

Negotiating the Constitutional Conundrum:

Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies

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I	INTRODUCTION	52
	Background	53
II	PROMOTION OF GENDER EQUALITY	56
	Constitutional Provisions	56
	International Law	57
III	THE STATUS OF PACIFIC WOMEN IN PRACTICE	60
	Women in Customary Society	60
	Women in the Introduced System	63
IV	MAIN AREAS OF CONFLICT	64
	Freedom from Discrimination	64
	In Re Miriam Willingal	64
	<i>Haren Hala Village Court Case</i>	70
	Tanavulu and Tanavulu v. Tanavulu and SINPF	72
	Freedom of Movement	75
	Public Prosecutor v. Walter Kota	75
	In re the Infant P	77

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V THE FUTURE

78

One of the most significant challenges currently facing the island states of the southwest Pacific is that of dealing with the competing claims of customary norms and rules on the one hand and contemporary international human rights on the other. Some commentators have assumed these goals to be complementary, a stance which ignores the fundamentally different values involved. Nowhere is the conflict between customary law and human rights more relevantly illustrated than in the area of gender equality. This paper looks at a small sample of South Pacific cases highlighting this conflict and at the way in which the competing norms have been balanced by the courts. The paper considers the constitutional conundrum facing South Pacific nations with a constitutional mandate to preserve a unique cultural identity, which involves a conservative manifesto, whilst upholding human rights agendas developed in a very different context. The dichotomy linking tradition with subjugation and Westernization with freedom and equality is also brought into question.

I INTRODUCTION

In the first decade of the 21st century, island countries of the southwest Pacific face the significant challenge of meeting the demands of the modern world. As the Bougainville crisis gradually drew to an end, coups in Fiji Islands and Solomon Islands and disorder in Vanuatu stepped in to take its place. Under pressure, cracks have appeared in the “Westminster” façade of island governments and the rule of law has disintegrated. More recently, the authority of the King has come under challenge in Tonga, and Nauru, like Solomon Islands before it, has been labelled a “failed state.”¹ The vast divide between the introduced system of law and government on the one hand and traditional authority and practices on the other can no longer be ignored. One area where conflict has long been apparent is the intersection of customary law and constitutionally enshrined human rights. Some earlier scholars and political advisors assumed these concepts to be complementary,² a stance which ignored the fundamentally different values involved. Customary law

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1. Australian Strategic Policy Institute, Policy Report, *Our Failing Neighbour: Australia and the Future of Solomon Islands*, (June 2003) at 1.
 2. P. Hyndman, *The Protection of Human Rights in the Pacific Region* (London: Human Rights Unit, Commonwealth Secretariat, 1991) 34.

is indigenous, fragmentary (on a geographical basis),³ and binding only on those who accept it as the law applicable to them. It is basically conservative and patriarchal.⁴ Human rights, on the other hand, are introduced concepts, purported to be universal and founded on liberal, egalitarian principles. Customary law also emphasizes status,⁵ duties and community values, whereas human rights provisions emphasize individual rights, freedoms and equality, and reflect internationally accepted values.

Nowhere is the conflict between customary law and human rights more relevantly illustrated than in the area of gender equality. This paper considers the constitutional conundrum facing South Pacific nations, with a constitutional mandate to preserve a unique cultural identity, which involves a conservative manifesto, whilst upholding human rights developed in a very different context. It sets out the framework of gender protection provided by the constitutions and international law in a selection of South Pacific countries, which poses this conundrum. The efficacy of these provisions is then brought into question by contrasting the written commitments to equality with the practical position of women in South Pacific societies today, which is examined in very general terms. The main areas of conflict are discussed and a small sample of South Pacific judicial decisions on point are used to illustrate the frictions which exist and the way in which the competing norms have been dealt with by the courts. The dichotomy linking tradition with subjugation and Westernization with freedom and equality is also brought into question. Although the constitutional conundrum may appear intractable, the article concludes by suggesting that there may be means of negotiating it and putting forward some possibilities for doing this.

Background

The Pacific Islands stretch from the Commonwealth of Northern Mariana Islands in the northwest Pacific Ocean to Pitcairn in the southeast. The small island countries within the region vary greatly in their physical geography.

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3. Particularly in Melanesia, where customary law may differ from island to island and even village to village. This is also discussed in J. Corrin Care, "Conflict Between Customary Law and Human Rights in the South Pacific" in *Commonwealth Law Conference Papers*, vol. 1 (Kuala Lumpur: Sweet & Maxwell, 1999) 251 [Corrin Care, "Conflict Between Customary Law and Human Rights"]. See further "Submissions by the Fiji Women's Rights Movement and the Crisis Centre" in *Report of the Commission of Inquiry on the Courts* (Fiji Islands: 1994) [Beattie Commission Report] 173 ["Submissions by the Fiji Women's Rights Movement"].
 4. See e.g. "Submissions by the Fiji Women's Rights Movement", *ibid.* at 172; K. Brown & J. Corrin Care, "Conflict in Melanesia: Customary Law and the Rights of Melanesian Women" (1998) 24 *Commonwealth L. Bull.* 1334 [Brown & Corrin Care, "Conflict in Melanesia"].
 5. See e.g. C.J. Muria, "Conflicts in Women's Human Rights in the South Pacific: The Solomon Islands Experience" (1996) 11:4 *Commonwealth Judicial J.* 7, where he observes that modern regimes in the domestic sphere are categorized as "foreign" by ordinary islanders.

The Melanesian countries of Solomon Islands, Vanuatu and Fiji comprise large, mountainous and mainly volcanic islands. They have valuable natural resources including fertile soil, large forests, mineral deposits and rich ocean resources. Micronesia and Polynesia are characterized by much smaller island countries. Kiribati, Tokelau and Tuvalu are made up of small atolls. Whilst falling within this latter group, Samoa, Tonga and the Cook Islands also include islands of volcanic origin with more fertile lands.

The people of the Pacific Islands can be grouped broadly, according to ethnic, cultural and linguistic concepts, into sub-regions of Melanesia, Micronesia and Polynesia. There are distinct differences in social organizations and cultural practices between the three sub-regions. For example, throughout Melanesia, social and political status and power are often acquired on the basis of individual merit and effort.⁶ In most of Polynesia, they are achieved on the basis of patrilineal descent. In Micronesia, the situation is more complex. On some islands there are close similarities to the Polynesian system, whereas on others respect is paid to age and political control traditionally exercised by a council of elders, who are almost invariably men. These generalizations should not be allowed to mask the fact that considerable variations exist from place to place within countries of the region.⁷ The diversity of cultures is evidenced by the number of languages spoken within the region. In Solomon Islands alone, about 65 vernacular languages and dialects exist.⁸

Political developments of the 1960s saw the majority of Pacific countries emerge as sovereign states. Written constitutions were brought into force, either by the departing colonial power, as in the case of Cook Islands,⁹ Fiji,¹⁰ Kiribati,¹¹ Niue,¹² Solomon Islands,¹³ Tuvalu¹⁴ and Vanuatu,¹⁵ or by a

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6. See further, H.M. Ross, "Leadership Styles and Strategies in a Traditional Melanesian Society" in D.L. Oliver, ed., *Rank and Status in Polynesia and Melanesia* (Paris: Société des Océanistes, 1978) 11; R. Scaglione, "Chiefly Models in Papua New Guinea" (1996) 8:1 *The Contemporary Pacific* 1; and G.M. White & L. Lindstrom, eds., *Chiefs Today* (U.S.: Stanford University Press, 1997). See also P.N. Stearns, *Encyclopaedia of World History*, 6th ed. (U.S.: Houghton Mifflin, 2001) at F.1.
 7. For examples of variations and criticisms of stereotyping within Melanesia, see Ross, *ibid.* at 11-22.
 8. Acknowledgment is due to Prof. J. Lynch and Dr. R. Early of the Pacific Language Unit, University of the South Pacific, who supplied this information. Although containing merely 0.1 per cent of the world's population, the Pacific region contains one third of the world's languages: South Pacific Commission, *Pacific Island Populations*, Report prepared by the South Pacific Commission for the International Conference on Population and Development (Cairo: 5-13 September 1994).
 9. *Cook Islands Constitution Act 1964* (N.Z.); *Cook Islands Constitution Amendment Act 1965* (N.Z.).
 10. *Fiji Independence Order 1970* (U.K.).
 11. *Kiribati Independence Order 1979* (U.K.).
 12. *Niue Constitution Act 1976* (N.Z.).
 13. *Solomon Islands Independence Order 1978* (U.K.).
 14. *Tuvalu Independence Order 1978* (U.K.).

constitutional convention, as in Nauru and Samoa.¹⁶ Whilst the preambles to these constitutions paid lip service to the importance of encapsulating local values and objectives,¹⁷ the origins of the substantive provisions were obvious.¹⁸

In spite of the introduction of the common law, customary law survived the colonial era. The colonial authorities tolerated and even encouraged Indigenous customs as a means of social control. The role of customary law in the formal system was originally restricted to land. However, in some countries, this gradually increased to allow for other minor matters to be dealt with in Native courts.¹⁹ Outside the formal system it continued to be recognized as binding, at least by those Indigenous people who lived a customary lifestyle. In the lead up to independence, the spirit of nationalism which came to the fore restored custom and culture to the agenda. In addition to affirming a commitment to local values and objectives in the preamble,²⁰ most Pacific Island nations went further, and gave constitutional recognition to customary law,²¹ according it a place in the formal legal system. However, customary law was not the only source of law. Introduced laws, in existence at the time of independence, were “saved” to fill the void until they were replaced by new laws enacted by the local parliament. This included legislation in force in England up to a particular date,²² common law and equity, and “colonial” legislation, made locally prior to independence by a person or body with legislative power bestowed by England.

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15. “Powers” would in fact be more accurate in the case of Vanuatu: *Exchange of Notes between Governments of the United Kingdom and France* (23 October 1979).
 16. For a detailed explanation of the manner of enactment of Pacific constitutions, see Y. Ghai, ed., *Law, Politics and Government in the Pacific Island States* (Suva: Institute of Pacific Studies, University of the South Pacific, 1988).
 17. See for example Preamble to the *Constitution of Papua New Guinea 1975*; paragraph (a) of the declaration in the Preamble to the *Constitution of Solomon Islands 1978*, scheduled to the *Solomon Islands Independence Order 1978*, SI 1978/783 (U.K.); Preamble to the *Constitution of Vanuatu 1980*.
 18. N.K.F. O’Neill, “Human Rights in Pacific Island Constitutions” in P. Sack, ed., *Pacific Constitutions* (Canberra: Research School of Social Sciences, Australia National University, 1982) 307 at 309.
 19. Jurisdiction was often defined in terms of civil and criminal jurisdiction, which was not a recognized distinction in customary law. A monetary limit was placed on civil claims and a seriousness and penalty limit on criminal cases.
 20. See *supra* note 17.
 21. See for example *Constitution of Solomon Islands 1978*, Sch. 3, para. 3(1); *Constitution of Samoa 1962*, art. 111(1); *Constitution of Vanuatu 1980*, art. 47(1). See further Corrin Care, “Conflict Between Customary Law and Human Rights”, *supra* note 3.
 22. In Fiji Islands the date is 2 January 1875: *Supreme Court Ordinance 1876*, s. 35; in Solomon Islands it is 7 July 1978: *Constitution of Solomon Islands*, Sch. 3, para. 4(1); In Vanuatu it is 30 July 1980: *Constitution of Vanuatu 1980*, art. 95(2). In the case of Vanuatu, French law was also “saved.”

II PROMOTION OF GENDER EQUALITY

Constitutional Provisions

Throughout the South Pacific, independence constitutions display a commitment to internationally accepted human rights by incorporating a bill of rights based on overseas models.²³ In the case of Fiji Islands, Kiribati, Nauru, Papua New Guinea,²⁴ Samoa, Solomon Islands and Tuvalu, this follows the United Nations' *Universal Declaration of Human Rights* (1948) and the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* made in 1950. Following these models, rights and freedoms and applicable exceptions are described in detail. The constitutions of Cook Islands and Vanuatu use the Canadian *Bill of Rights* as a model. This describes both the rights and freedoms and the relevant exceptions in very general terms. The *Constitution of Tonga* is rather different. Enacted in 1875, the first two sections, dealing with human rights and the form of government respectively, were based on the 1852 *Constitution of Hawaii*.²⁵ The third section deals with land and takes the unique approach of declaring it all to belong to the king. The declaration of rights in the first section reflects 19th century humanitarian concerns by commencing with a declaration of freedom and the prohibition of slavery.²⁶ The country's recent conversion to Christianity is also evident, in the form of the right to freedom of worship and the obligation to keep the Sabbath day sacred.²⁷

In most countries of the region,²⁸ rights and freedoms recognized include the right to protection from discrimination and the right to freedom of movement.²⁹ However, in many countries customary law is exempted

23. *The Niue Constitution Act 1974* (N.Z.) (see text accompanying note 12) is an exception; it does not contain a Bill of Rights. This is also discussed in Corrin Care, "Conflict Between Customary Law and Human Rights", *supra* note 3.

24. Prior to the enactment of the *Constitution*, human rights were protected in Papua New Guinea by the *Human Rights Ordinance 1971*, which protected 11 rights, but did not extend to protection from discrimination.

25. S. Latukefa, "Nineteenth-Century Constitutions" in Sack, *supra* note 18, 21 at 30.

26. Clauses 1 and 2.

27. Clauses 5 and 6. Arguably, these clauses are contradictory.

28. The *Constitution of Niue* does not protect fundamental rights or freedoms. There is no protection in Tokelau either, which does not yet have its own constitution.

29. These rights are recognized by the constitutions of Kiribati (ss. 14 and 15), Fiji Islands (ss. 34 and 38), Papua New Guinea (ss. 52 and 55), Samoa (arts. 13 and 15), Solomon Islands (ss. 14 and 15) and Vanuatu (art. 5(1)(i) and (k)). The constitutions of Cook Islands, the Federated States of Micronesia and Marshall Islands do not protect the right to freedom of movement, but only the right to freedom from discrimination on the grounds of gender (art. 64(1)(b); art. IV, s. 4; and art. II, s. 12, respectively). The *Constitution of Tuvalu 1986*, does not protect the right to freedom from discrimination on the grounds of gender (although it does confer this right on other grounds) but only the right to freedom of movement (s. 26). The *Constitution of Tonga* does not protect either right.

from these protections. In some countries, such as Tuvalu, this is part of a wider, general exception, which prevents all human rights provisions from applying in the realm of customary law.³⁰ Alternatively, customary law may be shielded from one of these rights in particular, as is provided in Samoa³¹ and Solomon Islands.³² The particular exception conferred in relation to the right to protection from discrimination by the Solomon Islands' *Constitution* is discussed below, in the context of a decided case.³³ In addition to the limitation of constitutional pledges of equality by shielding discriminatory customary laws from their protection, some regional courts have shown a reluctance to strike down discriminatory laws, even where they are not directly exempted.³⁴

A more robust approach has been taken in Papua New Guinea, where customary law is not shielded from the human rights provisions and the right to protection from discrimination is bolstered by Goal 2 of the National Goals and Directive Principles ("NGDP"), which deals with equality and participation and calls for "equal participation of women citizens in all political, economic, social and religious activities."³⁵ These provisions are also discussed below in the context of case law. Ironically, there were no women on the constitutional planning committee that drew up the blueprint for the *Constitution*, including the NGDP.³⁶

International Law

The *Convention on the Elimination of All Forms of Discrimination against Women* ("CEDAW") was adopted by the United Nations General Assembly in December 1979.³⁷ It calls on states to eliminate discrimination against

30. *Constitution of Tuvalu 1986*, s. 11(2).

31. *Constitution of Samoa 1960*, art. 13(4) restricts the right to freedom of movement.

32. *Constitution of Solomon Islands 1978*, s. 15(d) restricts protection from discrimination.

33. *Tanavulu and Tanavulu v. Tanavulu and SINPF* (12 January 1998), Solomon Islands Civ. Cas. 185/1995 (Solomon Islands H.C.) [unreported]; Solomon Islands Civ. App. 3/1998 (n.d.) (Solomon Islands C.A.) [unreported]. Note that lack of resources within the region has inhibited reliable reporting of cases even in the superior courts. For example, the last volume of the Solomon Islands Law Reports was published in 1990. The position has been ameliorated by the University of the South Pacific Law Schools' online collection of judgments, which allows access to some reported judgments: <<http://www.paclii.org>>.

34. See e.g. *Minister for Provincial Government v. Guadalcanal Provincial Assembly* (23 April 1997), Solomon Islands Civ. App. 3/97 (Solomon Islands C.A.) [unreported] at 26, in which the Court of Appeal refused to set aside a statutory provision allowing provident funds to be paid out in accordance with customary rules by virtue of which the widow was not entitled to a share.

35. NGDP 2(5).

36. See further D.D. Johnson, "Women and the Constitution of Papua New Guinea" in R. De Vere, D. Colquhoun-Kerr & J. Kaburise, eds., *Essays on the Constitution of Papua New Guinea*, (Port Moresby: Tenth Independence Anniversary Advisory Committee, 1985) 59 at 60-62.

37. Opened for signature 18 December 1979, Res. 34/80 (entered into force 3 September 1981).

women in the enjoyment of all civil, political, economic and cultural rights. It also puts obligations on states to work towards equality for women both in public life and in the private sphere, particularly with regard to the family. The number of small island countries in the South Pacific that have ratified or acceded to *CEDAW* is very gradually increasing. Set out in the table below are details of state parties, with a note regarding reservations.³⁸ In fact, the Federated States of Micronesia, which is the last but two regional signatory, is the only country in the region with current reservations. These reservations severely limit, if not negate, the benefit of accession.³⁹ The first two countries listed were bound by New Zealand's ratification, Niue having given its approval to this, as necessitated by its self-governing status. The second three countries listed were bound by France's ratification, as they were treated as overseas departments of that country.

Country	Date of Ratification/Accession ⁴⁰	Reservations	Date of Ratification/Accession to Optional Protocol
Tokelau	Ratified by New Zealand 10 January 1985	Subsequently withdrawn	Ratified by New Zealand 7 September 2000
Niue	Ratified by New Zealand 10 January 1985	Subsequently withdrawn	Ratified by New Zealand 7 September 2000
New Caledonia	Ratified by France, 14 December 1983	Subsequently withdrawn	Ratified by France 9 June 2000
French Polynesia	Ratified by France, 14 December 1983	Subsequently withdrawn	Ratified by France 9 June 2000
Wallis and Futuna	Ratified by France, 14 December 1983	Subsequently withdrawn	Ratified by France 9 June 2000
Samoa	Accession 25 September 1992	None	No
Papua New Guinea	Accession 12 January 1995	None	No
Fiji Islands	Accession 28 August 1995	Article 5(a) and 9. Withdrawn 24 January 2000	No
Vanuatu	Accession 8 September 1995	None	No

38. This information is correct as of 26 March 2006, according to the UN, Division for the Advancement of Women, online: <<http://www.un.org/womenwatch/daw/cedaw/states.htm>>.

39. In particular, art. 2 has been declared by the UN *CEDAW* Committee to be central to *CEDAW* and a reservation to art. 16 has been said to be incompatible with it: *Reservations*, UN Doc. A/42/38, 6th Sess. (1987), general recommendation 4.

40. Signing the *Convention* only obligates the signatory to refrain from contravention of the principles contained in the *Convention*. Arguably, South Pacific countries that have not ratified or acceded may be obliged by art. 56 of the *Charter of the United Nations 1946*, opened for signature 13 February 1946, Res. 22A(1) (entered into force 14 December 1946), to pursue the goals set out in article 55.

Country	Date of Ratification/Accession ⁴⁰	Reservations	Date of Ratification/Accession to Optional Protocol
Tuvalu	Accession 6 October 1999	None	No
Solomon Islands	Ratified 6 May 2002	None	Ratified 6 May 2002
Kiribati	Accession 17 March 2004	None	No
Federated States of Micronesia	Accession 1 September 2004	Articles 2(f), 5, 11(1)(d), 11(2)(b), 16, and 29(1)	No
Marshall Islands	Accession 2 March 2006	None	No
Cook Islands	Accession 11 August 2006	None	No

Table 1: Ratification Status of South Pacific Countries.

