World Almanac Book of Facts 1995*, 752 (1995).

normatively divergent groups in society. Moreover, they are often the least powerful group politically and, therefore, the most dependant on the protection of the law itself.

Thus, the last 500 years of "Indian experiments" has more to tell us about the legal systems in which we operate than they do about the nature of the indigenous people who resided here before those systems arrived. The oft-repeated words of Felix Cohen apply here perhaps more than in any other context: "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."¹⁷⁸

178. Cohen, *supra* note 30, at v.