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# CIVIL LIBERTIES GUARANTEES UNDER TRIBAL LAW: A SURVEY OF CIVIL RIGHTS PROVISIONS IN TRIBAL CONSTITUTIONS

*Elmer R. Rusco\**

Native American societies have a unique legal position in the American polity because they still retain the right to govern themselves according to cultural standards which are not those of the general society.<sup>1</sup> Consequently, the Constitution does not automatically restrain tribal governments. One important area in which this is the case concerns protections for individual liberties against tribal governments.

In 1968, Congress enacted the Indian Civil Rights Act (ICRA).<sup>2</sup> This law applied most of the Bill of Rights, in a slightly modified form, to tribal governments; it also stated that the writ of *habeas corpus* was available to persons alleging violations of the ICRA by tribal governments. In 1978 the United States Supreme Court, in *Santa Clara Pueblo v. Martinez*, upheld the ICRA and interpreted its meaning.<sup>3</sup> The Court ruled that the ICRA had not repealed the immunity of suit against tribal governments; moreover, that Congress had intended to allow only *habeas corpus* as a means of enforcing the Act. This conclusion was reached because the Court believed that "creation of a federal cause of action for the enforcement of rights created" by the Act "plainly would be at odds with the congressional goal of protecting tribal self-government."<sup>4</sup>

The chief effect of the holding in *Martinez*, absent Congressional modification of the ICRA, is that the Indian Civil Rights Act is primarily enforceable in tribal courts. "Tribal forums are

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Due to the inability of the law review staff to obtain certain materials cited in this article, we have relied on the author's own research and expertise to verify those materials.—*Ed.*

1. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, 202-04, 660-72 (1982 ed.) [hereinafter F. COHEN]; M. PRICE, *LAW AND THE AMERICAN INDIAN*, 730-78 (1973); GETCHES & WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW*, 255-63 (1st ed. 1979) [hereinafter GETCHES & WILKINSON]. Ernest Schusky has called this legal status "the right to be different." E. SCHUSKY, *THE RIGHT TO BE INDIAN* (1970).

2. Indian Civil Rights Act of 1968, Pub. L. No. 90-284 (codified at 25 U.S.C. §§ 1302-1303 (1968)).

3. *Santa Clara Pueblo v. Martinez*, 98 S. Ct. 1670, 436 U.S. 49, 56 L. Ed.2d 106 (1978).

4. *Id.* at 64.

available to vindicate rights created by the ICRA, and [the Act] has the substantial and intended effect of changing the law which these forums are obliged to apply."<sup>5</sup> This article deals with one important aspect of the status of civil liberties in tribal forums. Many tribal governments, though by no means all, operate on the basis of written constitutions. This article examines all the provisions dealing with civil liberties in 220 tribal constitutions in force as of September, 1981, in all states except Alaska and Hawaii. Slightly over half of these documents—130—were written under authority of the Indian Recognition Act, 24 were written under authority of the Oklahoma Indian Welfare Act, 63 cite no federal statute, and three are in the form of state statutes.<sup>6</sup>

There is a mistaken impression that almost all tribal constitutions are the same, because they were all based on a mythical "model constitution" produced by the Bureau of Indian Affairs when it implemented the Indian Reorganization Act.<sup>7</sup> The most obvious thing about these constitutions, however, is that there is no single pattern for dealing with civil liberties; many do not mention the subject at all, and those which do deal differently with it, although there are several patterns.

### *Provisions Asserting Cultural Difference*

Surprisingly, few constitutions state that the purpose of the document is to preserve tribal self-government and/or a distinctive tribal inheritance. The constitution of the Confederated Tribes of Siletz Indians of Oregon states that "Each duly enrolled member of the Confederated Tribes . . . shall have the following rights" and these include: "the right to exercise traditional rights and privileges of members of the Confederated Tribes . . . where not in conflict with other provisions of this Constitution, tribal laws and ordinances, or the laws of the United States."<sup>8</sup> The "Purposes" section of the same document says that the constitution is adopted and the tribal government established:

in order to: (1) Continue forever, with the help of God, our unique identity as Indians and as the Confederated Tribes . . .

5. *Id.* at 65.

6. Special thanks are due to Robert Farring of the Division, who provided me with copies of the constitutions.

7. For example, it is mistakenly reported that there was a "model constitution" in G. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM* 97 (1980).