In theory, ratification or accession obligates governments to pursue a policy of eliminating discrimination against women and to report on their progress in that regard to the UN *CEDAW* Committee. In practice, South Pacific countries have not honoured their obligations. With a few exceptions, such as the *CEDAW (Ratification) Act 1995* (Vanuatu), regional countries have not enacted *CEDAW* into national law. Although it may be argued that such action is unnecessary, as regional countries have already entrenched the right to freedom from discrimination in their constitutions, this does not supply them with the applicable benchmarks or expose them to objective scrutiny.⁴¹ Further, the absence of local legislation enshrining the *Convention* provides courts with an excuse for failing to promote human rights, if they are disinclined to do so. Judicial activism is required and there are very few examples of this.⁴² In Fiji Islands, the *Constitution* specifically mandates the courts to have regard to public international law when construing constitutionally enshrined rights, and this interpretative tool may be used by

41. The extent to which state agreement to be bound by the *Convention*, or possibly even the *Charter of the United Nations* (see note 40 above), justifies intervention by the UN under international law depends on whether this involves some abdication of sovereignty: see e.g. Geoffrey Best, "Justice, International Relations and Human Rights" (1995) 71:4 *International Affairs* 775.

42. By judicial activism is meant a liberal approach to human rights provisions in the constitution permitting the enforcement of international conventions. Regional courts have resisted such an approach and have tended to hold that failure to enact *CEDAW* results in unenforceability, see *Molu v. Molu* (15 May 1998), Vanuatu (S.C.), Lunabek A.C.J. [unreported], *Wagner v. Radke*, (19 February 1997) Samoa (S.C.) [unreported], and *R. v. Timiti and Robuti* (17 August 1998), Kiribati (H.C.), Lussick C.J. [unreported], discussed in Laitia Tamata, "Application of Human Rights Conventions in the Pacific Islands Courts" (2000) 4 *J. S. Pac. L.* 1.

the courts to support the application of *CEDAW*, or any other international law in some cases. However, this provision falls short of rendering international laws binding, and there may be occasions when the power to interpret will not be sufficient to justify the enforcement of a *CEDAW* provision.⁴³

Further, neither constitutional rights nor agreement to be bound by *CEDAW* has been translated into domestic reforms to eliminate discrimination. Again there are exceptions,⁴⁴ but none of these amount to a comprehensive program of reform. Most countries have also reneged on their obligation to report to the *CEDAW* Committee. A country's initial report is due within one year of the *Convention* coming into force. Fiji Islands, Samoa and Vanuatu are the only countries to have submitted their well overdue reports.⁴⁵

The Beijing Platform of Action called on all governments to develop plans of action for strategies to implement *CEDAW*.⁴⁶ Only Fiji Islands has drawn up and submitted a National Action Plan to the UN Division for the Advancement of Women.⁴⁷ Initiatives in Fiji are assisted by the establishment of a Human Rights Commission under the *Constitution*.⁴⁸

III THE STATUS OF PACIFIC WOMEN IN PRACTICE

Women in Customary Society⁴⁹

Customary law is not a homogenous body of rules applying throughout the Pacific region or even throughout each Pacific island nation. In Fiji Islands, for example, the Fiji Women's Rights Movement and the Fiji Crisis Centre pointed out in their submission to the Commission of Inquiry on the Courts:⁵⁰

43. *Constitution of Fiji Islands 1997*, art. 43(2).

44. See for example, the *Civil Procedure Rules 2002* (Vanuatu), Part 16, Div. 4, which provides for the making of domestic violence orders (these orders restrain violent parties from making contact with their partner or a relative).

45. At the time of submission, Fiji Islands was four and a half years overdue, Samoa and Vanuatu nearly ten years: United Nations, "Reports by CEDAW", online: United Nations High Commissioner of Human Rights, Treaty Body Database <<http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet>>.

46. Established under art. 18 to receive and comment on reports and make recommendations to assist countries to meet their obligations under *CEDAW*.

47. (3 September 1999).

48. *Constitution (Amendment) Act 1997*, s. 42. See also *Human Rights Commission Act 1999* (Fiji).

49. Some of the material in this section is based on earlier research by the author published in J. Corrin Care, "Between a Rock and a Hard Place: Women, Religion and Law in Solomon Islands" in Carolyn Evans & Amanda Whiting, eds., *Mixed Blessings: Laws, Religions, and Women's Rights in the Asia-Pacific Region* (Boston: Martinus Nijhoff, 2006) 101.

50. *Supra* note 3 at 172-173.

[T]here is a mistaken assumption that Fijian culture is a homogenous, monolithic culture universally agreed upon by all regions, provinces and villages. In fact we know that not only are there provincial and regional variations but variations exist from village to village. Further, we know that not only is culture not uniform and monolithic but two experts from the same village may not necessarily agree on e.g. whether in custom the custody of children goes to the father or mother or whether “bulubulu”⁵¹ is acceptable in rape cases.

It was also pointed out in this submission that “tradition, culture and custom in the main is defined by men, not women—therefore there is a conflict about whose custom is being applied.”⁵²

With this in mind, and speaking very generally, the customary system in place in post-independence countries of the South Pacific is patriarchal and status based. Women are often excluded from leadership roles and major decision making.⁵³ Customary dispute resolution forums are normally presided over by males.⁵⁴ Even in those parts of the region where title to land descends through matrilineal lines, such as Guadalcanal in Solomon Islands, land disputes are generally litigated by men.⁵⁵ In the custom ceremonies, which still take place throughout the region to commemorate all important events, only men are direct participants and are allowed to offer sacrifices or participate in feasting.⁵⁶ Women do not usually participate directly in the main ceremonies, apart from dancing or singing, but are required to prepare the food and to make traditional garments and goods such as baskets, ropes, mats and ornaments.⁵⁷ Women are excluded from certain ceremonies altogether. For example, they are prohibited from participating in the Nagol

51. “Bulubulu” is the traditional Fijian custom of reconciliation. Compensation is offered to the customary group of the victim by the guilty party’s group to restore amicable relationships between the two groups. See further, A. Ravuvu, *Vaka I Taukei: The Fijian Way of Life* (Suva: Institute of Pacific Studies, University of the South Pacific, 1983) at 46.

52. *Beattie Commission Report*, supra note 3 at 172-173.

53. See further Brown & Corrin Care, “Conflict in Melanesia”, supra note 4. For a contrary view, see B. Narokobi, “There’s No Need for Women’s Lib Here Because Melanesian Women are Already Equal” in *The Melanesian Way* (Port Moresby: Institute of Papua New Guinea Studies, 1980) 70.

54. See further Brown & Corrin Care, “Conflict in Melanesia”, *ibid.*

55. See e.g. *Maerua v. Kahanatarau*, [1983] SILR 95.

56. L. Foanaota, “Social Change” in Hugh Laracy, ed., *Ples Bilong Iumi* (Suva: Institute of Pacific Studies, University of the South Pacific, 1989) 68 at 71.

57. M. Wasuka, “Education” in Laracy, *ibid.*, 94 at 99. This is not the case in all regions. For example, in the Kwaio area of Solomon Islands, Keesing states, “Participation of women in the community rituals primarily staged by men is both significant and vital to successful performance”: R.M. Keesing, *Kwaio Religion* (New York: Columbia University Press, 1982) at 171.

(land diving) ceremony in Vanuatu.⁵⁸ In some regional societies, women have no say in selecting their husbands, and the husband's family has the strongest claim to any children of the marriage in the event of marriage breakdown or death of the parents.⁵⁹ Aspirations of gender equality put forward by regional women's group are often sneered upon by men.⁶⁰

However, whilst women might have less freedom in traditional societies, they are often valued members by virtue of their role as childbearers, producers of food and managers of domestic affairs.⁶¹ This status carries with it the benefits of prestige and protection.⁶² Further, whilst women may not have had a role in men's ceremonies, they did take part in their own ceremonies.⁶³ Ironically, it is arguable that women's position has worsened since independence. The importance of tasks such as tending a *sup sup* garden⁶⁴ has been diminished by Western influences, which label such tasks as demeaning. In 1986, the Australian Council for Overseas Aid found:⁶⁵

Women are experiencing a decline in status and power as dependency on the cash economy and imported political and social systems become more entrenched Pacific women often held a prestigious place in traditional society; they were economically active as producers, manufacturers, market managers and healers. Now women are increasingly marginalized. They are the least educated or consulted in the community.

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58. The ceremony involves leaping from high towers built from natural materials, with only a vine tied to one ankle to lessen the impact of contact with the ground. See further, M. Jolly, "Kastom as Commodity", in L. Lindstrom & G. White, eds., *Culture, Kastom, Tradition* (Suva: Institute of Pacific Studies, University of the South Pacific, 1994) 131 at 133.
59. See, for example, the evidence of customary law in *Sasango v. Beliga*, [1987] SILR 91; *In Re B.*, [1983] SILR 223; *Sukutaona v. Houanihou*, [1982] SILR 12; *K v. T and KU*, [1985/86] SILR 49. In all four cases, the husband or male relatives claimed that custom gave them the right to custody of children, in preference to the mother. See also, A. Pollard, "'Bride Price' and Christianity" (Paper presented to the Women, Christians, Citizens: Being Female in Melanesia Today Workshop, State, Society and Governance in Melanesia Project, Australia National University, 11-13 November 1998) at 2.
60. D. Paina, "Peacemaking in Solomon Islands: The Experience of the Guadalcanal Women for Peace Movement" (2000) 53 *Development Bulletin* 47; P. Boseto, "Melanesian Women, Mothers of Democracy" (Paper presented to the Women, Christians, Citizens: Being Female in Melanesia Today Workshop, State, Society and Governance in Melanesia Project, Australia National University, 1998).
61. See, for example, in relation to Solomon Islands, Pollard, *supra* note 59.
62. Australian Council for Overseas Aid, *Development in the Pacific: What Women Say*, Dossier No. 18 (Canberra: Australian Council for Overseas Aid, 1986) at iv [*Development in the Pacific*].
63. J. Zorn, "Women, Custom and International Law in the Pacific" (Vanuatu: University of the South Pacific, Occasional Paper No. 5, 1999) 12.
64. Market garden, where vegetables are grown for food and trading.
65. *Development in the Pacific*, *supra* note 62, cited in R. Shyvens, "Church Women's Groups and the Empowerment of Women in the Solomon Islands" (Paper presented to the Women, Christians, Citizens: Being Female in Melanesia Today Workshop, State, Society and Governance in Melanesia Project, Australia National University, 1998).

Notwithstanding these facts, to advocate a return to a customary system as a means of promoting human rights, as some commentators have done, is unrealistic and takes no account of the adverse implications of this for women.⁶⁶ In Fiji Islands, women resisted the reintroduction of the Fijian courts, which operated on a customary basis, on the grounds that women's experience of traditional courts in other Pacific countries was that they had worked against them and provided no real protection.⁶⁷

Women in the Introduced System

Contrasting the lack of status accorded to women in the customary system with the declarations of equality in many Pacific constitutions, it would be easy to assume that there has been an improvement in women's standing since independence. Unfortunately, constitutional rhetoric has not been translated into reality. The patriarchal underpinning of the social structure was carried forward through the colonial administration. Male power was entrenched in all three arms of the imported Westminster system of government, and more than written laws are required to change this. Even where countries have ratified *CEDAW*, this does not mean that they are complying with its demands.⁶⁸

The number of women represented in leadership roles is disappointing. There have been no women presidents or prime ministers. The closest they have come is vice president in Kiribati and Palau and deputy prime minister in Cook Islands. Even more disconcertingly, in some regional countries, such as Federated States of Micronesia, Palau, Papua New Guinea, Nauru, Solomon Islands⁶⁹ and Vanuatu, there are currently no women parliamentarians. Statistics produced by the United Nations Development Program⁷⁰ for 2003 show women as holding six per cent of seats in Fiji Islands and Samoa, five per cent in Kiribati and three per cent in Marshall Islands. Things are little better in the judicial sector: few women hold high judicial or legal office. Fiji Islands and Palau are the only countries to have female judges: one in Fiji and two in Palau. In the lower courts only Cook Islands, Kiribati, Niue, Palau, Solomon Islands and Tuvalu have female legal officers and in those countries women are in the minority; for example

66. See for example Hyndman, *supra* note 2 at 34, which cites the recognition of custom and the reintroduction of traditional courts in Pacific countries as evidence of the promotion of human rights.

67. "Submissions by the Fiji Women's Rights Movement", *supra* note 3 at 172.

68. See text accompanying note 46 above.

69. In the most recent elections, the one female member of Solomon Islands' parliament lost her seat. See statistics compiled by International Parliamentary Union (20 October 2003), available online: <<http://www.ipu.org/wmn-e/classif.htm>>.

70. Human Development Reports, online: <http://hdr.undp.org/reports/global/2003/indicator/indic_285.html>.

two magistrates out of nine in Solomon Islands and six island court justices out of 40 in Tuvalu are women.

IV MAIN AREAS OF CONFLICT

The key areas of friction between gender equality and customary law involve patriarchal and status based norms of customary law, which conflict with the constitutionally protected rights to protection from discrimination and to freedom of movement.⁷¹ This section of the paper looks at a small selection of cases decided within the region that illustrate this conflict.

Freedom from Discrimination

In Re Miriam Willingal

The case of *In Re Miriam Willingal*⁷² involved an 18-year-old girl from the Kumu Kanem clan of the Tangilka tribe of Tumba village in the Minj area. Miriam's maternal grandmother came from the Konumbuka tribe. In about 1979, a tribal fight broke out between the Tangilka tribe and the neighbouring Komun Kambilka tribe. As a result of this fight, Miriam's father, Koidam, sent his two wives and his children, including Miriam, to live with relatives on Konumbuka land, while he remained on Tangilka land to fight. This fight lasted for well over 15 years. In 1996, police shot dead Miriam's father at Wei village in the course of looking for another Tangilka tribesman. The Konumbuka demanded "head pay" (a specific type of traditional compensation)⁷³ from the Tangilka tribe for indirectly causing this death, on the basis that their wrongdoing caused the police to come to Tangilka territory and shoot Miriam's father.

71. See also Brown & Corrin Care, "Conflict in Melanesia", *supra* note 4.

72. (10 February 1997), Papua New Guinea, Civ. Cas. N1506 (National Court) [unreported], accessible online: <<http://www.pacii.org/pg/cases/PGNC/1997/7.html>> [*In Re Miriam Willingal*].

73. According to customary law in some parts of Papua New Guinea, when a male dies, other than from natural causes, his mother's tribe may demand "head pay" from those responsible to compensate them for the loss. The basis of this claim is that the mother's tribe has been deprived of the reciprocal obligations that the deceased had towards them due to the fact that his mother had brought him up and he was under the protection of her tribe. Head pay takes the form of payments in money, pigs and other valuable personal items. It also includes an obligation to provide a young unmarried woman from the tribe of those responsible to marry a man from the deceased's mother's tribe. As discussed above, customary law is not a homogenous system and head pay is not common to all parts of Papua New Guinea. However, the court in this case accepted that the custom was widely practiced in the Minj area where both tribes lived.

Following the death of Miriam's father, his mother's tribe, the Konumbuka, demanded head pay of 25 pigs, 20,000 kina and two women from the Tangilka tribe. Miriam, who had gone to live with her uncle in the regional centre of Mt. Hagen in order to attend college, was asked by members of her tribe to marry a member of the Konumbuka tribe, in part payment of the head pay. She agreed to go on the condition that she could finish her education first, but she was unhappy about this, particularly as she was not told exactly who the bridegroom would be. She feared that if she refused, the Konumbuka tribe would harm the other girls in the tribe or eject the Tangilka tribe from their land. Application was made to the court on Miriam's behalf by the Individual and Community Rights Advocacy Forum ("ICRAF"), a non-government organization ("NGO"). This in itself is significant, as without the aid of such NGOs women in the region are unlikely to have the social or economic power to access the courts. The application sought to have the marriage agreement set aside on the basis that it contravened Miriam's rights under the *Constitution*, including the right to freedom (s. 32) and the right to equality (s. 55). Relief was also sought under s. 36 (freedom from inhuman treatment); s. 42(1) (liberty of the person); s. 49 (right to privacy); and s. 52 (right to freedom of movement), but these sections were not discussed in the judgment or ruled on.

Injia J. acknowledged that the *Constitution* provided for the recognition and enforcement of customary law and highlighted No. 5 (3) and (4) of the National Goals and Directive Principles, which included a call for "recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture."⁷⁴ However, he pointed out that the role of custom and customary law was limited by national laws. In balancing these competing laws, Injia J. reminded himself of the need for special care and noted in particular that the majority of people in Papua New Guinea were uneducated and still lived a traditional lifestyle, governed by custom. He also pointed out that traditional customs

serve complex value systems which only they themselves best know. It is not easy for any outsider to fully understand the customs and the underlying values and purposes they serve. Any outsider including the modern courts must not be quick to extract those customs and their values and pass judgments on their soundness or otherwise.

Further, Injia J. pointed out that, whilst there was a small group of Indigenous Papua New Guineans who were familiar with both traditional values and customs and "modern ways of living," having been formally

74. *Constitution of Papua New Guinea 1975*, National Goals and Directive Principles and Basic Social Obligations, No. 5(3).

educated and exposed to different value systems in urban areas, it would be improper for an educated Papua New Guinean to pass quick judgment on a traditional custom.

After taking these factors into account, Injia J. concluded that the custom of requesting young women as part of head pay was contrary to the guarantee of freedom in s. 32 and the guarantee of equality in s. 55 and therefore unconstitutional. It was accepted by the court that s. 55 must be interpreted liberally, in the light of goal 2 of the National Goal and Directive Principles, which promotes equality and “equal participation of women in all political, economic, social and religious activities.”⁷⁵ Injia J. resolved the conflict between the mandate to recognize customary law and traditional practices and the requirement to protect human rights by interpreting the *Constitution* as calling for “the maintenance and advancement of good traditional customs and the discouragement and elimination of bad customs as seen from the eyes of an ordinary modern [citizen].”⁷⁶ On this basis it was ordered that the Tangilka and Konumbuka tribes refrain from this customary practice and tribal members were permanently restrained from enforcing the custom against Miriam by request, threat, force or otherwise and that she be allowed to exercise her constitutional rights and freedoms without hindrance.

This judgment raises several important points. Most importantly, it highlights the need to examine customary law in context. Caution must be exercised to ensure that customary law is not dismissed as discriminatory without a proper assessment of its place in traditional society. The evidence in this case revealed “a complicated network of relationships.”⁷⁷ Outlawing of an individual customary law has a potential “butterfly effect” and might destroy practices that support the fabric of traditional society. It is also worth noting that, since this case was decided, Papua New Guinea has passed the *Underlying Law Act 2000*, which strengthens the position of customary law by requiring the courts to use it in preference to common law in developing the underlying law.⁷⁸ It also made easier and more efficient the procedures for finding and proving custom.⁷⁹ Whilst the *Act* might have justified a more cautious approach to outlawing a customary practice, Injia J. repeated his

75. NGDP 2(5).

76. *In Re Miriam Willingal*, *supra* note 72.

77. *Ibid.* at 15.

78. *Underlying Law Act 2000*, No. 13 of 2000 (P.N.G.) at ss. 4, 6 and 7. Prior to the passing of the *Underlying Law Act 2002*, the position was governed by Sch. 2 of the *Constitution of Papua New Guinea 1975*, which provided that, until Parliament made laws regarding the proof and pleading of custom, the courts should look to both custom and the English common law as sources of rules for the underlying law. For a summary of the arguments and counter-arguments as to whether custom was intended to be given preference, see J. Zorn & J. Corrin Care, “Everything Old is New Again: The Underlying Law Act of Papua New Guinea” [2002] LAWASIA J. 61.

79. *Underlying Law Act 2000* (P.N.G.) at ss. 16, 17.

stance in the subsequent case of *The State v. Non Pable*.⁸⁰ In that case, His Honour refused to take head pay of four girls into account in mitigation when sentencing the accused for manslaughter on the basis that it was “a custom which is repugnant to the general principles of humanity and outlawed as being illegal and unconstitutional.”⁸¹ The court’s position was confirmed by Kandakasi J. in the *The State v. Karawa*.⁸² On sentencing for murder, His Honour noted that the accused’s counsel had correctly refrained from asking that the accused’s gift of his daughter in marriage to the deceased’s tribe as part of a compensation package. Kandakasi J. directed that a judicial inquiry commence immediately into this breach of the girl’s constitutional rights.⁸³

The judgment *In Re Miriam Willingal*⁸⁴ also indicates that it is not necessary to show that customary law inflicts physical harm on a woman in order to obtain a declaration of unconstitutionality. Here, His Honour was willing to grant relief on the basis of threats and psychological pressure from the men of both tribes. He accepted that there was no evidence of a custom of taking women by physical force, but considered that custom placed pressure on the woman involved. The extent of that pressure would depend on the circumstances: “The more closely related the girl to the deceased and the more mature the girl is to marry, the more intense the pressure appears to be. In extreme cases, this could involve certain tribesmen ... taking more drastic measures such as threat of violence or even death.”⁸⁵ So, even though there was no evidence of force having been exercised, His Honour was prepared to act on the basis of Miriam’s fear of force being used if the men became impatient.

The third important point is that His Honour was prepared to grant relief under the very general words of s. 32. Section 32 states:

- (1) Freedom based on law consists in the least amount of restriction on the activities of individuals that is consistent with the maintenance and development of Papua New Guinea and of society in accordance with this Constitution and, in particular, with the National Goals and Directive Principles and the Basic Obligations.
- (2) Every person has the right to freedom based on law, and accordingly has a legal right to do anything that:
 - (a) does not injure or interfere with the rights and freedoms of others;
 - and
 - (b) is not prohibited by law and no person;

80. (11 June 1999), Papua New Guinea, Civ. Cas. N1873 (National Court) [unreported].

81. *In Re Miriam Willingal*, *supra* note 72 at 2.

82. (2 September 2004), Papua New Guinea, Civ. Cas. N2631 (National Court) [unreported].

83. *Ibid.* at 11.

84. *Supra* note 72.

85. *In Re Miriam Willingal*, *ibid.* at 17.

- (c) is obliged to do anything that is not required by law; and
 - (d) may be prevented from doing anything that complies with the provisions of paragraphs (a) and (b).
- (3) The section is not intended to reflect on the extra-legal existence, nature or effect of social, civic, family or religious obligations, or other obligations of an extra-legal nature, or to prevent such obligations being given effect to by law.

As opposed to the more specific rights invoked by the applicant in this case, but not ruled on,⁸⁶ this right is more the expression of an ideal. Further, if head pay may be regarded as a social or family obligation rather than a customary law, the proviso in sub-section (3) gives rise to an argument that it is exempt from this provision. However, this exemption would not have saved this customary practice as it was also held to fall within the “repugnancy clause”⁸⁷ and to be contrary to the *Marriage Act*.⁸⁸ The former prevents the recognition or enforcement of customary law that is “repugnant to the general principles of humanity.”⁸⁹ The latter empowers a magistrate to prevent a customary marriage being entered into against a woman’s will and makes it an offence to carry out such marriage.⁹⁰

Even more striking is the fact that His Honour went on to say that head pay was contrary to No. 2 (5) and (12) of the NGDP. These goals and directive principles are specifically stated to be non-justiciable.⁹¹ On the other hand, Injia J.’s remarks could be regarded as using the NGDP as an aid to interpretation of s. 32, which he was clearly entitled to do.⁹² The problem with this is, of course, as Injia J. recognized, NGDP No. 5 sets out a conflicting mandate.

In addition to declaring head pay to be contrary to the general right to freedom in s. 32, the court found the custom of head pay to be contrary to the guarantee of equality in s. 55, as it restricted certain women from the deceased’s tribe in their choice of spouse, whereas eligible men from the deceased’s tribe were free to marry anyone. Although there was no specific

86. Section 36 (freedom from inhuman treatment); s. 42(1) (liberty of the person); s. 49 (right to privacy); s. 52 (right to freedom of movement).

87. *Constitution of Papua New Guinea 1975*, Sch. 2.1(2). For further discussion of the repugnancy clause, see T.W. Bennett, *The Application of Customary Law in Southern Africa* (Cape Town: Juta, 1985) at 79-86.

88. Cap. 280 (P.N.G.).

89. *Constitution of Papua New Guinea 1975*, Sch. 2.1(2).

90. Section 5. The penalty is a fine not exceeding K400 or imprisonment for a term not exceeding six months or both.

91. *Constitution of Papua New Guinea 1975*, s. 25(1).

92. *Constitution of Papua New Guinea 1975*, s. 25(3): “Where any law ... can reasonably be understood, applied, exercised or enforced ... without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way”.

evidence before the court to contradict this point, it appears unlikely that young men would be allowed a completely free choice. The evidence of the continuing practice of bride price and prescriptive marriage customs in this case suggests that arranged marriages are still the norm in the Minj area.⁹³ Further, if a female from the Tangilka tribe was obliged to marry into the Konumbuka tribe, there would appear to be a reciprocal obligation on one of the men in the latter tribe to be the groom. However, there is a significant difference; a female is obliged to leave her own village and to reside in that of her future husband. This restriction could be regarded as an infringement of the right to freedom of movement enshrined in s. 52, which was not discussed by the court.

In this case, Miriam's status as a student, living away from her customary group, insulated her from the ostracism which questioning the chiefs' decision might otherwise have entailed. However, the judgment may have been a pyrrhic victory as there is anecdotal evidence that following the court's decision upholding her rights, she married a member of the Konumbuka tribe who happened to be the expert witness for the respondents in this case.⁹⁴

This case also confirms that the fundamental rights are enforceable horizontally (*i.e.* against private bodies and individuals) as well as vertically (*i.e.* against the state) in Papua New Guinea. Unlike some of the other countries of the region, where there is no direct guidance on this point,⁹⁵ the *Constitution of Papua New Guinea* makes provision for horizontal application.⁹⁶ This can be compared with Fiji Islands, where it is expressly provided that human rights provisions only bind "the legislative, executive and judicial branches of government" and persons holding public office.⁹⁷ Most of the other regional constitutions do not address the matter. The case law in those countries is conflicting, but the weight of authority seems to be

93. See evidence of Dr. Muke in *In Re Willingal*, *supra* note 72 at 8, 9-20.

94. There is also anecdotal evidence that the groom already had at least one wife: Personal communication from a lawyer in Port Moresby, Papua New Guinea. Polygamous marriages are still recognized under the law of Papua New Guinea: J.Y. Luluaki, "Customary Marriage Laws in the Commonwealth: A Comparison Between Papua New Guinea and Anglophonic Africa" (1997) 11:1 *Int'l J.L. Pol'y & Fam.* 1.

95. The constitutions of Kiribati, Samoa, Solomon Islands and Vanuatu make no direct provision.

96. *Constitution of Papua New Guinea 1975*, s. 34 (a) provides that the rights provisions apply, "as between individuals as well as between governmental bodies and individuals." See further W.P. Marshall, "Diluting Constitutional Rights" (1985) 80 *Nw. U.L. Rev.* 558 (supporting the vertical approach) and A.S. Butler, "Constitutional Rights in Private Litigation" (1993) 22 *Anglo-American L. Rev.* 1 (supporting the horizontal approach).

97. Section 21(1).

against horizontal application.⁹⁸ In societies where traditional leaders, who may have no official status in the formal system of government, often wield more power than officers endorsed by the state, this may severely limit the effectiveness of human rights provisions.⁹⁹

Haren Hala Village Court Case

Another illustrative case came before a village court in Haren Hala, Vanuatu, in 1989.¹⁰⁰ This gives a very different perspective from the cases decided in the formal courts. The village court has no official status, but is a recognized forum for dispute resolution at the village level in some areas of Vanuatu. Decisions are not reported; in fact, they are rarely written down. In this case, evidence was given that a village girl, Jenny Hingena, was abducted by Timothy Wai and handed on to Edmond Tari, who raped her. After the incident, a married man from the same village, Headley Tabe, came across Jenny and carried her to his house as she could not walk. The village court expressed outrage, not at the rape, but at the fact that the matter had been reported to the police, rather than being left to be dealt with by the local chiefs. Further, the court considered that Headley Tabe was in the wrong as he had carried the victim and it was *tabu* for a married man to carry a woman, even if she was dead or unconscious. The village court imposed the following penalties:

Edmond Tari:

- to give 1 pig to victim's father
- to give 1 pig to his wife
- to pay 1,000 vatu to Council of Chiefs

98. For example, *Teitinnong v. Ariong*, [1987] LRC (Const) 517, where the right to freedom of movement was held to be unenforceable against village chiefs; but see contra, for example, *In Re the Infant P*, [1980-88] 1 Van LR 130, where the rights in c. 2, part 1 were held to be enforceable against individuals; *Tuivaiti v. Sila*, [1980-93] WSLR 19 at 21, where the right to freedom of religion, contained in art. 11, was held to be enforceable against village chiefs; *Mauga v. Leituala*, (9 December 2005) Samoa (C.A.) [unreported], where the right to freedom of movement was held to be enforceable against village chiefs. See further J. Corrin Care, *et al.*, *Introduction to South Pacific Law* (London: Cavendish, 1999) at 86. In Solomon Islands, the Court of Appeal held that the rights provision in question did not apply horizontally, but conceded that this might not always be the case and that it would depend on the nature of the right: *Ulufa'alu (Prime Minister) v. Governor-General*, [2005] 1 LRC 698 [*Ulufa'alu*].

99. See further J. Corrin Care, "Horizontal or Vertical Enforcement of Human Rights in the South Pacific" (Paper presented to the Australasian Law Teachers Association Conference, July 2006).

100. Haren Hala Village Court, North Pentecost, Vanuatu, 1989 [unreported]. Although this case was not reported, the facts were recorded in writing, probably for the purpose of the criminal proceedings. They were passed on to the author by a private practitioner in Vanuatu. The facts of this case are also referred to in J. Corrin Care, "Reconciling Customary Law and Human Rights in Melanesia" (2003) 4 *Hibernian L.J.* 53 at 72-73 [Corrin Care, "Reconciling"].

Timothy Wai:

- to give 1 pig to victim's father
- to pay 1,000 vatu to Council of Chiefs

Headley Tabe:

- to give 1 pig to victim's father
- to pay 1,000 vatu to Council of Chiefs

Jenny Hingena:

- to give 1 pig to Edmond Tari's wife
- to give 1 pig to Headley's wife
- to pay 1,000 vatu to Council of Chiefs

There is no appeal from the village court, but neither do its decisions bar applications to the formal, introduced courts. In this case, the matter does not appear to have been pursued in the formal courts. The chiefs' expression of outrage that the matter was reported to the police by an unknown person, rather than being left to be dealt with by them, suggests a reason for this. In contrast to Miriam Willingal, who was living outside her customary community, Jenny Hingena may not have had the opportunity to complain or anyone to complain to either inside or outside the community. For the victim to complain to anyone outside the customary system would no doubt be seen as an insult to the chiefs and could lead to ostracism from the community. Further, the victim would be unlikely to find support amongst her relatives. Although the victim's penalty was equal to the rapist's, her father, as her traditional representative, would probably be satisfied with the chiefs' decision. After fulfilling his daughter's obligation to deliver a total of two pigs and paying 1,000 vatu (currently about A\$12.50) to the Council of Chiefs, he would still be in credit to the extent of one pig.

Whilst this case may appear discriminatory when viewed from an outsider's perspective, it is important to consider it in context. Village chiefs' decisions are driven by community interests rather than individual rights. They are more concerned with restoring harmony in the village than with benefitting any individual. Had the case been pursued in the formal system, these considerations would be unlikely to have been given much weight. Under the *Constitution of Vanuatu*, customary law is not exempted from the right to protection from discrimination.¹⁰¹ In other cases, discussed below under the heading of freedom of movement, the formal courts have made it clear that customary laws or practices that breach human rights will not be upheld.

101. 1980, art. 5. See text accompanying notes 32 to 34 above.

Tanavulu and Tanavulu v. Tanavulu and SINPF

In *Tanavulu and Tanavulu v. Tanavulu and SINPF*¹⁰² the High Court was called on to interpret *Solomon Islands National Provident Fund Act*.¹⁰³ This *Act* provides for the establishment of a national provident fund (“SINPF”), which operates as a self-funded pension fund. Funds are derived from compulsory contributions to the fund by employers and employees, which are invested and paid out to the employee on turning 50 or on retirement. It also provides that a member of the fund may nominate a person to whom they wish their entitlement to be paid in the event of the member’s death. On marriage, any existing nomination is void.¹⁰⁴ Where a member of SINPF dies without a valid nomination in place, a unique section of the *Act* provides that distribution is to be “in accordance with the custom of the member to the children, spouse and other persons entitled thereto in accordance with that custom.”¹⁰⁵ In this case, the deceased had nominated his brother and nephew as beneficiaries when he joined the fund. When he married the following year, that nomination became void. After he died, the deceased’s father applied for and was paid the amount held in the fund (\$11,079) on the basis of custom in Babatana, South Choiseul. The father deposited \$4,000 in an interest-bearing deposit account in the name of the deceased’s son. He paid \$2,000 each to the deceased’s brother and nephew. He used \$3,000 to meet funeral expenses and \$79 for his own purposes. The deceased’s widow, who had received nothing, challenged this distribution in the High Court, seeking a declaration that she and her infant child were entitled to one third of the money each. She also alleged that SINPF had been negligent in carrying out their duties under the *Act*.

At trial, most of the argument concentrated on what was meant by “children, spouse and other persons.”¹⁰⁶ Did it mean that the “children and spouse” were always entitled to something or that this would depend on custom? The court preferred the latter view. As to who was entitled in custom, this depended on where the parties were from, as different customary laws applied in different parts of the country. Under Babatana

102. (12 January 1998), Solomon Islands Civ. Cas. 185/1995 (H.C.) [unreported]. Aspects of this decision are also discussed in K. Brown & J. Corrin Care, “More on Democratic Fundamentals in Solomon Islands: *Minister for Provincial Government v. Guadalcanal Provincial Assembly*” (2001) 32:3 V.U.W.L.R. 653 at 668-670 [Brown & Care, “More on Democratic Fundamentals”]; and J. Corrin Care & J. Zorn, “Legislating for the Application of Customary Law in Solomon Islands” (2005) *Common Law World Rev.* 144 at 155-158. See also the Solomon Islands case of *Minister for Provincial Government v. Guadalcanal Provincial Assembly*, *supra* note 34, where the Court of Appeal refused to declare an act which discriminated against women unconstitutional, discussed in Brown & Corrin Care, “More on Democratic Fundamentals”, *ibid*.

103. Cap. 109.

104. Section 32.

105. Section 33(c).

106. *Ibid*.

custom, it was not disputed that inheritance in the deceased's tribe was patrilineal, but the witnesses differed as to whether the deceased's father had complete discretion to distribute the estate or whether the money should be paid to the deceased's son, with an unspecified share to be paid as of right to the mother. In this respect, the widow was no doubt at a disadvantage, as the patriarchal system would discourage members of the community from giving evidence supporting an interpretation of customary law that restricted male domination. The court preferred the evidence of the deceased's father and his witnesses, according to which the deceased's father was entitled to distribute the proceeds of the fund to relatives as he saw fit. It was held that the children and spouse had no automatic right to payment, as they would have done if the fund had formed part of the deceased's estate on intestacy. The deceased's father had the discretion to pay some amount of the inheritance to the widow but, in some circumstances, he was entitled to leave her out of the distribution altogether. One such circumstance was where she had left the father's house, as she had done here.¹⁰⁷

Of more interest to the discussion in this paper is the argument advanced on behalf of the widow that the rules of customary law were discriminatory. Section 15 of the *Constitution* provides protection from discrimination, and "law" which offends against it is unconstitutional. However, the judge found that the word "law" in section 15(1) did not include customary law. His basis for this finding was that the words "no law shall" in section 15(1) were referring to a law to be made in the future. As customary law was "evolving or was already pertaining [by which it is assumed His Lordship meant "existing"] at the time of the adoption of the Constitution" it was not such a law. According to this startling decision, no customary law, no matter how discriminatory, would be outlawed by section 15. However, it is open to serious question. Whilst the word "shall" may generally be used to denote indefinite future time, legislative drafters employ it to denote an obligation.¹⁰⁸ It is fairly common drafting practice to use the negative phrase "no law shall" to mean that "a law must not."

Awich J. went on to say that even if sub-section (1) had included customary law, sections 15(5)(c) and 15(5)(d) would excuse discriminatory law in a case such as this. Section 15(5)(c) exempts certain personal law, including law "with respect to devolution of property on death," from the

107. In some areas the wife is expected to remain with the husband's family after his death, if there are children of the marriage. If she leaves, the bride price may have to be returned (see further *To'ofilu v. Oimae* (19 June 1997), Solomon Islands, Civ. App. 5/1996 (H.C.) [unreported]), and she runs the risk of losing all rights. The attitude that the wife is expected to live with the husband's family during his lifetime has prevailed outside the customary sphere in Fiji Islands, where a wife was refused a divorce on the grounds of constructive desertion and cruelty when she left the matrimonial home as she could not put up with her mother-in-law's presence: *Begum v. Hussein*, Fiji Islands (Suva), Civ. Cas. 198/1989 (Magistrates' Court) [unreported].

108. See further G.C. Thornton, *Legislative Drafting*, 3rd ed. (London: Butterworths, 1987) at 90.

protection against discrimination. Again, the reasoning is flawed. This sub-section would not cover the distribution of funds under the *National Provident Fund Act*, as the *Act* removes entitlements from the fund from a deceased's estate for testamentary purposes. In any event, it is stated to apply only to persons falling within the description in the previous paragraph of the sub-section. Paragraph (b) clearly refers to "persons who are not citizens of Solomon Islands." Thus, the exemption in paragraph (c) only applies to non-citizens. Section 15(5)(d) is a different matter. That sub-section exempts from the protection from discrimination any laws making provision "for the application of customary law." It is arguable that s. 15(5)(d) only provides a shield for a law designed specifically to govern the application of customary law, that is, a law passed pursuant to s. 75 of the *Constitution*, such as the *Customs Recognition Act 2000*, which is discussed below.¹⁰⁹

On appeal, the Court of Appeal agreed with the trial judge's conclusion that the words, "children, spouse and other persons" conferred no automatic right on children and spouses, but merely listed those to be taken into consideration.¹¹⁰ Whether or not they received a share was "dependent upon custom." On the conflict between customary law and protection from discrimination, the Court of Appeal limited itself to upholding the trial judge's decision on the basis that section 15(5) recognized that the application of customary law might have certain discriminatory consequences. The fact that the Court of Appeal referred specifically to s. 15(5) and not to s. 15(1) suggests that it does not endorse Awich J.'s interpretation of "law" in s. 15(1). However, it is not clear whether the court agreed with him as to the effect of both ss. 15(c) and 15(d) or only one of them and, if so, which. It seems most likely that the Court was referring to s. 15(5)(d); as explained above, the exemption in s. 15(c) was inapplicable in this case. Given the importance of this point in resolving conflicts between the patriarchal norms of customary law and the egalitarian spirit of human rights, it is unfortunate that a definitive judgment was not given. The practical effect of the conservative line taken in this case is to perpetuate discrimination founded on customary law and practice.¹¹¹

A new, federal constitution is currently under discussion in Solomon Islands.¹¹² The Rights Chapter takes a more robust approach to women's rights. Equality and protection from discrimination are separately guaranteed

109. This *Act* makes provision for proving customary law before a court. It has not yet been brought into force.

110. (n.d.), Solomon Islands, Civ. App. 3/1998 (C.A.) [unreported].

111. See also *Minister for Provincial Government v. Guadalcanal Provincial Assembly* (11 July 1997), Solomon Islands, Civ. App. 3/1997 (C.A.) [unreported]. See text accompanying note 34 above.

112. *Federal Constitution of Solomon Islands Bill 2004*. The *Bill* was drafted as a response to demands for localization, which was one of the causes of civil unrest between 1998 and 2003.

in Chapter Four¹¹³ and the exceptions to the anti-discrimination provision, appearing in the current *Constitution*, have disappeared. However, it is provided that a “[f]ederal law may provide for areas of legitimate exception to this general freedom.”¹¹⁴ No concessions are made to the circumstances of Solomon Islands and customary law is specifically stated not to apply if it is inconsistent with the *Constitution*, a state constitution or an act of federal or state parliament.¹¹⁵ This clearly indicates that rights to equality and freedom from discrimination will prevail over customary law. However, this may conflict with the mandate to promote rights of cultural and linguistic communities, which is also constitutionally enshrined.¹¹⁶ There is no provision for resolving such conflicts, which will again leave matters in the hands of the judiciary, if the *Bill* becomes law in its present form.

Freedom of Movement

Both cases in this section were decided in the formal courts of Vanuatu, where customary law is not exempt from human rights provisions. This factor is reflected in the courts’ decisions, which both uphold the right to freedom of movement.