8. CONFEDERATED TRIBES OF SILETZ INDIANS OF OR. CONST. art. II, § 1.

and to protect that identity from forces that threaten to diminish it; (2) Protect our inherent rights as Indians and as a sovereign Indian tribe; (3) Promote our cultural and religious beliefs and to pass them on in our own way to our children, grandchildren, and grandchildren's children forever. . . .<sup>9</sup>

The constitution of the Burns Paiute Indian Colony states that one of the purposes of the document is "to exercise and protect any individual or colony rights arising from any source including but not limited to tradition, federal statute, state statute, common law, or otherwise."<sup>10</sup>

The constitution of the Crow Tribal Council states that the Crow Tribe will make its own decisions "without Indian Bureau interference or advice . . ." and that "the Crow Tribal Council, regardless of same, hereby reserved [sic] unto itself the right to initiate moves looking to the protection of the Crow tribal rights and interests under their treaties and under the American constitution guaranteeing all basic human rights to all who live under the American flag, and to the equal protection of the laws of our country."<sup>11</sup> The Fort Mojave Indian Tribe states in its constitution:

The members of the Fort Mojave Tribe shall continue undisturbed in their customs, culture, and their religious beliefs including but not limited to, the customs of cremation, ceremonial dancing and singing, and no one shall interfere with these practices, recognizing that we have been a people and shall continue to be a people whose way of life has been different.<sup>12</sup>

The constitution of the Spokane Indian Tribe states that "Every tribal member shall have . . . the right to exercise traditional rights and privileges of members of the tribe where not in conflict with other provisions of this Constitution, Tribal laws and ordinances, or the laws of the United States."<sup>13</sup> The Statement of Purpose of the same document says that "Our purpose shall be to promote and protect the sovereignty, rights, and interests of the Spokane Tribe of Indians."<sup>14</sup>

9. *Id.*

10. BURNS PAIUTE INDIAN COLONY CONST. art. 1, § 1.

11. CROW TRIBAL COUNCIL CONST. art. VII, § 8.

12. FORT MOJAVE INDIAN CONST. art. V, § 2.

13. SPOKANE TRIBE-SPOKANE RESERVATION TRIBE CONST. art. IV, § 1.

14. *Id.* at art. I.

The Fort Sill Apache Tribe states in its governing document that "The treaty rights of the Fort Sill Apache Tribe . . . shall not in any way be altered, abridged or otherwise affected by any provision of this constitution and bylaws."<sup>15</sup> The Prairie Band of Potawatomi Indians states in its constitution that "We, the Prairie Band of Potawatomi, do not accept a diminishing of our sovereign status as a nation and of our vested and inherent rights by the act of adopting this constitution."<sup>16</sup>

While some other governing documents implicitly assert a "right to be different" in ways noted below, most constitutions do not contain explicit statements of either this right or the right of self-government.

### *Provisions Stating General Constitutional Principles*

A few constitutions state general principles of constitutional, democratic government, in formulations which do not conflict with the principles of the general American political order. For instance, the Gila River Indian Community of Arizona states in its constitution that:

All political power is inherent in the people. Governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.<sup>17</sup>

The constitution of the Colorado Indian Reservation states:

All members of the Colorado River Indian Tribes have certain inherent rights, namely, the enjoyment of life, liberty, and the acquiring and ownership of possessions, and pursuing happiness and safety. These rights cannot be protected unless the members recognize their corresponding obligations and responsibilities.<sup>18</sup>

The preamble to the governing document of the Fort Mojave Indian Tribe states that the members of the tribe, "in order to . . . enjoy

15. FORT SILL APACHE TRIBE OF OKLA. CONST. art. VIII, § 4.

16. PRAIRIE BAND OF POTAWATOMI INDIANS CONST. art. II, § 1.

17. GILA RIVER INDIAN COMMUNITY OF ARIZ. CONST. art. IV.

18. COLO. RIVER TRIBES OF THE COLO. RIVER INDIAN RESERVATION/ARIZ. AND CAL. CONST. art. III, § 2. [hereinafter COLO. RIVER INDIAN TRIBES CONST.]

and maintain our rights and privileges as citizens under the Constitution and laws of the United States of America, do establish this Constitution and Bylaws".<sup>19</sup> The Chickasaw Nation's constitution states the basic rights to alter or abolish forms of government, in these words:

All political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit; and they have at all times the inalienable right to alter, reform or abolish their form of government in such a manner as they may think expedient; provided, such action is taken pursuant to this Constitution.<sup>20</sup>