Public Prosecutor v. Walter Kota

In *Public Prosecutor v. Walter Kota*¹¹⁷ the accused were charged with kidnapping and inciting the offence of kidnapping.¹¹⁸ The first accused and his wife were both from Tanna, but lived in Port Vila. On the basis of serious matrimonial problems between them, two paramount chiefs, visiting from Tanna, called a meeting to try to resolve the problem. At this meeting, it was resolved to ask the police for assistance in securing the wife’s presence before the chiefs. The police and one of the defendants went to her house and forced her to go to the meeting. At the meeting, the chiefs suggested reconciliation, which she refused. The chiefs then pronounced that she must return to Tanna. She was placed on a boat and taken from Port Vila to Tanna, where she attempted to report the matter to the police. After a

113. *Ibid.*, c. 4, part I, clauses 25 and 29(1). Part IV of Chapter 4 of the *Bill* deals specifically with the rights of women.

114. *Ibid.*, clause 29(3). For an example of such an exception see clause 59(3), discussed below.

115. *Ibid.*, clause 9(2).

116. *Ibid.*, clauses 44 and 53(2).

117. [1989-94] 2 Van LR 661. This case is also discussed in Corrin Care, “Conflict Between Customary Law and Human Rights”, *supra* note 3; J. Corrin Care, “Reconciling”, *supra* note 100 at 73 to 74.

118. *Penal Code*, Cap. 135 (Vanuatu), ss. 35 and 105(b).

week, she returned to Port Vila and consulted the Women Against Violence Against Women's Association.

Four of the accused were convicted of incitement and fined 40,000 vatu (about A\$500) each and given a suspended prison sentence of one year. One accused was convicted of the actual kidnapping and fined 40,000 vatu and given a suspended prison sentence of two and a half years. Downing J., an expatriate judge, made the following comments on the relationship between custom on the one hand and equality and the right to freedom from movement on the other:

I think that the Chiefs must realise that any powers they wish to exercise in Custom is [sic] subject to the Constitution of the Republic of Vanuatu, and also subject to the Statutory Law of Vanuatu. Article 5 of the Constitution makes it quite clear that men are to be treated the same as women, and women to be treated the same as men. All people in Vanuatu are equal and whilst the Custom may have been that women were to be treated or could be treated a property, and could be directed to do things by men, whether those men be their husbands or chiefs, they cannot be discriminated against under the Constitution. A significant number of cases that come before this Court are as a direct result of the failure to treat women equally, and therefore in so treating women as property [is] a substantial breach of the Constitution. The Constitution by Article 5(1)(b) provides for the liberty of people. It also by Article 5(1)(i) provides for the freedom of movements Whilst I appreciate in this case that the Chiefs were trying to resolve a problem they did so from a very biased point of view. It was from a man's point of view and not from a woman's point of view.

The wife in this case was obviously better placed to pursue her complaint in that she was living outside her customary community. Whilst the police were not only deaf to her complaints but also accomplices in the contravention of her rights, she eventually gained access to an NGO to assist her in pressing her complaint. Few would disagree that she was treated unfairly in this case. However, there is no discussion of the context in the judgment, other than a cursory reference to the chiefs' motive of trying to resolve a problem. Tanna Island, in the far south of Vanuatu, is a stronghold of custom. The chiefs were no doubt amazed, if not disgusted by the lack of respect accorded to them in the Supreme Court. The decision is unlikely to have changed their attitudes towards women, but rather to have increased their antipathy towards the introduced legal system.

In re the Infant P

*In re the Constitution of the Republic of Vanuatu and the Infant P and her Natural Mother S*¹¹⁹ is a similar type of case, which arose on the island of Santo. The petitioner in that case alleged that her brothers had forced her to allow her sister to adopt her illegitimate child. When she complained they kidnapped her and took her to the family village where she was effectively held captive for nearly six months. The brothers informed the bank which employed her that she had resigned and they paid off her loan from the bank. After she escaped, the petitioner complained to the Commissioner of Police and the Attorney General, but no action was taken. She and the natural father of the child then engaged a lawyer. The Court of Appeal, made up of expatriate judges, commented that, if proved, the actions of the woman's male relatives, namely using threats of force to induce the petitioner to agree to the adoption, false imprisonment, and interference with her employment to the extent of tendering a false resignation purporting to come from her, represented "a gross interference with the fundamental rights of a citizen as detailed in the Constitution, chapter 2, part 1." The matter was remitted to a single judge of the Supreme Court for further evidence to be taken. Unfortunately, the outcome of the hearing is not reported.

This is another example of a case where the victim was living and working outside the village. This economic and social advantage, combined with the support of the child's father, who appears to have been an expatriate, gave her the ability to access the formal court system.

As these cases demonstrate, male attitudes in the region are often uninformed by the constitutions. In countries where customary law is shielded from the right to freedom from discrimination, such as Solomon Islands, patriarchal practices have been left intact. In other countries, formal courts have upheld the human rights of women. In Papua New Guinea, the caution required in doing so has been emphasized, whilst in Vanuatu, a less conciliatory approach has been taken.¹²⁰ A robust approach to the enforcement of human rights in a country where they conflict with the culture and values of the majority of the population runs the risk of reducing respect for the *Constitution* and for introduced law and institutions generally. This has implications for the rule of law, which, as pointed out at the beginning of this article, is already in a precarious position.

119. [1980-88] 1 Van LR 130 [*In re the Infant P*]. See also *Public Prosecutor v. Silas*, [1993] 2 Van LR 659, where a man was convicted of abducting his sister and forcing her to go to live with another man, which was an offence under the *Penal Code* (Cap. 135) but permissible under customary law.

120. See also *Noel v. Toto* (19 April 1994), Civ. Cas., 18/1994 [unreported], where Kent J. held that the right to freedom from discrimination prevailed over customary land law which favoured men.

V THE FUTURE

At independence South Pacific countries set a high standard for protection of human rights, incorporating Bills of Rights into their constitutions well ahead of the standard set by the departing colonizers in their home countries.¹²¹ However, in the intervening years cause for complacency has dwindled. The cases discussed above highlight the gulf between the rhetoric of constitutions and conventions and the cultural realities. Constitutional guarantees and accession to international law have not been followed through to bring about tangible cultural change. In fact, the extent to which they are capable of doing so is limited. Written laws may signal an intention and serve as a symbolic affirmation of human rights, but it takes more than domestic or international law to change deeply imbedded structures and attitudes.

As explained above, in some countries, the efficacy of the human rights provisions has been circumscribed by dispensation in favour of customary law. Further, some courts have interpreted the provisions governing discrimination on the grounds of gender narrowly, even where no such restriction is required.¹²²

There are also questions of scope and accessibility.¹²³ As discussed above, in relation to *In Re Miriam Willingal*,¹²⁴ in many countries of the region, rights are expressed or have been interpreted as enforceable against the state only, rather than against individuals.¹²⁵ Even where a wider scope has been accorded to such laws, they operate in the public, jural domain, not in the domestic sphere where the impact of patriarchal values is felt on a daily basis. Cases that have come before the courts in the region have often done so only because an outside agency, such as the Women Against Violence Against Women's Association in *Public Prosecutor v. Walter Kota*¹²⁶ and the Individual and Community Rights Advocacy Forum in the

121. The *Constitution of Australia* contains only a few human rights provisions, which have been read down by the courts. Human Rights in New Zealand were governed by the *Human Rights Commission Act 1977* until the passing of the *Bill of Rights Act 1990*. The United Kingdom was one of the last countries to adopt a Bill of Rights, with the *Human Rights Act 1998*, which took effect from 1 September 2000.

122. See for example *Tanavulu and Tanavulu v. Tanavulu and SINPF* (12 January 1998), Solomon Islands, Civ. Cas. 185/1995 (H.C.) [unreported]; *Tanavulu and Tanavulu v. Tanavulu and SINPF* (n.d.), Solomon Islands, Civ. App. 3/1998 (C.A.) [unreported], discussed above; *Minister for Provincial Government v. Guadalcanal Provincial Assembly*, *supra* note 34.

123. In Vanuatu, lack of access to justice for women has been put down to the following factors: custom and religion; the geographical nature of Vanuatu; lack of legal services; lack of education and awareness of the law; problems with the application and enforcement of the law; problems with the content of the law: A. Jowitt, "Women's Access to Justice in Vanuatu", in *Proceedings of the Legal Developments in the Pacific Island Region Conference* (1999) 11.

124. *Supra* note 72.

125. See for example in *Ulufa'alu (Prime Minister) v. Governor-General*, [2001] 1 LRC 425; and text discussing *Ulufa'alu*, *supra* note 98. See further Corrin Care, *et al.*, *supra* note 97 at 86.

126. [1989-94] 2 Van LR 661.

case of *In Re Miriam Willingal*,¹²⁷ has assisted the woman to initiate action.¹²⁸ There may also be problems of proof for women involved in court proceedings, as they are not in a position to negotiate the application of the customs and traditions most beneficial to them.¹²⁹ Those regarded as knowledgeable in custom are usually older males who are unlikely to give evidence on behalf of a woman who is standing up for herself against her husband or a male relative. Even where a woman obtains judgment in her favour, this may be a pyrrhic victory when she is ostracized by her own community.

The question then is how to find a practical way of advancing towards gender equality, negotiating between the inflexibility of “universal” human rights agendas on the one hand and the barrier of cultural relativism on the other. An approach that has often been taken in the past, both to the issue of reconciling customary law and introduced law generally, and to the more particular issue of accommodating customary law and human rights is to search for a means of integration. This approach ignores the fact that, as discussed at the outset and illustrated by the cases discussed above, the two are based on very different values. The gulf between the foundations of these structures and beliefs may doom any initiative seeking integration to failure. Accordingly, it may be time to approach the dilemma more pragmatically, to admit that the gulf is too wide to bridge and to seek a way of gradually improving women’s status through changing the emphasis of the debate. For example, the language of human rights is currently couched in terms of individual rights, rather than collective rights and duties, which have more resonance in the Pacific.¹³⁰ Some ideas for changing the language of human rights might be drawn from the *Draft Declaration on the Rights of Indigenous Peoples*¹³¹ and, perhaps more importantly, the discussions surrounding it, which are often illuminating.¹³² Initiatives, such as the United Nations Permanent Forum on Indigenous Issues¹³³ are unlikely to achieve

127. *Supra* note 72.

128. The *Constitution of Papua New Guinea 1975* expressly gives *locus standi* to any person or body with an interest in the rule of law, whether personal or not: s. 57.

129. *Beattie Commission Report*, *supra* note 3 at 172-173. See further J. Zorn & J. Corrin Care, *Proving Customary Law in the Common Law Courts of the South Pacific* (U.K.: British Institute of International and Comparative Law, 2002).

130. The emphasis on duties is echoed in the Preamble to the *Constitution of Papua New Guinea 1975* and article 7, *Constitution of Vanuatu 1980*, although those duties are non-justiciable: *Constitution of Vanuatu 1980*, art. 8. On the importance of collective rights and duties in the Pacific, see further B. Narokobi, *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Papua New Guinea: Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific, 1989).

131. UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

132. See e.g. email correspondence from Native Law Centre, online: University of Saskatchewan, Native Law <<http://www.usask.ca/nativelaw/ddir.html>> under the Draft Declaration on the Rights for Indigenous Peoples.

133. Established in 2000 by the Economic and Social Council, UN.

their aim of engaging Indigenous people if discussions are couched in inappropriate and inflexible terms. In any event, such debate may be better conducted within the region, where Pacific people feel at home, rather than in a forum dominated by the pre-existing agenda of the UN.

A related approach might be to renegotiate human rights from a different starting point, perhaps building from a more basic view of what is fundamental, such as the “goods” identified by Finnis: life, health, knowledge, play, friendship, religion and aesthetic experience. According to Finnis, each of these goods is universal in the sense that it governs all human cultures at all times.¹³⁴

It may also assist to increase the options available to women in the formal system, which will give them more negotiating power in the customary system. For example, support in the form of legal advice, mediation or even temporary accommodation from non-government organizations gives women a choice when the customary system is unsatisfactory, which may help to redress the power imbalance and, in the long term, transform social attitudes. This may be less threatening than trying to replace traditional systems altogether. It is also in accord with what would appear to be the intention of the framers of independence constitutions, which is, in the words of Injia J., “the maintenance and advancement of good traditional customs and the discouragement and elimination of bad customs as seen from the eyes of an ordinary modern [citizen].”¹³⁵

One way of approaching this, advocated by Abdullahi An-Na'im, is to initiate internal, cross cultural dialogue on women's status and rights, with a view to challenging discrimination in a way which is more relevant to the particular society in which the dialogue takes place. This, he suggests, will found a deeper consensus and give human rights a cultural legitimacy.¹³⁶ The difficulty with this is of course that it may be difficult for women to get their voices heard in any discourse, when they start from such a disadvantageous position.¹³⁷ Further, many men and women are ignorant about rights and this exacerbates the conflict. For this reason, any plan of action must be accompanied by a program of education for both sexes. Supporting the work of NGOs is a vital part of this process. As Bennett has already pointed out in relation to Africa:¹³⁸

134. J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 23-24.

135. *In Re Miriam Willingal*, *supra* note 72.

136. “Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights” in C. Welch & V. Leary, eds., *Asian Perspectives on Human Rights* (Oxford: Westview Press, 1990) 31.

137. For a useful summary of some of the problems in getting women to speak for themselves, see R. Keesing, “Ta'a geni: Women's Perspectives” in M. Strathern, ed., *Dealing with Inequality* (Cambridge: Cambridge University Press, 1987) 33 at 35.

138. *Human Rights and African Customary Law* (Cape Town: Juta, 1995) at 47.

It is necessary to remember that for many people the constitution is an alien transplant, and without advance publicity, careful education, and a serious attempt to make legal forums more accessible, people at whom the fundamental rights were aimed will be in no position to act on them.

A plan of action must also include steps to provide women with the economic base from which to pursue their rights and obtain equal status at all levels of society.

In August 2004, the Secretariat of the Pacific Community (“SPC”) facilitated the 9th Triennial Conference of Pacific Women with the telling theme of “Gender Equality: Commitment or Tokenism.” The conference reviewed the progress of the Pacific Platform for Action (“PPA”), adopted in 1994, and considered emerging areas of concern for the regional commitment to gender equality. The main outcome appears to have been the adoption of a Revised Pacific Platform for Action (“RPPA”), which regrouped the areas of concern set out in the PPA into four strategic themes.¹³⁹

- Mechanisms to promote advancement of women
- Women’s legal and human rights
- Women’s access to services
- Economic empowerment of women

The RPPA is intended to guide Pacific action from 2005-2015, with triennial reviews by ministers. Unfortunately, taking action to implement changes within these themes is not as easy as rationalizing their grouping. If the forthcoming decade is to be more fruitful than the last, the challenge now is to translate written commitments into reality and to find the resources to address the vast divide between rhetoric and reality.

139. See further 9th Triennial Conference of Pacific Women; 2nd Pacific Ministerial Meeting on Women, 16-20 August 2004, Nadi, Fiji Islands, online: The Secretariat of the Pacific Community Website <<http://www.spc.org.nc/AC/artpwbtriennialoutcomes.htm>>. For an update on progress in meeting the targets set out in the 1995 Beijing Platform for Action, see Report on the 50th Session of the Commission on the Status of Women, online: UN Economic and Social Council <<http://www.un.org/News/Press/docs/2006/wom1539.doc.htm>>.

A People Without Law

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I	INTRODUCTION	84
II	JOHN MARSHALL'S GHOST	87
III	THE FRIENDS OF THE INDIAN	93
	Harsha	95
	Pancoast	97
	Thayer and the Thayer Bill	97
	Thayer Brings in the ABA	100
	Abbott	101
	Canfield	101
IV	THE FRIENDS OF THE INDIAN'S LEGACY	102
	Depredations Laws and the <i>Jaeger</i> Case	104
	New York	108
	The Supreme Court	110
	The 1946 <i>Indian Claims Act</i>	112
	Federal Question Jurisdiction	116
V	CONCLUSION	117

American Indian nations seldom brought lawsuits to enforce their rights prior to the 1960s but have often done so since. Why were so few cases filed until recently? In addition to such obvious barriers as poverty, racial hostility, and smothering federal control, legal and popular literature raised doubt about whether Native American tribes had legal capacity to sue. Our article examines the grounds for this view, from its beginning in 1830 until its last gasp in 1968.

The incapacity question was one of the grounds for tracts in pamphlets and journals published in the 1880s by the self-proclaimed Friends of the

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Indian, a group of eastern reformers preaching assimilation as the cure-all for Native American grievances. Led by Harvard professor James Bradley Thayer, the Friends provided strong support for the ill-fated allotment policy that undermined tribal societies for over 70 years. The issue also became entangled in the jurisdiction of the Court of Claims over Indian treaty claims and over the notorious “Indian depredation” cases.

We conclude that the incapacity claim never had legal validity but at times suited the political agenda of powerful men and was the subject of careless and ignorant dicta. When the issue reached the U.S. Supreme Court, it was consistently rejected without a dissenting vote. We could not determine whether the capacity error was a serious impediment to Indian claims; proof of a negative is always difficult. But in any case, other barriers were more than sufficient to deny justice to Native American claims.

I INTRODUCTION

Since the late 1960s, American Indian nations have often sued to enforce rights under federal law. The “proliferation” of Native American rights law has made it a major specialty in the legal profession.¹ For more than a century before, tribes had pursued damages claims against the federal government.² But “claims cases” were based on specific statutes authorizing suit, which limited the remedy to money damages in moderate amounts. Other forms of legal actions by tribes were rare. Why?

The question has obvious importance. Delay in seeking legal redress has many negative consequences for those whose rights lie dormant. The costs to Indian nations of slow recognition of their property claims are manifest.³ A recent Supreme Court decision increased the detriment, holding that a tribe’s effort to revive tribal sovereignty was barred by the equitable defences of laches, acquiescence and impossibility.⁴ A lower court then applied the laches defence to defeat a land claim.⁵

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1. See David H. Getches, Charles F. Wilkinson & Robert A. Williams Jr., *Cases and Materials on Federal Indian Law*, 5th ed. (St. Paul: West, 2005) at 1.
 2. See Nell Jessup Newton *et al.*, *Cohen’s Handbook of Federal Indian Law* (Newark: LexisNexis Matthew Bender, 2005) at 442-446 [Newton *et al.*, *Cohen’s Handbook*].
 3. See text accompanying notes 196-217.
 4. *Sherrill (City of) v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) [*Sherrill*]. Until this decision, the modern revival of tribal sovereignty had fared well despite the long passage of time. See Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven & London: Yale University Press, 1987).
 5. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2021 at 2022 (2006) [*Cayuga*]. In 1985, the Supreme Court had rejected a laches defence interposed against a tribe’s claim to land taken in violation of federal law. *Oneida (County of) v. Oneida Indian Nation of New York State*, 470 U.S. 226 at 244-245 (1985). The *Cayuga* court interpreted the 2005 *Sherrill* decision, *ibid.*, to restrict the 1985 holding.

We came to the question of why there were few tribal lawsuits with several assumptions and points of prior knowledge. Tribes were poor, and the means to sue have become widely available only in modern times. Tribal leaders were demoralized by 19th century conquests and lacked knowledge of the legal system. Racial hostility near Indian communities led to assumptions that courts would be inhospitable to Native American claims. Indian law was (and is) inordinately complex. Few lawyers understood much about the subject, which was not organized until 1941.⁶ Tribal rights depended on treaties with the United States, but Congress withheld Indian treaty claims from the general jurisdiction of the Court of Claims until 1946.⁷ When tribes did sue, they had some successes but suffered discouraging failures, notably in *Lone Wolf*.⁸ That decision and others gave federal authorities almost unrestricted power over tribes and their land and endorsed the 80-year federal policy of doing away with tribal governments.⁹ In some instances, there were difficulties deciding on the identity of a party plaintiff claiming to be an Indian nation.¹⁰ And, of course, resort to courts was less common in American society generally before the 1960s.

Those reasons are powerful and important, but another barrier appears in legal and political literature: the view that Indian tribes (and at times individuals) lacked legal capacity to sue, that tribes and Indians were not legal entities or persons able to bring suit. When Felix Cohen and his staff at Interior compiled the *Handbook of Federal Indian Law*, tribal capacity was prominent enough in the records and literature that the subject commanded a distinct section in their book.¹¹ The Supreme Court had decided the merits of cases brought by tribes in which the issue of capacity to sue was not raised, and the Court had expressly held that the Pueblo tribes had capacity to sue.¹² New York state courts had held that tribes lacked legal capacity,¹³ but no other state or federal court had done so. Cohen acknowledged that the Pueblo cases could have been construed to apply only to those tribes. For other tribes, he noted the adverse dictum in the *Jaeger* case, which “may be seriously questioned,” but “in the absence of any clear holding, judgment

6. See Felix S. Cohen, *Handbook of Federal Indian Law* (Washington: U.S. Government Printing Office, 1941) [Cohen, *Handbook*]. See also *infra* notes 11-15 and accompanying text.

7. See also text accompanying notes 134-137, 196-217.

8. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) [*Lone Wolf*] (sustaining power of Congress to override treaty and convert tribal land into individual holdings). For criticisms, see “Symposium: *Lone Wolf v. Hitchcock*: One Hundred Years Later” (2002) 38 *Tulsa L. Rev.* 1.

9. Newton *et al.*, *Cohen’s Handbook*, *supra* note 2 at 75-84, 185.

10. *Ibid.* at 134-137. See also text accompanying notes 165-170, 215, 224.

11. Cohen, *Handbook*, *supra* note 6 at 283-285. See also the *Handbook’s* section titled “Corporate Capacity” (*ibid.* at 277-279).

12. See text accompanying notes 185-195.

13. See text accompanying notes 170-183.

must be reserved.”¹⁴ Cohen’s own view surely favoured tribal capacity to sue, but he cautiously said that the question was not settled. He also pointed out that some tribal issues had been litigated in suits filed by tribal members in a representative capacity.¹⁵

We think the issue was clear enough in favour of tribal capacity to sue that Cohen was too cautious. In any case, events between 1946 and 1968 settled the issue conclusively in favour of tribal capacity. Tribal plaintiffs filed a number of lawsuits in which the courts reached the merits unimpeded by any doubt that tribes might lack capacity to sue.¹⁶ In 1946, Congress gave tribes the same general right to sue the United States for damages as other claimants.¹⁷ In 1966, Congress expressly authorized tribes to bring federal question actions in federal district courts without regard to the amount in controversy.¹⁸ As there has never been any question about the power of Congress to authorize tribes to sue, this removed any remaining doubt in federal courts, and the New York courts had reformed.¹⁹ Two years later, the Supreme Court expressly rejected the argument that individual Indian beneficiaries could not sue to protect property held in trust for them by the United States.²⁰ Thus, by the time a new edition of the *Handbook* was published in 1982, the issue had become historical.²¹

Cohen’s 1941 caution reflected statements in a few legal opinions and in articles in popular and scholarly journals in the late 19th and early 20th centuries.²² These sources are the focus of our inquiry. Why and to what

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14. Cohen, *Handbook*, *supra* note 6 at 284-285, 285 n.169, citing *Jaeger v. United States*, 27 Ct. Cl. 278 (1892) [*Jaeger*]. *Jaeger* is discussed below in the text accompanying notes 144-165.
 15. Cohen, *Handbook*, *ibid.* at 285. Lawyers filing these suits invoked the rule of equity that allowed unincorporated associations such as partnerships, which could not sue or be sued at law, to sue and be sued on certain equitable claims. See Edward H. Warren, *Corporate Advantages Without Incorporation* (New York: Baker, Voorhis & Co., 1929) at 42-43. See also text accompanying note 170.
 16. See e.g. *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959); *Oglala Sioux Tribe of the Pine Ridge Reservation v. Barta*, 146 F.Supp. 917 (D. S. Dak. 1956).
 17. See text accompanying notes 196-217. Cohen’s treatise was revised by staff at the Interior Department and published as a revised edition in 1958. This edition copied much of the 1941 *Handbook*, changing only parts that were ideologically out of favour in the Department. The 1946 statute was inserted, but the general section on tribal capacity to sue was not part of the impetus for change and was retained almost verbatim. U.S. Department of the Interior, *Federal Indian Law* (Washington: U.S. Government Printing Office, 1958) at 489-495.
 18. See text accompanying notes 221-222.
 19. See *infra* note 183 and accompanying text.
 20. *Poafpybitty v. Skelley Oil*, 390 U.S. 365 (1968). See text accompanying note 195.
 21. See Rennard Strickland *et al.*, *Felix S. Cohen’s Handbook of Federal Indian Law* (Charlottesville: Michie/Bobbs-Merrill, 1982) at 325, 527. In *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003), the Court held that an Indian tribe could not maintain an action under 42 U.S.C. § 1983 (2000), but this was because of the tribe’s sovereign status, not for lack of capacity to sue.
 22. The only source cited was *Jaeger*, *supra* note 14. See Cohen, *Handbook*, *supra* note 6 at 284-285. But Cohen and his staff were surely aware of most or all of the other sources discussed in this paper.

extent did the legal community hold the view, unsupported by authoritative legal holding, that Indian tribes could not bring suit in any court? When did this viewpoint change? And how has it affected the course of Indian law?

In part II, we review the Supreme Court's famous decision in *Cherokee Nation v. Georgia*.²³ In part III, we discuss abundant nonjudicial opinions of the late 19th century arguing that Indian country was lawless because Indians and tribes had no right to sue in federal or state courts. In part IV, we examine the influence of those opinions on the law and bring the subject forward to its conclusion in the 1960s.

II JOHN MARSHALL'S GHOST

Claims cases aside, there were many reported legal decisions prior to 1880 of lawsuits brought by individual plaintiffs identified as Indian, but tribal plaintiffs appeared in only a handful of cases in a few locations.²⁴ Only one tribal suit is widely known, *Cherokee Nation v. Georgia*, the Cherokee Nation's failed attempt to invoke the Supreme Court's original jurisdiction.²⁵

The bearing of *Cherokee Nation* on capacity of tribes to sue confronts complexities and ambiguities in the Court's several opinions in that case, none of which commanded a majority of the justices. In the late 1820s, Georgia passed statutes attempting to destroy Cherokee sovereignty and control Cherokee land. After the Cherokee Nation's appeals to Congress failed, the Nation's counsel, former Attorney General William Wirt, looked for ways to seek legal protection against the state.²⁶ He faced many of the intricacies of the federal legal system, most importantly, where to file suit, how to overcome Georgia's sovereign immunity, and how to frame the case to overcome a political question defence.

The Cherokee Nation had its own courts,²⁷ but haling Georgia before them would have been entirely futile. Georgia's state courts were theoretically open to an action to enforce the Cherokee treaties against the state. There the Cherokees expected overwhelming hostility that would

23. 30 U.S. (5 Pet.) 1 (1831) [*Cherokee Nation*].

24. All reported 19th century cases were brought by the Five Tribes before and after their removal from the southeast to Indian Territory, e.g. *Cherokee Nation, ibid.*; or by New York tribes, e.g. *St. Regis Indians v. Drum*, 19 Johns. 127 (1821); or by Pueblo tribes in New Mexico, e.g. *Victor de la O v. Pueblo of Acoma*, 1 N.M. 226 (1857). See also colonial cases described in Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950). On the Five Tribes, see Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press, 1972). For an example of an individual case, see *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856).

25. *Cherokee Nation, ibid.*

26. See Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality" (1969) 21 *Stan. L. Rev.* 500 at 503-508.

27. See *supra* note 23 at 6.

translate into impossible legal obstacles. Wirt feared that the Georgia courts would simply refuse to enter a plea, which would bar review by the U.S. Supreme Court.²⁸ On the point of our inquiry, the Georgia courts could have held that the Cherokees lacked capacity to sue, normally a question of state law not reviewable by the Supreme Court.²⁹ And Georgia's sovereign immunity would have been a barrier.³⁰

Wirt seriously considered two courses of action—filing suit against state officers in the Georgia federal circuit court with the Cherokees' principal chief as plaintiff in a representative capacity, and the bold and daring choice of an original bill for injunction filed in the Supreme Court in the name of the Cherokee Nation.³¹ Regarding the first, suing state officers would have avoided an 11th amendment (sovereign immunity) defence under governing precedents.³² But in 1830, the only general civil jurisdiction of lower federal courts was based on diversity of citizenship.³³ The chief was not a citizen of any state. The plan was to claim he was a citizen of a foreign state.³⁴

The hard question was whether the courts would accept the claim that the Cherokee Nation was a foreign state, which was also the crucial question for an original bill.³⁵ So Wirt decided to file in the Supreme Court. Filing an original bill affected the choice of parties defendant. Article III expressly authorizes original jurisdiction in all "Cases ... in which a State shall be a Party,"³⁶ so Georgia qualified, and her officers did not. To avoid a political question defence, the case was to be framed as one to enforce the Cherokee treaties, relying on the Supreme Court's previous decisions allowing direct enforcement of foreign treaties.³⁷

The remaining difficulty was Georgia's sovereign immunity. The 11th amendment expressly bars only diversity cases, so it could have been read to

28. See John P. Kennedy, *Memoirs of William Wirt* (Philadelphia: Lea & Blanchard, 1849) vol. 2 at 294.

29. See e.g. *Onondaga Nation v. Thacher*, 189 U.S. 306 (1903).

30. See *Printup v. Cherokee Railroad*, 45 Ga. 365 (1872); *Georgia Military Institute v. Simpson*, 31 Ga. 273 (1860).

31. See Kennedy, *supra* note 28 at 294-295; Burke, *supra* note 26 at 510.

32. *Georgia (Governor) v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). The same would be true today. See John E. Nowak & Ronald D. Rotunda, *Constitutional Law*, 7th ed. (St. Paul: Thomson/West, 2004) at 52-56.

33. See Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System*, 4th ed. (Brooklyn: Foundation Press, 1996) at 29-33. Federal diversity jurisdiction also required that a minimum dollar amount be in controversy, \$500 at the time of the Cherokee case. *Ibid.* The case surely met that threshold.

34. See Kennedy, *supra* note 28 at 294.

35. *Ibid.* See also *Karrahoo v. Adams*, 14 F. Cas. 134 (C.C.D. Kans. 1870) (rejecting an Indian's claim to be a citizen of a foreign state, relying on *Cherokee Nation*).

36. U.S. Const. art. III, § 2, cl. 2.

37. See e.g. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). On this subject, American constitutional law departed from English law, which did not allow suit on a treaty absent an enabling act of Parliament. See *Halsbury's Laws of England*, 4th ed. reissue, vol. 8 (London: Butterworths, 1996) at 221, 466-469.

allow all others. If so, it would allow federal question jurisdiction over, in relevant part, “Cases ... arising under ... Treaties.”³⁸ It was clear that the Court had appellate jurisdiction over claims by any plaintiff based on treaties.³⁹ But Wirt did not assert federal question jurisdiction. Rather, his sole claim was that the Cherokee Nation constituted a foreign state as the term is used in Article III’s definition of the judicial power to include “Controversies ... between a State ... and foreign States.” The assumption was that this clause allowed suit by a foreign state to override Georgia’s immunity, while suit by a plaintiff not identified in Article III would not. The theory was explicitly stated in Justice Johnson’s separate opinion:

It is not enough, in order to come before this court for relief, that a case of injury, or of cause to apprehend injury, should be made out. Besides having a cause of action, the complainant must bring himself within that description of parties, who alone are permitted, under the constitution, to bring an original suit to this court.

It is essential to such suit that a state of this union should be a party; so says the second member of the second section of the third article of the constitution: the other party must, under the control of the eleventh amendment, be another state of the union, or a foreign state. In this case, the averment is, that the complainant is a foreign state.⁴⁰

In other words, it was assumed that to invoke the Court’s original jurisdiction against a state of the union, the controversy must be one of those enumerated in Article III’s definition of the judicial power between a state and another named party. Justice Johnson’s analysis eventually proved half right. The Court in time agreed that plaintiffs not identified in the “controversies” part of Article III’s definition of the judicial power were barred from suit against a non-consenting state.⁴¹ But the Court held that suits by foreign states were barred as well.⁴² Under current law, the bill would be dismissed without any need to decide whether the Cherokee Nation were a foreign state.

The Court famously held that the Cherokee Nation was not an Article III foreign state, so the Court lacked jurisdiction. What bearing had this holding on the question of the Cherokees’ capacity to sue? In legal theory regarding the scope of a holding for purposes of *stare decisis*, the answer is plainly

38. U.S. Const. art. III, § 2, cl. 1.

39. *Martin v. Hunter’s Lessee*, *supra* note 37.

40. *Supra* note 23 at 21. See also the dissenting opinion of Thompson J., *ibid.* at 52: “The controversy in the present case is alleged to be between a foreign state, and one of the states of the union; and does not, therefore, come within the eleventh amendment of the constitution.”

41. *Hans v. Louisiana*, 134 U.S. 1 (1890).

42. *Monaco (Principality of) v. Mississippi*, 292 U.S. 313 (1934). Suits by Indian nations are also barred. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Only suits by the United States or a sister state override state immunity. See Nowak & Rotunda, *supra* note 32 at 51.

none. But dicta and implications in Supreme Court opinions cast long shadows outside strict theory, and these were abundant in the *Cherokee Nation* opinions.

Most observers begin and end their analysis of *Cherokee Nation* with Chief Justice Marshall's opinion, called the opinion of the Court. In modern parlance it would be labelled the opinion stating the judgment of the Court.⁴³ While analyzing whether the Cherokee Nation were an Article III foreign state, Marshall gave implications both ways on the capacity to sue question. His negative statements have had more attention. Without any mention of the 11th amendment (probably because he did not want to forecast future decisions about it), he stated:

At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.

The mere question of right might perhaps be decided by this court in a proper case with proper parties.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.⁴⁴

The Chief Justice twice stated the scope of his opinion to be "federal courts," suggesting that tribes were barred from resort to federal courts at any level. In the final paragraph, he limited the judgment to "this ... tribunal." Based primarily on the quoted parts of Marshall's opinion, a leading Indian law scholar concluded that "Indian tribes generally could not

43. The 1830 Court had seven members, so on the face of the reports, Marshall wrote for a plurality of three. But there are collateral reports that Justice Duvall was absent from the case, so that Marshall's opinion was joined only by Justice M'Lean. See G. Edward White, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-1835*, vols. 3-4 (New York: Oxford University Press, 1991) at 325, 724.

44. *Supra* note 23 at 18-20.

directly enforce their rights in American courts until the last third of the twentieth century.”⁴⁵

Can the opinion of the Chief Justice be read to imply that tribes lacked capacity to sue? It is more likely that he had in mind the extant limits on jurisdiction of the lower federal courts, particularly the glaring omission of Indians from diversity jurisdiction.⁴⁶ If so, his opinion on this point became largely obsolete in 1875, when Congress opened federal district courts to all federal question cases when a minimum dollar amount was in controversy.⁴⁷ And, of course, his opinion had no bearing on the issue of capacity to sue in state courts.

Another part of Marshall’s opinion with possible implications for tribal capacity to sue was his famous characterization of tribes as “domestic dependent nations ... in a state of pupilage ... [whose] relation to the United States resembles that of a ward to his guardian.”⁴⁸ In later years, when Marshall’s guardianship analogy was to a significant extent made operational, this gave rise to the claim that tribes’ and Indians’ “wardship” precluded their capacity to sue.⁴⁹ Only the United States as their guardian could sue to enforce their rights, and when the federal government was the alleged wrongdoer, they had no rights unless Congress explicitly conferred them. When this claim was made in defence to a tribal or Indian lawsuit, it was consistently rejected.⁵⁰ Its one reported judicial recognition was dictum in a case in which a tribe was a defendant.⁵¹

Marshall’s opinion also included statements that favoured tribal capacity to sue:

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any

45. Robert N. Clinton, “Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law” (1993) 46 Ark. L. Rev. 77 at 89-90. See Robert N. Clinton, “The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation” (1986) 28 Ariz. L. Rev. 29 at 32-34. See also John Edward Barry, “Comment, *Oneida Indian Nation v. County of Oneida*: Tribal Rights of Action and the *Indian Trade and Intercourse Act*” (1984) 84 Col. L. Rev. 1852 at 1858 (“Prior to 1966 ... it was unclear whether Indian tribes could bring suit in federal court”).

46. See text accompanying notes 132-135.

47. Judiciary Act of 1875, c. 137 § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)). See text accompanying notes 218-219.

48. *Supra* note 23 at 17.

49. See text accompanying note 190.

50. *Ibid.*

51. See text accompanying notes 144-162.

aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.⁵²

Federal and state courts have consistently recognized the capacity to sue of a “state” in the sense described by Marshall.⁵³ That the quoted passage was understood to relate to capacity to sue is shown by the other opinions in the case. Justices Thompson and Story in dissent plainly thought the Cherokees had capacity to sue because they voted in the plaintiff’s favour. Justices Baldwin and Johnson voted to dismiss but refused to join Marshall’s opinion. Baldwin opined:

As jurisdiction is the First question which must arise in every cause, I have confined my examination of this, entirely to that point, and that branch of it which relates to the capacity of the plaintiffs to ask the interposition of this court. I concur in the opinion of the court in dismissing the bill, but not for the reasons assigned.

In my opinion there is no plaintiff in this suit.⁵⁴

Justice Johnson was less direct but reached a like conclusion:

I cannot but think that there are strong reasons for doubting the applicability of the epithet state, to a people so low in the grade of organized society as our Indian tribes most generally are.⁵⁵

Hence, Marshall’s characterization of the Cherokee Nation as a state resolved an explicit disagreement among the Court’s justices about tribes’ legal status. And he strongly restated his view of tribes’ governmental status in his celebrated majority opinion in *Worcester v. Georgia*:

The Indian nations had always been considered as distinct, independent political communities The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have

52. *Cherokee Nation*, *supra* note 23 at 16. See also the dissenting opinion of Thompson J. on the same point, *ibid.* at 52-53.

53. See *Colombia v. Cauca Company*, 190 U.S. 524 (1903); *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *King of Spain v. Oliver*, 14 F.Cas. 577 (C.C.D. Pa. 1810); *Honduras v. Soto*, 112 N.Y. 310; 19 N.E. 845 (1889); *Mexico v. Arrangois*, 5 Duer 634 (N.Y. 1856). See also *Pfizer Inc. v. India*, 434 U.S. 308 at 318-319 (1978) (foreign nations can sue under the antitrust laws).

54. *Cherokee Nation*, *supra* note 23 at 31.

55. *Ibid.* at 21.

applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.⁵⁶

The final irony of the Cherokee cases was that the *Worcester* decision, originating in the Georgia state courts, achieved the Cherokees' desired victory on the illegality of Georgia's actions. But a determined president and Congress snubbed the Court and removed the Cherokees from Georgia anyway.⁵⁷

III THE FRIENDS OF THE INDIAN

The dominant government Indian policy from the nation's founding until the 1920s was to acquire Indian land for settlers and miners, at least nominally by voluntary purchase.⁵⁸ At the time of *Cherokee Nation*, this was achieved by treaties that ceded large tracts to the government, set aside retained tribal territory apart from white settlements, and allowed tribes a substantial measure of self-government over their reduced domains.⁵⁹ The Jacksonians accentuated the policy by adding their removal scheme. Using various forms of coercion, the government acquired all tribal land near white settlements and resettled tribes on new lands in the west that became known as Indian Territory, now mostly Oklahoma.⁶⁰

In the 1850s, a new policy became prominent. While not abandoning removal, the government began to insert a clause into Indian treaties providing for allotting tribal common lands to individual heads of Indian families as homesteads.⁶¹ Thus began the policy of forced assimilation of Native Americans that predominated for the next 80 years.⁶² The allotment policy did generate an important decision by the Supreme Court. Three tribes in Kansas were allotted, and Kansas counties levied property taxes on the allotments. The tribes contested the taxes in Kansas courts, losing on the merits before the Kansas Supreme Court. The U.S. Supreme Court reversed and held the lands not subject to Kansas taxes.⁶³ Pertinent to our subject,

56. 31 U.S. (6 Pet.) 515 at 559-560 (1832) [*Worcester*]. Justice Baldwin dissented again: *ibid.* at 562. Justice Johnson did not.

57. See Foreman, *supra* note 24 at 235. The *Worcester* decision gave rise to a report, probably apocryphal, that President Jackson said, "John Marshall has made his decision:—now let him enforce it." Albert J. Beveridge, *The Life of John Marshall*, vol. 4 (Boston & New York: Houghton Mifflin, 1916) at 551 (citing a book by Horace Greeley).

58. See Newton *et al.*, *Cohen's Handbook*, *supra* note 2 at 183-184.

59. *Ibid.*

60. *Ibid.*

61. *Ibid.* at 66-69.

62. *Ibid.* at 84.

63. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867).

plaintiffs in the three cases were the respective tribal chiefs in a representative capacity.⁶⁴ No one's capacity to sue was questioned.