The constitution of the Yankton Sioux Tribe states a free enterprise philosophy which some regard as basic constitutional principle in the American polity. This document states that "[a]ll operations under this Constitution shall be free from any system of collectivism and/or socialism under any and all circumstances" and that "[t]his Constitution shall stress to the fullest extent of its authority, at all times, recognition of and operation under the private enterprise system and democratic way of life."<sup>21</sup>

The governing documents of six tribes parallel the wording of the 9th amendment to the United States Constitution, asserting the existence of rights not enumerated. The constitution of the Jicarilla Apache Tribe asserts that "[t]he enumeration of certain rights in this constitution shall not be construed to deny or disparage others retained by members of the Jicarilla Apache Tribe."<sup>22</sup> Practically the same language is contained in the constitutions of the Ak-Chin Indian Community, the Gila River Indian Community, and the Pueblo of Isleta, plus the bylaws of the Salt River-Maricopa Indian Community. The constitution of the Colorado River Indian Reservation combines such a declaration with a statement of basic philosophy by stating, "All political power of the tribes is inherent in the members. This constitution and bylaws is the expression of the will of the members and enumeration of rights and privileges herein shall not be construed to impair or deny others retained by the members."<sup>23</sup> While such provisions may

19. FORT MOJAVE INDIAN TRIBE CONST. preamble.

20. CHICKASAW NATION CONST. art. IV, § 2.

21. YANKTON SIOUX TRIBAL BUSINESS AND CLAIMS COMM. CONST. art. IX, § 1.

22. JICARILLA APACHE TRIBE CONST. art. IV, § 3.

23. COLO. RIVER INDIAN TRIBES CONST. art. III, § 1.

reflect little more than a declaration of constitutional principle, which has been the fate of the 9th amendment as interpreted by the courts, in the Indian case they might be used to assert the continued relevance of rights unique to Native Americans.

### *Incorporating the ICRA*

Twenty-two constitutions incorporate the Indian Civil Rights Act ("ICRA") into the document, and do not go beyond it or change it in any way. For example, the constitution of the Alturas Indian Rancheria simply states that "The protection guaranteed to persons by Title II of the ICRA of 1968 . . . against actions of a tribe in exercising its powers of self-government shall apply to the Alturas Indian Rancheria, its officers and all persons within its jurisdiction."<sup>24</sup> Similar wording is found in the constitutions of seventeen other tribes, with only minor variations (such as omitting "its officers and all persons within its jurisdiction.") Six constitutions accomplish the same thing by listing specifically the rights guaranteed by the ICRA. For example, the governing document of the Mississippi Band of Choctaws states that the tribe, "in exercising powers of self-government shall not . . ." violate any of the specific rights spelled out in Title II of the ICRA.<sup>25</sup> The constitution of the Paiute Indian Tribe of Utah states that any further amendment of the ICRA will be accepted "without requiring the amendment of this constitution."<sup>26</sup>

### *General Statements Accepting Federal and State Rights*

Fifty-nine tribal constitutions contain general language asserting that members of the tribe enjoy rights as citizens of the United States and/or a state and stating that the tribal constitution does not disturb these rights. For example, the constitution of the Alabama-Quassarte Tribal Town states that "This Constitution shall not in any way be construed to alter, abridge or otherwise jeopardize the rights and privileges of the members of this Tribal Town as citizens of the Creek Nation, the State of Oklahoma or of the United States."<sup>27</sup> Another formulation of this provision, in the governing document of the Chehalis Reservation, says, "No

24. ALTURAS INDIAN RANCHERIA/MODOC COUNTY, CAL. CONST. art. VIII.

25. MISS. BAND OF CHOCTAW INDIANS CONST. art. X.

26. PAIUTE INDIAN TRIBE OF UTAH CONST. art. XIII. § 4.

27. ALA.-QUASSARTE TRIBAL TOWN/OKLA. CONST. art. IX.

member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution and Statutes of the United States. . . .<sup>28</sup> The Constitution of the Cherokee Nation of Oklahoma states that “[t]he Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.”<sup>29</sup> While not specifically referring to the Bill of Rights, this provision might be read as a pledge by the Cherokee Nation not to violate the Bill of Rights. The Pueblo of Laguna states in its governing document that “Each member of the Pueblo of Laguna is hereby assured of his rights as a citizen of the United States and no attempt shall be made by the Council or the officers of the Pueblo to enforce any order which shall deprive him of said rights.”<sup>30</sup> In twenty-one cases, a general statement of this nature is followed by a listing of specific rights which the tribe cannot violate, sometimes with the statement that the rights guaranteed by the United States or state constitutions shall not be violated, “including but not limited to” the specified rights. The meaning of provisions of this sort is unclear but is of great importance; the issues involved are discussed in the conclusion of this article.