After the Civil War, tribal reservations became increasingly dysfunctional. Repeated pressures to cede more land created a general sense of instability. Constant encroachments by lawless settlers undermined tribal authorities and economies. Government payments for tribal land ceded in treaties, in cash and services, were either not provided or diverted by corrupt officials.⁶⁵ President Grant tried to address the issues by establishing and empowering a Board of Indian Commissioners, 10 prominent citizens named by the president to serve without compensation.⁶⁶ While ineffectual, this body in turn generated a number of other high-minded reform efforts. President Hayes appointed Senator Carl Schurz as Interior Secretary in 1877. Schurz greatly reduced corruption in the Bureau of Indian Affairs, though his tenure was marred by his defence of the government's outrageous attempt to force the Ponca tribe to remove to Indian Territory.⁶⁷

Based on his experience as secretary, Schurz determined that major reforms in Indian policy were needed. Shortly after leaving office in 1881, he published an article that outlined his proposals.⁶⁸ Consistent with general policy since the 1850s, his overriding goal was "civilization" of Native Americans by cultural assimilation. But he sought to pursue this aim more aggressively by two policy initiatives: much more extensive allotment of tribal common land to Indian families in severalty, and greatly increased efforts for Indian education in white ways.⁶⁹

Another part of the reform movement was establishment of prominent private groups in the eastern U.S. to promote major changes in national policy towards Native Americans. Most of these groups had similar notions of needed reforms, which they honed in the annual Lake Mohonk Conference of Friends of the Indian, at a resort near New Paltz, New York, owned by Board of Indian Commissioner Albert Smiley.⁷⁰

Like those of Schurz and the government, the policies promoted by the Friends of the Indian had a common goal of "civilization" of Native Americans by cultural assimilation.⁷¹ They shared Schurz's promotion of allotment of land and of education, though with more emphasis on religious

64. *Ibid.* at 738.

65. See Francis Paul Prucha, *The Great Father* (Lincoln: University of Nebraska Press, 1984) vol. 1 at 462-478 [Prucha, *Great Father*]. In addition, the strong pre-war governments of the Five Tribes in Indian Territory were shattered by participation in the war. See Jeffrey Burton, *Indian Territory and the United States, 1866-1906* (Norman & London: University of Oklahoma Press, 1995) at 14-25.

66. See Prucha, *Great Father, ibid.*, vol. 1 at 501-512.

67. *Ibid.* at 526, 566-571, 586-589.

68. Carl Schurz, "Present Aspects of the Indian Problem" (July 1881) 133 N. Amer. Rev. 1.

69. *Ibid.* at 6-21.

70. Prucha, *Great Father, supra* note 65, vol. 2 at 617-618.

71. *Ibid.* at 609-610.

education. But they added a third major initiative: extension of general laws to Indians and Indian country.⁷² Their principal spokesmen, the Reverend William Justin Harsha, lawyer Henry S. Pancoast, and Harvard professor James Bradley Thayer, promoted this aim by claiming that without their reforms, Indians had no legal rights at all.⁷³

Harsha

The year after Carl Schurz published his reform agenda in 1881, Presbyterian divine William Justin Harsha's article in the *North American Review*, "Law for the Indians,"⁷⁴ responded that Schurz had his priorities backward. According to Harsha, the first order of business should have been extension of general laws over Indians and Indian country. Lack of legal training did not deter Harsha from bold assertions about the law.

Harsha argued repeatedly that Indians had no legal capacity to bring civil lawsuits. White people knew they could steal Indian property, and the Indians had no recourse in court.⁷⁵ He discussed two instances in which tribes, the Utes and the Poncas, were forcibly removed from their reservation lands because they were not able to turn to courts for protection.⁷⁶ He called for Indians to be granted "standing in the courts necessary for protection."⁷⁷ He lauded Canada and New York State as places where whites and Indians lived peacefully and justly together because Indians had the protection of laws.⁷⁸ As an example of injustice done to Indians because they could not bring civil actions in courts, Harsha told the story of Iron Eye, an Omaha Indian who became wealthy as a merchant. He lent several hundred dollars to white men, receiving promissory notes from them. They defrauded him of every cent they owed him, claimed Harsha, because Iron Eye could not bring suit to recover his money.⁷⁹

Harsha also quoted an Interior Department report on the Poncas' attempt to take their grievance to court in which Secretary Schurz had stated, "Such a suit cannot be brought at all."⁸⁰ He quoted Schurz as saying that the Supreme Court had repeatedly decided the question, and that "the decisions are clear and uniform on this point," and among the lawyers he consulted,

72. *Ibid.*

73. *Ibid.* at 676-681.

74. (1882) 134 *N. Am. Rev.* 272.

75. *Ibid.* at 274-275.

76. *Ibid.* at 276-277.

77. *Ibid.* at 277.

78. *Ibid.* at 279-280.

79. *Ibid.* at 287. We have not seen any published research that says how accurate Harsha's story was.

80. *Ibid.* at 283, citing to Report Interior Department, 1878, at 675. Our failed attempts to verify this cite led us to believe it to be defective, though the quotation may be correct.

not one disagreed with his view on Indians' legal status; the Indians' disability "has been decided by the Supreme Court so clearly and comprehensively that further testing seems utterly futile."⁸¹ For further evidence of official opinion on this question, Harsha cited reports of a number of reservation Indian agents who had decried the lack of law in Indian country. He excerpted a paragraph from a dispatch from the Commissioner of Indian Affairs regarding the Ponca case:

The ... United States District-Attorney has been directed to appear and endeavor to have the [Poncas'] writ dismissed. He takes the ground that under the law, and according to repeated decisions of the Supreme Court, the Indians stand as wards of the Government, and are under the same relations to the Government as minors to their parents or guardians; that the law forbids them to make contracts, and such contracts, if made by them, are void. No attorney has the right or can appear for an Indian, unless authorized to do so by the Indian Department.⁸²

Harsha quoted President Julius Seelye of Amherst as saying that the U.S. government had given the Indian no status in courts except as a criminal.⁸³ He also quoted former New York governor and presidential candidate Horatio Seymour, "a wise and thoughtful student of Indian affairs," to claim that "[e]very human being born upon our continent, or who comes here from any quarter of the world, whether savage or civilized, can go to our courts for protection—except those who belong to the tribes who once owned this country."⁸⁴ Harsha also quoted S.W. Marston, Muskogee agent, Indian Territory, as saying, "If a white man sees fit, in his depravity, to infringe upon the rights of an Indian, or to violate his pledge or contract with him, he has no redress whatever, and there is no tribunal to which he can appeal for justice."⁸⁵ Bishop Whipple, a proponent of Indian education, said, "The Indian ... is not amenable to or protected by law. The *man* has no standing before the law. A Chinese or a Hottentot would have, but the [N]ative American is left pitifully helpless."⁸⁶

Harsha cited no legal authority for his assertions. Further, in the case of the Poncas, he failed to note that their lawsuit had in fact succeeded, contrary to his quoted passages from Secretary Schurz and others.⁸⁷

81. *Ibid.* at 290. As noted below, there was no authority for this claim. See text accompanying note 87.

82. *Ibid.*

83. *Ibid.* at 283.

84. *Ibid.* at 287.

85. *Ibid.* at 288.

86. *Ibid.*

87. *United States ex rel. Standing Bear v. Crook*, 25 F.Cas. 695 (C.C.D. Neb. 1879) (No. 14,891). A colourful account of the trial in this case appeared in an article about Secretary Schurz soon after his death. See "One Case Where Carl Schurz Was Not on the Side of Human Liberty" *The New York Times* (27 May 1906) SM6.

Pancoast

Another inspired advocate of Friends of the Indian ideals was Henry S. Pancoast. He was a young lawyer from Philadelphia who helped organize the Indian Rights Association in that city after an 1882 visit to Sioux country in Dakota Territory. In 1884, the Indian Rights Association published Pancoast's pamphlet, *The Indian Before the Law*,⁸⁸ in which he analyzed the legal status of Native Americans.

Pancoast stated his conviction that Indians did not have capacity to bring lawsuits either as tribes or as individuals. Without citing *Cherokee Nation*, he summarized its holding that Indian tribes were not within the clause of the Constitution giving "foreign nations" a right to sue in the Supreme Court. Pancoast then expanded on the holding to state that "in no other capacity could they [Indian tribes] claim redress in our courts."⁸⁹ Thus, Indian tribes were left without any legal remedies if their rights were violated.

Pancoast also believed that incapacity to bring lawsuits extended to individual Indians in civil actions. He stated that because an Indian is neither a foreigner nor a citizen, he had an anomalous status that left him without capacity to bring a civil action in his own name in either a state or federal court.⁹⁰ In summarizing the legal status of the Indian, Pancoast stated, "[O]ur Executive rules him; our Naturalization Acts do not apply to him; if he offends against our people, he is tried in our courts; if our people offend against him, our courts are practically shut upon him."⁹¹ He ended his article by calling for Indians to be allowed to bring civil actions in either local or federal courts and to be considered persons before the law.⁹²

Thayer and the Thayer Bill

Because of his academic and legal prestige, the most formidable advocate among the Friends of the Indian was Harvard law professor James Bradley Thayer. Son of a newspaper editor and silkworm farmer, Thayer caught the

88. (Philadelphia: The Indian Rights Association, 1884).

89. *Ibid.* at 7.

90. *Ibid.* at 11-13. It was of course true that non-citizen Indians' status deprived them of the diversity jurisdiction of federal district courts, but this was not a defect of capacity and had no application to state courts nor to federal question jurisdiction in federal courts after 1875. See text at notes 132-137.

91. *Ibid.* at 17.

92. *Ibid.* at 21-28. Pancoast was the principal source quoted and cited for the propositions that Indians "were barred from any remedy for violation of their legal rights" and "the Indian is incapacitated for bringing suit in his own name" in state or federal court in Fayette Avery McKenzie, *The Indian in Relation to the White Population of the United States* (Ph.D. Thesis, University of Pennsylvania, 1908) [unpublished]. McKenzie taught in a reservation school and later served as president of Fisk University.

attention of a wealthy widow from Northampton, Anne Lyman, who provided for his education.⁹³ His original goal was to become a Baptist missionary to the Indians. He instead chose to attend Harvard Law School, graduating in 1856.⁹⁴ He married Sophia Ripley, Ralph Waldo Emerson's niece, in 1859⁹⁵ and practiced law in Boston until 1874.⁹⁶ He was then appointed to the faculty of Harvard Law School and became a leading scholar of evidence and constitutional law.⁹⁷ In the mid-1880s he became particularly concerned with bringing Indians under American law.⁹⁸ He wrote articles promoting Friends of the Indian reforms and worked with the Indian Rights Association.⁹⁹

Thayer first took up the issue raised by Harsha and Pancoast through the Lake Mohonk Conference and the Indian Rights Association. The latter's law committee reported in 1887 that Professor Thayer had drafted a proposed federal bill designed to bring all Indians under American law.¹⁰⁰ He also wrote the 1888 report of the Lake Mohonk Conference's law committee to promote his completed draft.¹⁰¹ Introduced in the Senate that year, and commonly called the "Thayer Bill," it would have applied state and federal laws to Indians and Indian country, and established new "commissioners" courts for the specific purpose of affording Indians justice through the American system.¹⁰² The first section of the bill stated:

[A]ll Indians not citizens of the United States, whether residing on or off a reservation, are hereby declared entitled to the full protection and exemptions secured by the Constitution of the United States to persons other than such citizens; and especially they shall be entitled to the equal protection of the law, they may sue and be sued in all courts, and shall have full power to make contracts, and engage in any trade or business.¹⁰³

Thayer's bill implied that Indians did not have the right to bring suits in courts. However, in a Harvard Law Review piece published the same year, he cited and acknowledged many cases in which Indians had been able to

93. See Jay Hook, "A Brief Life of James Bradley Thayer" (1993) 88 Nw. U.L. Rev. 1 at 1-2.

94. *Ibid.* at 2.

95. *Ibid.* at 4.

96. *Ibid.* at 3.

97. See Prucha, *Great Father*, *supra* note 65, vol. 2 at 679-680.

98. *Ibid.* at 680.

99. *Ibid.* at 680-681; Francis Paul Prucha, *Americanizing the American Indians: Writings by the "Friends of the Indian," 1880-1900* (Cambridge: Harvard University Press, 1973) at 167.

100. See the *Report of the Law Committee: Legislation and Legal Matters*, in *Fifth Annual Report of the Executive Committee of the Indian Rights Association* (Philadelphia: The Indian Rights Association, 1887) at 3-7.

101. See *Proceedings of the Sixth Annual Meeting of the Lake Mohonk Conference of Friends of the Indian* (Lake Mohonk, N.Y.: Lake Mohonk Conference, 1888) at 42-43 [*Proceedings 1888*].

102. U.S., Bill S. 2341, 50th Cong., 1st Sess. (introduced 29 March 1888) (commonly known as the Thayer Bill).

103. *Ibid.*

sue.¹⁰⁴ His attitude towards tribes was stated in his report for the Lake Mohonk Law Committee: “for the future, we are no longer going to keep up this nonsense of dealing with you as a separate people; we do not care anything about your tribes; keep them if you like, just as the Shakers and others keep up their private organizations; but no longer as separate nations.”¹⁰⁵

Frustrated by failure of his bill, Thayer elaborated his view in an 1891 article, “A People Without Law,” published in the *Atlantic Monthly*, from which we cribbed our title.¹⁰⁶ His article was a historical summary of relations between Native and other Americans and an explanation of how Indian agents had become virtual rulers of Indian tribes, rather than intermediaries. This summary and explanation supported Thayer’s thesis that Indians had no just system to settle their disputes; therefore, the United States should extend its laws and courts onto Indian reservations.¹⁰⁷ He stated that Indians did not have a legal status, merely a political condition. He added that because Indians had no courts to appeal to when they were wronged by other Indians or whites, their only resort was to fight.¹⁰⁸ He argued that Indians should be allowed into established courts of law and that new courts should be established specifically to afford Indians justice in disputes among themselves and between Indians and whites.¹⁰⁹ He again treated tribes as anachronistic and irrelevant.

The Thayer Bill went nowhere in large measure because it was opposed by Senator Henry L. Dawes, another luminary of the Friends of the Indian and chief sponsor of the *General Allotment Act*. At the 1891 Lake Mohonk Conference, Dawes was “quite astounded ... to hear that the Indian is without law. It is a mistake, a sore mistake.”¹¹⁰ Dawes explained that the Indian police and Courts of Indian Offenses established on reservations during the 1880s had provided a legal system run by Indian people themselves (albeit those hand picked by the government’s Indian agents).¹¹¹

Thayer’s bill also highlighted another source of confusion about tribal capacity to sue. As his text showed, there is a tendency to think of capacity to sue and be sued as if the two are the same. But for governments they are not because of the common-law concept of governmental immunity. Indian nations have governmental immunity from suit, absent consent or override

104. See James Bradley Thayer, “In the Moot Court, *Coram Thayer J.*” (1888) 1 *Harv. L. Rev.* 149.

105. *Proceedings 1888*, *supra* note 101 at 43.

106. James Bradley Thayer, “A People Without Law” (1891) 68 *Atlantic Monthly* 540, 676.

107. *Ibid.* at 542.

108. *Ibid.* at 540, 542.

109. *Ibid.* at 542.

110. See *Proceedings of the Ninth Annual Meeting of the Lake Mohonk Conference of Friends of the Indian* (Lake Mohonk, N.Y.: Lake Mohonk Conference, 1891) at 44 [*Proceedings 1891*].

111. *Ibid.* at 45-46.

by act of Congress.¹¹² Therefore, like other governments, their capacity to sue as plaintiffs is not coextensive with their capacity to be sued as defendants.

Thayer Brings in the ABA

The American Bar Association's 1891 annual meeting was held a few months before Professor Thayer's article appeared in the *Atlantic Monthly*. William Hornblower, a lawyer from New York City, gave a paper titled "The Legal Status of the Indians," having little relevance to our subject despite its title.¹¹³ However, Professor Thayer was present and jumped in to advocate for courts for Indians and Indian country in terms similar to his 1888 bill, his article soon to appear, and resolutions at Lake Mohonk.¹¹⁴ He proposed that the ABA resolve to support his position. After a discussion in which other members agreed with him, the resolution was unanimously adopted, advocating that "the Government of the United States should provide at the earliest possible moment for courts and a system of law in and for the Indian reservations."¹¹⁵ Another member proposed to establish a standing committee to promote the resolution, which also was approved. Thayer was one of three members appointed.¹¹⁶

The committee reported to the 1893 ABA convention its *Special Report on Indian Legislation*, which quoted from and supported Thayer's 1891 *Atlantic Monthly* article.¹¹⁷ The report appended a draft statute that would have extended state and territorial laws to Indian country and would have vested federal courts with exclusive general jurisdiction of suits by or against Native Americans *or tribes*. This was an advance over the 1888 "Thayer Bill," which had scorned tribes.¹¹⁸

112. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998).

113. *Report of the Fourteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1891) at 261.

114. *Ibid.* at 12-16.

115. *Ibid.* at 18-24.

116. *Ibid.* at 25-27.

117. See *Report of the Sixteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1893) at 351.

118. *Ibid.* at 361-363. The report sought ABA endorsement, but that question was committed to the Committee on Jurisprudence. That Committee's 1894 report recommended adoption of the proposed resolutions, but no formal action was taken. *Report of the Seventeenth Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1894) at 53, 333. The next year, the ABA adopted a tamer resolution proposed by Professor Thayer. *Report of the Eighteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1895) at 18-21. The Indian Legislation Committee limped along until abolished in 1905, three years after Thayer's death.

Abbott

In 1888, Austin Abbott, a New York lawyer, published “Indians and the Law” in the *Harvard Law Review*.¹¹⁹ Most of the piece recited events and decisions without comment. Towards the end, he described the Thayer Bill in favourable terms, reciting its purpose “to put an end to the shameful condition of lawlessness which the government is now maintaining.” He recited uncritically that the bill was to enable Indians “to sue and be sued in all courts,” and referred to Indians as “these now lawless people.”¹²⁰

Canfield

A more complex paper was published in 1881 in the *American Law Review* by George F. Canfield, a New York lawyer who was later appointed to the Columbia law faculty. In “The Legal Position of the Indian,” Canfield expressed some unique ideas about the nature of Indian rights in federal and state courts.¹²¹ Canfield emphasized the absolute nature of Congressional control over Indians and Indian tribes. He stated that because they are members of distinct political communities, Indians were not subject to federal or state laws or court jurisdiction.¹²² He believed Indians could use courts, but only to enforce rights acquired by Indian laws and customs. He thought courts had lost sight of this in allowing Indians to sue on contracts and for trespass.¹²³ He reasoned that, because an individual Indian could successfully bring a trespass suit, an Indian tribe could bring a trespass suit in its corporate capacity as a nation.¹²⁴ Unlike other authors of his time, Canfield showed his awareness that Indians had brought lawsuits in state and federal courts. Canfield’s analysis went off the rails, however, when he claimed that Indians were not “persons” protected by the Bill of Rights.¹²⁵

119. (1888) 2 *Harv. L. Rev.* 167.

120. *Ibid.* at 174-177.

121. (1881) 15 *Am. L. Rev.* 21.

122. *Ibid.* at 29.

123. *Ibid.* at 33.

124. *Ibid.* at 34.

125. *Ibid.* at 28. In 1888, Robert Weil published his doctoral thesis in political science at Columbia. Robert Weil, *The Legal Status of the Indian* (1888) (reprinted, New York: AMS Press, 1975). His analysis of the law was mostly quite accurate, much more so than tracts by the Friends of the Indian. He included a section headed, “Is the Indian a Person,” based on Canfield and accepting some of Canfield’s analysis, but arguing that Indians are persons for purposes of habeas corpus and bill of rights defences to prosecution (*ibid.* at 74-75).

IV THE FRIENDS OF THE INDIAN'S LEGACY

Did the Friends of the Indian discourage tribal lawsuits? The prominence of its members gives rise to the supposition that they did. But records of cases not filed are rare, and we have found none on point. Moreover, aside from tribes in New York,¹²⁶ the claim that Indians and tribes had no capacity to sue had no support in holdings of decided cases. Throughout the 19th century, individual Indians brought many reported cases in state and federal courts, and we have found none that failed for lack of legal capacity. The same is true of the small number of suits by tribes except for decisions in New York beginning in 1898.¹²⁷ It is equally true that the American legal system was woefully inadequate for Native Americans and tribes. Their abundant grievances against the federal government and lawless settlers had no reasonable legal redress. Indians and tribes did not lose in court for lack of capacity to sue, but they usually lost on some other ground.

The Friends' focus was exclusively on ordinary civil suits, but this was not the most important problem for Indian nations and their members. The greatest barrier to redress was immunity and other obstacles to suing the federal government and its agents. The government orchestrated dispossession of tribal land and the system of coercive assimilation. When Indian or tribal plaintiffs tried to contest government actions, the courts ruled that the government had extremely broad, discretionary power over tribal property.¹²⁸ When tribes sought compensation for land or for broken promises of money and services, they confronted sovereign immunity.¹²⁹ Congress controlled money claims against the government until the Court of Claims was given direct jurisdiction in 1863, but that statute excluded claims based on treaties, foreign or Indian.¹³⁰ Tribes could only sue on treaty violations when Congress consented to particular claims. This was often done, but remedies were restricted and achieved only years after the wrong.¹³¹ The federal juggernaut of dispossession and assimilation was never impeded by the courts.

For ordinary civil suits within states, Indian access to courts was not impossible, as the Friends' claimed, but it was difficult. In state courts, Indians encountered bias as outsiders of a different race, particularly when

126. See text accompanying notes 171-184.

127. See *supra* note 24 and *infra* notes 180-183, and accompanying text.

128. Notably in *Lone Wolf*, *supra* note 8.

129. *E.g. Blackfeather v. United States*, 190 U.S. 368 (1903). See *infra* note 149 and accompanying text.

130. Act of 3 March 1863, c. 92 § 9, 12 Stat. 765 at 767. The reasons given at the time for the treaty exclusion related entirely to foreign affairs. See Daniel Barstow Magraw, "Jurisdiction of Cases Related to Treaties: The Claims Court's Treaty Exception" (1985) 26 Va. J. Int'l L. 1 at 16-19.

131. See text accompanying notes 196-200.

they sought relief against settlers, who could vote.¹³² The Constitution's framers had recognized the potential for local favouritism in state courts and responded by giving access to federal courts, where Article III judges had life tenure and some immunity from local biases, based on diversity of citizenship.¹³³ However, only American and foreign citizens could invoke diversity jurisdiction; non-citizen Native Americans, in common with slaves, could not.¹³⁴ Diversity jurisdiction was also confined to suits in which there was a minimum amount in controversy, so that as Indians later became citizens, this was an added barrier.¹³⁵

Until 1875, diversity jurisdiction was the only basis for federal trial courts to hear ordinary civil cases. In that year, Congress added general jurisdiction over cases arising under federal law when a like minimum dollar amount was in controversy,¹³⁶ but this did not perceptibly improve matters for Indians. The threshold amount in controversy was a barrier, the legal community was slow to assimilate the change,¹³⁷ and the great problem of the federal government's immunity from suit was unchanged.

For much of the 19th century, many Indian reservations were in federal territories rather than states; the local courts were federal and had general jurisdiction like that of state courts.¹³⁸ However, the territorial judges were not Article III judges with life tenure; they were answerable to voters like their state counterparts.¹³⁹ In any event, there was little reported success for Native Americans in territorial courts.

Congress did respond in one limited way to the importuning of the Friends of the Indian. An 1894 statute gave federal district courts original jurisdiction over actions by Indians to enforce their rights to allotments

132. See *United States v. Kagama*, 118 U.S. 375 at 384 (1886) (“[The Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”).

133. U.S. Const. art. III, § 2, cl. 1. See Fallon, Meltzer & Shapiro, *supra* note 33 at 1524.

134. *Cherokee Nation*, *supra* note 23; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Karrahoo v. Adams*, 14 F. Cas. 134 (C.C.D. Kans. 1870).

135. The amount in controversy was originally \$500, raised to \$2000 in 1887, \$3000 in 1911, \$10,000 in 1958, \$50,000 in 1988, and \$75,000 in 1996. See Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts*, 6th ed. (St. Paul: West Group, 2002) at 192. All American Indians became citizens under federal statutes passed between 1890 and 1924. See Newton *et al.*, *Cohen's Handbook*, *supra* note 2 at 900-1001.

136. See Fallon, Meltzer & Shapiro, *supra* note 33. Until 1966, federal question jurisdiction had the same requirement of a minimum dollar amount in controversy as diversity jurisdiction. See Wright & Kane, *ibid.* at 193-194.

137. For example, when Senator Dawes argued in 1891 that Indians did have adequate legal redress, he nevertheless described federal trial court jurisdiction in pre-1875 terms. See *Proceedings 1891*, *supra* note 110 at 47. See also text accompanying notes 218-220.

138. See Max Farrand, *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895* (Newark: William A. Baker, 1896) at 29-30.

139. *American Insurance v. Canter*, 26 U.S. (1 Pet.) 511 (1828). See Farrand, *ibid.*

without regard to the amount in controversy.¹⁴⁰ Of course, this was part of the assimilationist agenda, favouring the break-up of tribal property. And even here, whenever Indians tried to use the statute, federal authorities fought diligently to narrow its interpretation and defeat its use.¹⁴¹

Thus, the Friends of the Indian had a point about inadequate law, despite their failure to analyze the matter accurately and their misguided and patronizing choice of remedies. However, their hyperbole about lawlessness, while incorrect about Indian capacity to sue in the past, contributed prospectively to the few decisions in which tribes *were* denied legal capacity. The Friends' tracts, a Court of Claims decision on service of process, and holdings in the New York courts led to a 1906 legal encyclopaedia's recitation that tribes lacked legal capacity.¹⁴² This authority was in turn invoked by the federal government to defend against tribal suits, though unsuccessfully.¹⁴³ We turn to these events.

Depredations Laws and the *Jaeger* Case

A federal statute enacted in 1796 provided for compensation of what were commonly called depredations of Indians by settlers and of settlers by Indians.¹⁴⁴ When a non-Indian harmed Indian property, he was to pay twice the fair value of the property destroyed. When the offender could not pay at least the fair value, compensation to that extent was to be paid out of the Treasury. When an Indian harmed property of a non-Indian, the victim was to apply to the government, which in turn would demand "satisfaction" from the offender's tribe. If the tribe did not respond appropriately, the statute authorized the government to deduct compensation from tribal funds or payments. Some Indian treaties had similar provisions.¹⁴⁵ The underlying theory reflected international norms about compensation for transnational torts that had the aim of deterring acts of revenge and retaliation.¹⁴⁶ Both provisions were re-enacted several times and as amended remain on the statute books.¹⁴⁷

140. Act of 15 August 1894, c. 290 § 1, 28 Stat. 286 at 304 (codified as amended at 25 U.S.C. §§ 345-346 (2000)).

141. See *e.g.* *Scholder v. United States*, 428 F.2d 1123 at 1125-1126 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970). See generally Newton *et al.*, *Cohen's Handbook*, *supra* note 2 at 620-622.

142. See *infra* note 186 and accompanying text.

143. See text accompanying notes 186-187.

144. Act of 19 May 1796, c. 30 §§ 4, 14, 1 Stat. 469 at 470, 472 (codified as amended and re-enacted at 18 U.S.C. § 1160 & 25 U.S.C. § 229 (2000)).

145. See Larry C. Skogen, *Indian Depredation Claims, 1796-1920* (Norman & London: University of Oklahoma Press, 1996) at 27-28.

146. See *e.g.* *Goodell v. Jackson*, 20 Johns. 693 at 714 (Sup. Ct. Jud. N.Y. 1823) (Kent, Ch.).

147. 18 U.S.C. § 1160 & 25 U.S.C. § 229 (2000).

The reality was that the provision to compensate Indians for settlers' wrongs was rarely used. Even when Native Americans knew about the law, most were too unfamiliar with the ways of white courts and government to use it.¹⁴⁸ Moreover, when they eventually did try to enforce it in the courts, the Supreme Court held that the provision for payment from the Treasury was not a sufficiently clear waiver of sovereign immunity.¹⁴⁹

By contrast, as a dissenting member of Congress predicted in 1796, the provision to compensate settlers spawned a major enterprise of claims for "Indian depredations" lasting more than a century.¹⁵⁰ This hugely wasteful and sometimes fraudulent scheme seldom directly charged tribal funds.¹⁵¹ But the money it siphoned often came from appropriations that would have otherwise assisted Native Americans.¹⁵²

The section to compensate settlers had no provision for payment from the Treasury, so it generated bureaucratic systems for claims that in turn depended on discretionary appropriations by Congress.¹⁵³ The bureaucrats were in, successively, the War Department, its Indian Office, and the Department of the Interior. When Interior's system was exposed as corrupt, Congress restricted the bureaucrats' power.¹⁵⁴ Tiring of this ponderous system in the 1880s, Congress ordered Interior to inventory all outstanding claims with an eye towards closing out the program but with no period of limitations after 1870. Not surprisingly, this generated thousands of new filings.¹⁵⁵ Despairing of Interior ever clearing its files, in 1891 Congress empowered the Court of Claims to adjudicate all Indian depredations cases.¹⁵⁶ The statute allowed all pending claims and all new claims accruing after 1865, provoking still more new claims.¹⁵⁷

One of the earliest decisions reported by the Court of Claims involved Lewis Jaeger's claim for loss of a Colorado River ferryboat in 1872. One of his ferryboats broke loose from its mooring and floated down the river until it ran against the bank near a Yuma Indian community. Jaeger tied up the

148. See Skogen, *supra* note 145 at 209, 234 n.11, 236 n.39.

149. *Blackfeather v. United States*, 190 U.S. 368 (1903). Stingy interpretation of consents to sue remains a major obstacle to justice for Native Americans. See e.g. *United States v. Navajo Nation*, 537 U.S. 488 (2002).

150. See Skogen, *supra* note 145 at 25, 210-211 & *passim*.

151. *Ibid.* at 186-209. As Skogen states, an exception was during a corrupt period in the later 1860s and early 1870s. *Ibid.* at 90-91, 197-199.

152. *Ibid.* at 188, 190.

153. *Ibid.* at 26-36, 50-51, 186-206. An 1834 statute did provide for payments from the Treasury when Indian annuities were unavailable, but it was repealed in 1859: *Ibid.* at 192. An 1870 law barred use of annuities to pay depredations claims, but the authority was restored in 1891: *Ibid.* at 187-189.

154. *Ibid.* at 26-36, 90-91, 115-116, 187-188.

155. *Ibid.* at 103-116.

156. Act of 3 March 1891, c. 538, 26 Stat. 851.

157. See Skogen, *supra* note 145 at 126. The statute required claims to be filed by 3 March 1894, and disallowed claims accruing after 3 March 1891. See *ibid.*

boat, but it was accidentally destroyed by the Yumas' fires, for which he sought \$3000.¹⁵⁸

Justice Department lawyers moved to dismiss Jaeger's claim on the ground that no service of process had been made on the Yuma Indians, as due process demanded. This required the court to sort out the Yumas' status under the statute, a matter of some ambiguity.

For a successful plaintiff, the statute directed judgment "against the United States, and against the tribe of Indians committing the wrong, when such can be identified."¹⁵⁹ The statute made the tribe primarily liable to satisfy the judgment out of tribal funds and gave the tribe an independent right of appeal, naming it as a "party" to the appeal.¹⁶⁰ These provisions appeared to entitle the tribe to receive service of process or other notice of the claim, as the government's motion argued. However, other provisions were fuzzier. The statute required the plaintiff's petition to the court to identify the "persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged acts were committed, as near as may be." Its provision for process directed service on the Attorney General, who was required to appear and defend both the United States and the Indians, provided that "any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the Commissioner of Indian Affairs, if he or they shall choose to do so."¹⁶¹

The court could have satisfied due process by requiring service on the Yumas, or it might have interpreted the statute to require the government to notify the tribal defendant. Instead, it acknowledged the due process issue but dodged it by an extended discussion of the status of Indians and tribes right out of the Friends of the Indian's playbook. Of seven relevant pages in the reports, the most pertinent passages were:

If it be true, as insisted by the defendants, that the Indian tribe, band, or nation alleged to have been the parties guilty of the wrong is a necessary party and a defendant within the ordinary meaning of the law, then the court is without jurisdiction as to persons, until a notice in some form is given to such Indians.

The civil policy of the United States, as it has been developed in the form of treaties and statutes, has been radically different from the policy which they have pursued in the government and protection of the civilized order of men. The courts have not been opened to the Indian, and the civil liberty which is the boast of our system has not been given to the Indians in any period of our history.

158. *Jaeger*, *supra* note 14. See also Skogen, *supra* note 145 at 141.

159. Act of 3 March 1891, *supra* note 156 at § 5.

160. *Ibid.* at §§ 6, 10.

161. *Ibid.* at § 4.

Congress have legislated on the rights of the Indians on the theory that they were dependent and helpless, to such an extent that the nation had a right to assume unlimited control of them.

The civil rights incident to States and individuals as recognized by what may be called the "law of the land" have not been accorded either to Indian nations, tribes, or Indians. Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors.

The General Government, in its legislative and executive departments, has been the special guardian of the Indians, and it is to be presumed, when their rights become the subject of judicial administration that the same care and guardianship will be extended over them.

If the Yuma Indians have funds in the control and custody of the United States, the United States have a perfect legal right to deal with it as they see fit, and the reference of a question to this court affecting the integrity of that fund does not confer upon the Indians the legal rights of a suitor.

[C]onsidering that the Indians are peculiar in their relations to the United States in not having incident to them the common-law rights of suitors, that their standing in courts is purely statutory and within the discretion of the United States, we are of opinion that the Indians are not defendants in the proceedings in the sense of being distinct from the United States entitled to notice.¹⁶²

The *Jaeger* opinion suggests that the judges and lawyers confused the question of tribal capacity to sue and be sued with lack of Court of Claims jurisdiction to hear treaty claims.¹⁶³ For treaty claims against the United States, tribes needed the special jurisdictional acts mentioned by the *Jaeger* court, and most Indian claims in 1891 were based on treaties. This confusion persisted as late as the 1940s.¹⁶⁴

When the Court of Claims got around to the merits, *Jaeger* lost. The court ruled that the compensation statute covered only intentional torts, and it held that the jurisdictional act did not apply to the Yuma tribe.¹⁶⁵ The latter ruling has a relationship to our inquiry. The amazing split decision that tribes were parties primarily liable, against whom judgment could be entered, and entitled to appeal as parties, but who were not entitled to notice or service of process, required the court to identify the tribe whose property was to be taken without notice. Until then, identifying tribes had been a political issue

162. *Jaeger*, *supra* note 14 at 282-288.

163. See text accompanying notes 7, 128-131 above, and text accompanying note 196 below. On the distinction between tribal capacity to sue and to be sued, see *supra* note 112 and accompanying text.

164. See text accompanying notes 207-212.

165. *Jaeger v. United States*, 29 Ct. Cl. 172 (1894), motion for new trial overruled, 33 Ct. Cl. 214 (1898).

for the Executive and Congress.¹⁶⁶ The 1891 statute made it a judicial question with all the formality and hairsplitting that implies. Over the statute's operational life of 29 years, the Court of Claims, and on a notable occasion the Supreme Court on appeal, repeatedly strained to identify the proper tribal party.¹⁶⁷

The analogous issue when a party files suit claiming to be an Indian tribe, or claiming to be head of a tribe in a representative capacity, is whether the party plaintiff is in fact a tribe. In most instances, this presents little difficulty because of recognition in a treaty or by the Interior Department. In modern times, a statute mandates that Interior maintain a formal registry of recognized tribes, and there is an administrative procedure for gaining recognition as a tribe.¹⁶⁸ But on occasion there has been doubt, and at least one instance contributed to a New York court finding that tribes have no capacity to sue.¹⁶⁹ More recently, a tribal claim lost when a federal jury decided that an Indian nation had ceased to maintain itself as a tribe.¹⁷⁰

New York

As an original state, New York was long thought by many to be outside the coverage of federal Indian law, so the state developed its own legal relationship with Native Americans, asserting broad powers to regulate their affairs comparable to those claimed by Congress.¹⁷¹ Key events for our inquiry occurred in May of 1845. On the 6th, in *Strong v. Waterman*, the Chancellor affirmed an injunction that two Seneca chiefs had obtained against a non-Indian trespasser on tribal land.¹⁷² The trespasser's counsel apparently argued that the Senecas had an adequate remedy at law, precluding an injunction in equity. The Chancellor rejected this contention in a brief opinion, reasoning:

166. E.g., *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866).

167. See Newton *et al.*, *Cohen's Handbook*, *supra* note 2 at 146-148 (discussing *Montoya v. United States*, 180 U.S. 261 (1901) and Court of Claims rulings on tribal identity). The statute required that tribes to be charged be "in amity with the United States." Act of 3 March 1891, *supra* note 156 at § 1. This phrase was the focus of many decisions, including *Montoya*. See also *Dobbs v. United States*, 33 Ct. Cl. 308 at 314-316 (1898). The Court of Claims ruled against the majority of claimants on the merits, and very few successful claims were charged against tribes. See Skogen, *supra* note 145 at 201-206.

168. 25 U.S.C. § 479a-1 (2000); 25 C.F.R. part 83 (2005).

169. See *infra* notes 180-182 and accompanying text.

170. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979). On tribal recognition generally, see Mark D. Myers, "Federal Recognition of Indian Tribes in the United States" (2001) 12 Stan. L. & Pol'y. Rev. 271.

171. See N.Y. Indian Law (McKinney 2001 & Supp. 2006); Newton *et al.*, *Cohen's Handbook*, *supra* note 2 at 372-373; Robert B. Porter, "Legalizing, Decolonizing, and Modernizing New York State's Indian Law" (1999) 63 Alb. L. Rev. 125 at 128-130.

172. 11 Paige Ch. 607, 5 N.Y. Ch. Ann. 250 (1845).

No provision, however, has been made by law for the bringing an ejectment to recover the possession of [I]ndian lands in the Cattaraugus reservation. For the right to the possession is in several thousand individuals, in their collective capacity; which individuals, as a body, have no corporate name by which they can institute an ejectment suit.

The laws of this state do not recognize the different tribes of [I]ndians, within our bounds, as independent nations, but as citizens merely, owing allegiance to the state government; subject to its laws, and entitled to its protection as such citizens. (*Jackson v. Goodell*, 20 *John. Rep.* 188.) The [I]ndians cannot therefore institute a suit in the name of the tribe; but they must sue in the same manner as other citizens would be required or authorized to sue, for the protection of similar rights. And as the individuals composing the Seneca nation of Indians, and residing on, and entitled to, their several reservations, are too numerous to join in this suit by name, the bill is properly filed by these complainants in behalf of themselves and the residue of the nation residing upon their reservations.¹⁷³

Thus the Seneca Nation was held to have no capacity to sue at law, nor had its chiefs in a representative capacity, but the latter could sue in equity. The Chancellor had treated the Seneca Nation like a private, unincorporated association, not entitled to sue in its own name but able to obtain relief in equity by a representative action.¹⁷⁴ However, the only authority cited was the 1822 decision in *Jackson v. Goodell*, which the Chancellor failed to note had been reversed on appeal in an opinion by his noted predecessor, James Kent. Chancellor Kent had disagreed with the very point relied on regarding Indian citizenship.¹⁷⁵

Two days later, the New York Legislature passed a statute expressly authorizing the Seneca Nation—but no other New York tribe—to sue in its tribal name and to have the legal remedy of ejectment.¹⁷⁶ Whether the statute had any effect on the *Strong v. Waterman* injunction does not appear in a reported decision.

The Chancellor's reasoning error in *Strong* benefited a tribe, doing justice on the facts and rejecting a technical defence. And for decades after, his opinion on tribal capacity to sue lay dormant while cases on tribal rights were decided.¹⁷⁷ But in the era of the Friends of the Indian—many of them New York lawyers—the 1845 events were revived. In 1888, a lower New York court addressed an ejectment action by the Seneca Nation. The court reached the merits but cited both *Strong v. Waterman* and the 1845 statute,

173. 11 Paige Ch., *ibid.* at 610-612.

174. See Warren, *supra* note 15 at 42-43.

175. *Goodell v. Jackson*, 20 Johns. 693 at 709-718 (1823).

176. N.Y. Laws, 1845, c. 150 § 1.

177. See e.g. *That Portion of the Cayuga Nation of Indians residing in Canada v. New York*, 99 N.Y. 235, 1 N.E. 770 (1885).

saying that the Senecas had no right to sue absent the statute.¹⁷⁸ Similar reasoning appeared in the same case on appeal and in three other opinions in cases where the Seneca Nation was plaintiff.¹⁷⁹ All of these were ejection actions brought long after the relevant events. The central issue was the statute of limitations, and the judges thought the claims should be barred. The Senecas' counsel argued that statutes of limitations could not extinguish Indian title. The courts reasoned that the claims were dependent on the 1845 statute, a state law, so state limitations applied.

The *Strong v. Waterman* statement on lack of capacity at last became a holding against tribal capacity to sue in a case brought in the name of the Montauk tribe in 1898.¹⁸⁰ The same view was taken by New York's highest court in decisions rendered in 1900 and 1901.¹⁸¹ These were again suits brought to recover land alienated long before, and in the *Montauk* case there was doubt about the status of the tribal plaintiff, so the courts were searching for a rationale to dismiss.¹⁸² Without noticing the Chancellor's error, *Strong v. Waterman* was elevated to a major precedent, and the rule adopted remained New York law until modern times.¹⁸³ Moreover, recent federal decisions holding tribal claims barred by laches¹⁸⁴ arose in New York, the one state where tribes were held to lack capacity to sue.

The Supreme Court

In 1890 and 1902, the Supreme Court decided cases brought by the Cherokee Nation without questioning the Nation's capacity to sue, though the Cherokees lost both cases on the merits.¹⁸⁵ But in 1906, the *Cyclopedia*

178. *Seneca Nation v. Christy*, 2 N.Y.S. 546 at 551 (Sup. Ct. 1888), *aff'd sub nom. Seneca Nation v. Christie*, 126 N.Y. 122 at 147, 27 N.E. 275 at 282 (1891), *error disp'd*, 162 U.S. 283 (1896).

179. *Ibid.* See also *Seneca Nation of Indians v. Hugaboom*, 9 N.Y.S. 699 (Sup. Ct. 1890), *aff'd*, 132 N.Y. 492 at 497-498, 30 N.E. 983 at 985 (1892); *Seneca Nation v. Lehley*, 8 N.Y.S. 245 at 246 (Sup. Ct. 1889).

180. *Montauk Tribe of Indians v. Long Island Railroad*, 51 N.Y.S. 142 at 143; 28 A.D. 470 at 471 (1898).

181. *Onondaga Nation v. Thacher*, 169 N.Y. 584, 62 N.E. 1098 (1901), *writ disp'd*, 189 U.S. 306 (1903); *Johnson v. Long Island Railroad*, 56 N.E. 992 at 993 (N.Y. 1900). In *Johnson*, the court held that tribal rights cannot be enforced in a representative action, either.

182. See *Pharoah v. Benson*, 164 A.D. 51, 149 N.Y.S. 438 (1914), *aff'd*, 222 N.Y. 665, 119 N.E. 1072 (1918).

183. In *Oneida Indian Nation of New York v. Burr*, 132 A.D.2d 402, 522 N.Y.S.2d 742 (1987), the court held that federal and state statutes authorized all tribes to sue in New York courts. The state's highest court has not reviewed the issue, but the former New York rule seems clearly gone.

184. See *supra* notes 4-5 and accompanying text.

185. *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *Cherokee Nation v. Southern Kansas Railway*, 135 U.S. 641 (1890). The latter case involved a statute consenting to suit for damages, but the Cherokees unsuccessfully sought equitable relief that was not authorized by the statute. A companion case to *Cherokee Nation v. Hitchcock* was *Lone Wolf*, *supra* note 8,

of Law and Procedure opined, “It is generally held that an Indian tribe cannot sue and be sued in the courts of the United States or in a state court, except where authority has been conferred by statute.”¹⁸⁶ The only relevant authorities cited for lack of capacity to sue were the New York decisions discussed above. (Of course the *Cyclopedia* was published in New York City.)

In 1914, the Pueblo of Santa Rosa (today part of the Tohono O’Odham Nation) sued the Secretary of the Interior to enjoin him from illegally disposing of tribal land. Justice Department lawyers argued that the plaintiff had no capacity to sue, citing the *Cyclopedia* and *Cherokee Nation v. Georgia*. The District Court agreed and dismissed but was reversed by the Court of Appeals, and the Supreme Court affirmed the reversal.¹⁸⁷ One basis for the Court’s decision was the status of pueblo tribes under the *Treaty of Guadalupe-Hidalgo* and Mexican law, not applicable to other tribes.¹⁸⁸ But in its response to *Cherokee Nation*, the Court said:

The case of *Cherokee Nation v. Georgia*, 5 Pet. 1, on which the defendants place some reliance, is not in point. The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a “foreign state” in the sense of the judiciary article of the Constitution and therefore entitled to maintain an original suit in this court against the State of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a “foreign state” in the sense intended, and so could not maintain such a suit. This is all that was decided.¹⁸⁹

The government also argued that wardship deprived the tribe of capacity. The Court replied:

The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation.

brought by tribal leaders in representative capacity. Again, no issue about capacity to sue was raised.

186. *Cyclopedia of Law and Procedure*, vol. 22 (New York: American Law Book, 1906) “Indians”, 120-121. This passage was repeated verbatim in *Corpus Juris*, vol. 31 (New York: American Law Book, 1923) “Indians”, 488-489.

187. *Pueblo of Santa Rosa v. Lane*, 46 App. D.C. 411 (1917), *aff’d*, 249 U.S. 110 (1919).

188. 46 App. D.C., *ibid.* at 419-430, 249 U.S., *ibid.* at 111-112.

189. 249 U.S., *ibid.* at 112-113.

Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court, of which *Lone Wolf v. Hitchcock*, 187 U.S. 553, is an illustration.¹⁹⁰

Thus the *Pueblo of Santa Rosa* court explicitly rejected the two main arguments made against tribal capacity over the previous 88 years. That was the state of the law when Felix Cohen's Interior team produced the 1941 *Handbook of Federal Indian Law*.¹⁹¹ The Supreme Court next visited the capacity issue in *Creek Nation*, a 1943 claims case.¹⁹² The Creek and Seminole nations sought compensation for land taken by the same railroads that the Cherokees had challenged in 1890.¹⁹³ The Court rejected their claim, in part because, according to the Court, the tribes could have protected their rights by suing the railroads, as the Cherokees had done.¹⁹⁴ And in 1968, the Court specifically held that individual Indian allottees had capacity to sue—as Congress had provided 74 years previously.¹⁹⁵

In sum, the Supreme Court has never accepted the claim that tribes or Indians lack capacity to sue. When the issue has been presented to it, the Court has firmly rejected the claim.

The 1946 Indian Claims Act

As explained above, sovereign immunity bars unconsented claims for damages against the United States, and the Claims Court's general consent statute, later dubbed the *Tucker Act*, excluded claims based on treaties.¹⁹⁶ Nontreaty tribal claims were mistakenly believed barred as well, either because the treaty exclusion was erroneously assumed to be broader, or

190. *Ibid.* at 113-114. The decision was reaffirmed seven years later in a case involving the Pueblo of Laguna, written by the same justice, though with the government on the Indians' side. *United States v. Candelaria*, 271 U.S. 432 at 442 (1926).

191. See *supra* notes 6, 11-15 and accompanying text.

192. *Creek Nation v. United States*, 318 U.S. 629 (1943) [*Creek Nation*].

193. See *supra* note 181 and accompanying text.

194. *Creek Nation*, *supra* note 192 at 640. In support, the Court cited each of the Supreme Court decisions discussed in this subpart of our paper. *Ibid.* at 640 n.19. The dissenters did not dispute this point. *Ibid.* at 641-642.

195. *Poafpybitty v. Skelley Oil*, 390 U.S. 365 (1968). The decision had many precursors that should have settled the issue long before. See *Choate v. Trapp*, 224 U.S. 665 (1912); *Tiger v. Western Investment*, 221 U.S. 286 (1911); Act of 15 August 1894, *supra* note 140, and accompanying text; Ray A. Brown, "The Indian Problem and the Law" (1930) 39 Yale L.J. 307 at 314-315.

196. See text accompanying notes 128-131. The 1863 treaty exclusion was amended in 1878 and 1911 without altering its substance. Rev. Stat. c. 21 § 1066, at 197 (1878); Act of 3 March 1911, Pub. L. No. 61-475, § 153, 36 Stat. 1087 at 1138. The consent statute was re-enacted and broadened to include claims based on the Constitution by the *Tucker Act*, 3 March 1887, c. 359, 24 Stat. 505, but the treaty exclusion was unchanged.

because of doubt about tribal and Indian capacity to sue as we have explained. In any case, Indian claims were based on wrongs committed decades earlier, and the *Tucker Act*'s statute of limitations is six years.¹⁹⁷ Case-by-case, special jurisdictional statutes consented to tribal claims based on treaties or any other law, and they waived statutes of limitations defences.¹⁹⁸ And, of course, by authorizing named tribes to sue, they avoided any claim that the tribal plaintiffs lacked legal capacity.

Tribes seeking a consent statute faced huge burdens under the case-by-case system. First, there were expenses for investigation and lawyers. Tribes had few funds other than trust funds controlled by the government, and the government had to approve both selection of lawyers and use of the money. Approving suits against itself was not a favoured action. Contingent fee agreements were a possible way to finance the effort, but few lawyers could undertake the burden. Getting bills through Congress and signed by the president was a yet greater obstacle, as bills often took years to be enacted, and many efforts failed. A successful bill simply allowed a suit to be filed and determined. Many tribes lost on the merits because of overly narrow consent statutes, onerous offset provisions, or parsimonious Claims Court decisions. From 1920, over half the claims filed resulted in no net recovery.¹⁹⁹ "It would be hard to imagine any more effective legislative and judicial ways to stack the deck."²⁰⁰

Calls for a special tribunal to hear all Indian claims began at least by 1910. The 1928 *Meriam Report* broadened support, and a bill to establish an Indian claims commission was first introduced in 1935.²⁰¹ Dissatisfaction with the *ad hoc* system for adjudicating claims cases grew in the 1940s. Tribes and their allies viewed the system as slow, cumbersome, uneven and thus unfair.²⁰² Congress found the practice of addressing every claim individually to be overly burdensome.²⁰³ These views coalesced in 1945 into bills in Congress to provide a comprehensive system to adjudicate all past tribal claims in a new, special tribunal, the Indian Claims Commission. Future tribal claims would be addressed in the Court of Claims on the same

197. 28 U.S.C. § 2501 (2000). The six-year limit originated in the Act of 3 March 1863, c. 92 § 10, 12 Stat. 765 at 767.

198. See Newton *et al.*, *Cohen's Handbook*, *supra* note 2 at 444.

199. See Michael Lieder & Jake Page, *Wild Justice: The People of Geronimo v. the United States* (Norman & London: University of Oklahoma Press, 1997) at 53-58.

200. *Ibid.* at 58.

201. See Harvey D. Rosenthal, "Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission" in Imre Suttton, ed., *Irredeemable America: The Indians Estate and Land Claims* (Albuquerque: University of New Mexico Press, 1985) at 40-43.

202. See *e.g.* U.S., *Creation of Indian Claims Commission: Hearing on H.R. 1198 & H.R. 1341 Before the House Committee on Indian Affairs*, 79th Cong. (1945) at 55-56 (N.B. Johnson, President, National Congress of American Indians) [*Creation of Indian Claims Commission*].

203. "[W]e are being harassed constantly by various pieces of legislation." *Ibid.* at 68 (Rep. Jackson).

basis as those of other claimants by removing the treaty exclusion. Bills to enact this scheme were introduced in 1945 and enacted in 1946.²⁰⁴ To no one's surprise, the Indian Claims Commission's remedies were limited, mostly by denial of prejudgment interest, so that full justice to tribal claims could not be rendered.²⁰⁵ Nevertheless adjudicating claims before the Indian Claims Commission became a massive enterprise, though one that achieved little closure for tribes.²⁰⁶

Pertinent to the theme of this paper, the run-up to the *Indian Claims Act* became a reprise of the Friends of the Indian and *Jaeger* case debacles. Two bills were introduced early in 1945, and hearings on them before the House Committee on Indian Affairs were reported.²⁰⁷ A former U.S. senator from Oklahoma appeared as "a Friend of the Indians" and asserted that legislation was needed to provide tribes a forum to adjudicate their rights because there "is no such forum today and there never has been."²⁰⁸ He quoted the *Jaeger* dictum as support and concluded, "The courts of this country are not open to these Indians and our civil liberties have never been extended to them."²⁰⁹

The hearings led to an amended bill introduced later in 1945, to a Senate hearing report and to House and Senate committee reports.²¹⁰ These reports came closer to the actual state of the law. Assertions that Indians lacked any forum were restricted to the Court of Claims, and its treaty exclusion was accurately cited. But the exclusion continued to be rhetorically broadened to include Indian claims of any kind, not limited to those based on treaties.²¹¹ And broader claims reappeared during floor debates in the House. A member averred:

It is lamentable that the courts of this country are not open to the Indians and our civil liberties have never been given to them At the present time there is no legal forum open to the Indians The United States Court of Claims has held in the *Jaeger* case that the courts of this country are not open to the Indians.²¹²

204. Act of 13 August 1946, c. 959 § 24, 60 Stat. 1049 at 1055 (codified as amended and re-enacted at 28 U.S.C. § 1505 (2000)). The prohibition on tribal treaty claims reappeared with foreign treaty claims in the 1948 codification of the U.S. Code and was removed by the Act of 24 May 1949, c. 139 § 88, 63 Stat. 102. See 28 U.S.C.A. § 1502 (2001).

205. Except when a constitutional taking was established, the Commission was limited to awarding actual damages measured by the fair market value at the time of the wrong. Interest from the date of the wrong would have added a considerable amount to the damage awards. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 285 n.17 (1955) (noting that interest on claims pending would bring damages in all pending cases to \$9 billion).

206. See text accompanying notes 216-217.

207. See *Creation of Indian Claims Commission*, *supra* note 202.

208. *Ibid.* at 42 (testimony of Hon. Thomas P. Gore).

209. *Ibid.* at 42-43.

210. See *ibid.*; U.S., H.R. Rep. No. 1466 (1945); U.S., *Indian Claims Commission Act: Hearing on H.R. 4497 Before the Senate Committee on Indian Affairs*, 79th Cong. (1946).

211. See H.R. Rep. No. 1466 (1945) at 1-3.

212. U.S., *Cong. Rec.*, vol. 92, at 5317-5318 (20 May 1946) (Rep. Robertson).

Of course the treaty exclusion was an actual and substantial barrier to Indian claims, and the *Indian Claims Act* removed it.²¹³ The *Act* established the Indian Claims Commission to address the very large number of claims that had accumulated over the past century and a half. Nor did the confusions prevent Congress and the Interior Department from recognizing and attempting to address several other barriers to adjudicating Native American rights. The Indian Claims Commission was to recognize a broad array of wrongs, including claims based on executive orders of the president, or those that would result if Indian treaties and other agreements “were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake,” or “claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.”²¹⁴ Neither statute of limitations nor laches was to bar any claim.

As our analysis above shows, the new statute was needed to remove the treaty exclusion from the *Tucker Act*, not to accord to treaty parties capacity to enforce treaties (or any other cause of action). Recognition in making the treaties did that. However, the statute adopted a broad definition of tribal plaintiffs empowered to bring claims: “Any tribe, band, or other identifiable group of American Indians.”²¹⁵ This definition encompassed tribal groups whose previous legal status had been uncertain.

In practice, the *Act* had several shortcomings, most of them limitations on remedies. Judgments for tribes were in 19th century dollars without interest or compounding for changes in the value of the currency.²¹⁶ Even this stingy measure was reduced by deducting as offsets federal expenditures for tribes—many of which were of little actual benefit, and all of which were made during the very period when tribes were denied any recompense for the use of their property by others. The *Act* allowed no remedies other than inadequate damages, though many tribes would have preferred land restoration. And distribution of judgment funds rarely made any investment in a tribe’s future, assuring that tribal poverty and related social ills would soon return.²¹⁷

213. See *supra* notes 196, 204 and accompanying text.

214. Act of 13 August 1946, c. 959, Pub. L. No. 726 § 2, 60 Stat. 1049 at 1050 (formerly codified at 25 U.S.C. § 70a).

215. *Ibid.*

216. See Vine Deloria Jr., *Of Utmost Good Faith* (San Francisco: Straight Arrow Books, 1971) at 142.

217. The claims process has had many critics, often focusing on lack of any remedy to restore land in kind. See e.g. Vine Deloria Jr., *Behind the Trail of Broken Treaties* (Austin: University of Texas Press, 1985) at 226-227. See also Nell Jessup Newton, “Indian Claims in the Courts of the Conqueror” (1992) 41 Am. U. L. Rev. 753 at 764-765 (Sioux Nation’s refusal to accept claims judgment as payment for taking of Black Hills).

Federal Question Jurisdiction

From the nation's founding, many legal wrongs to tribes violated federal law, or in jurisdictional terms, arose under federal law. These are within the federal judicial power, but Congress did not give federal trial courts original jurisdiction over general federal claims until 1875.²¹⁸ Until that time, federal question cases had to be filed in a state trial court or to be based on federal diversity jurisdiction that excluded Indians and tribes.²¹⁹ The 1875 statute allowing federal question claims to be filed in federal trial courts was limited, however, by a minimum jurisdictional amount in controversy of \$500, raised to \$2000 in 1887, to \$3000 in 1911, and to \$10,000 in 1958.²²⁰ This was an obvious barrier to some tribal and Indian claims.

Tribes gained special access to federal courts when Congress enacted 28 U.S.C. § 1362 in 1966.²²¹ This statute provides original jurisdiction in federal district courts of federal question claims brought by Indian tribes regardless of the amount in controversy. No other plaintiff (save the United States itself) then had this right; others' general federal question claims not satisfying the jurisdictional amount could be filed only in state courts.²²²

As explained above, this statute was not needed to accord tribes capacity to sue, and its legislative history is consistent with this assertion. The only purpose stated was to give tribes access to federal district courts in federal question cases not meeting the jurisdictional amount; the history assumes that tribes could sue under prior law when their claims met the jurisdictional amount.²²³ Like the *Indian Claims Act*, the 1966 statute has a broad definition of eligible plaintiffs: "Any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." This definition, coupled with a later statute and regulations,²²⁴ has created greater certainty for tribal plaintiffs that had lacked official recognition in a treaty or prior statute.

In 1980, the general federal question statute was amended to remove the jurisdictional amount for all plaintiffs (including individual Native Americans).²²⁵ Thus the 1966 *Act* is of minimal importance today.²²⁶

218. See Fallon, Meltzer & Shapiro, *supra* note 33 at 33, 36.

219. *Ibid.* at 36; see text accompanying notes 46-47 and 136-137.

220. Fallon, Meltzer & Shapiro, *ibid.* at 880-881.

221. Act of 10 October 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (2000)).

222. See Fallon, Meltzer & Shapiro, *supra* note 33 at 878-881.

223. See U.S., *Indian Tribes—Civil Suits*, S. Rep. No. 1507 (1966); U.S., H. Rep. No. 2040 (1966). The Senate Report stated that a purpose of the bill was to overcome the decision in *Yoder v. Assiniboine & Sioux Tribes*, 339 F.2d 360 (8th Cir. 1964), which denied federal district court jurisdiction for lack of the required amount in controversy but did not question tribal capacity to sue (S. Rep. at 5).

224. See text accompanying notes 169-170.

225. See 28 U.S.C.A. 1331 (2001) (text and annotations).

V CONCLUSION

Assertions that Indian tribes, and at times individual Native Americans, lacked capacity to sue in American courts were a frequent part of the long and difficult struggle for Indian causes to have their days in court. We cannot know how many lawsuits were not brought because of this belief, but it was one of the many obstacles tribes faced in their quest for justice. However, unlike barriers such as poverty, lack of federal jurisdiction, racial hostility, and demoralization, the incapacity claim had no basis in fact or law. It arose from a mix of rhetoric by assimilationist do-gooders, a disgraceful attempt by an 1891 Court of Claims judge to justify denying tribal defendants due process of law, and an accidental 1845 dictum by New York's chancellor. Whenever the capacity issue came to the U.S. Supreme Court, the Court rejected the claim without a dissenting vote. While impossible to quantify, the capacity gaffe was part of the complex legal forms used to justify depriving Indians of land, described perceptively and ironically by de Tocqueville: "It is impossible to destroy men with more respect for the laws of humanity."²²⁷

226. Tribes and Indians faced another barrier when they sought to recover land in federal district court based on federal question jurisdiction. The Supreme Court had held that origin of title in a federal statute did not raise a federal question unless the complaint alleged an issue about meaning of the statute. *Taylor v. Anderson*, 234 U.S. 74 (1914); *Shulthis v. McDougal*, 225 U.S. 561 (1912). Lower courts applied this rule to deny jurisdiction over tribal claims that land was taken in violation of the federal nonintercourse statutes until the Supreme Court reversed in 1974, holding that tribal ownership under these statutes is a federal question. *Oneida Indian Nation of New York v. Oneida (County of)*, 414 U.S. 661 at 665-667 (1974). However, these decisions raised no issue about capacity to sue.

227. Alexis de Tocqueville, *Democracy in America*, ed. by Phillips Bradley, trans. by Henry Reeve, rev. by Francis Bowen (New York: Alfred A. Knopf, 1980) vol. 1 at 355.