### *Enumeration of Rights*

Most of the provisions noted to this point deal with general constitutional provisions. In addition to these or instead of such general statements, the constitutions contain listings of specific rights which members or non-members have against tribal governments. This section will describe the specific rights mentioned in tribal governing documents.

#### *First Amendment Rights*

The most numerous specific guarantees are those protecting first amendment rights. A total of eighty-nine constitutions list religious freedoms and freedoms of expression together, while there are numerous additional statements of first amendment rights. Thirty-seven constitutions contain a statement essentially the same as that contained in the constitution of the Apache Tribe of Oklahoma: “All members of the Apache Tribe of Oklahoma shall enjoy,

28. CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION CONST. art. VIII.

29. CHEROKEE NATION OF OKLA. CONST. art. I.

30. PUEBLO OF LAGUNA/N. M. CONST. art. VIII, § 1.



without hindrance, freedom of worship, conscience, speech, press, assembly and association."<sup>31</sup> Another nine constitutions contain essentially the same wording except that "may" is substituted for "shall." Twenty-nine constitutions contain wording similar to that in the governing document of the Chehalis Reservation, which states that "freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or redress of grievances. . ." shall not be abridged by the tribal government.<sup>32</sup> It is noteworthy that these summaries of first amendment rights do not include a prohibition of the establishment of religion. Several constitutions provide an even more incomplete list of first amendment rights. For example, the constitution of the Burns Paiute Indian Colony lists "freedom of worship, speech, press and assembly" only, and the constitution of the Sauk-Suiattle Indian Tribe lists "freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievance. . .", but not religious freedom.<sup>33</sup>

Overall, a tabulation of specific first amendment rights among the constitutions having a general first amendment provision shows the following pattern:

Freedom of religion (and/or conscience and/or worship)	85
Freedom of speech (and/or to speak)*	88
Freedom of the press or to write*	56
Freedom of association and/or assembly, sometimes qualified with the word orderly"	88
Freedom of petition (sometimes for redress of grievances)	34

\*The bylaws of the Salt River Pima-Maricopa Indian Community state that "Every member of the Salt River Pima-Maricopa Indian Community may freely speak, write or publish on all subjects, being responsible for the abuse of that right."<sup>34</sup>

In addition to provisions listing more than one first amendment right, various other specific provisions of tribal constitutions mention first amendment rights. A number of provisions on religious

31. APACHE TRIBE OF OKLA. CONST. art. X.

32. CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION CONST. art. VIII.

33. BURNS PAIUTE INDIAN COLONY CONST. art. X, § 3; SAUK-SUIATTLE INDIAN TRIBE CONST. art. VIII.

34. SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY CONST. art. IV, § 3.

freedom obviously were written specifically for the situation of the tribe. For example, several refer to traditional Native religious beliefs or practices. For example, the constitution of the Miccosukee Tribe states that “[t]he members of the tribe shall continue undisturbed in their religious beliefs and nothing in this constitution and bylaws will authorize either the General Council or the Business Council to interfere with these traditional religious practices according to their custom.”<sup>35</sup> The constitution of the Seminole Tribe of Florida contains an almost identical provision.

While these two provisions dealing with religious freedom refer only to traditional tribal beliefs, several other specific provisions stating freedom of religion guarantee religious diversity. For example, the constitution of the Pueblo of Laguna states, “All religious denominations shall have freedom of worship in the Pueblo of Laguna, and each member of the Pueblo shall respect the other members’ religious beliefs.”<sup>36</sup> The constitution of the Alabama-Quassarte Tribal Town states that “no member shall be treated differently because he does or does not believe in or take part in any religion or religious custom.”<sup>37</sup> The constitution of the Cocopah Tribe says that “[t]he members of the tribe shall continue undisturbed in their religious beliefs and nothing in this Constitution will authorize the Tribal Council to interfere with religious practices.”<sup>38</sup> The Gila River Indian Community of Arizona states in its governing document that “Freedom of religion or conscience shall not be abridged,” and the constitution of the Menominee Indian Tribe of Wisconsin forbids the tribe to “make or enforce any law . . . prohibiting the free exercise of religion or of the dictates of conscience. . . .”<sup>39</sup> An unusually detailed provision on religious freedom is found in the bylaws of the Salt River Pima-Maricopa Indian community, which state that:

The liberty of conscience secured by the provisions of this constitution and bylaws shall not be construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the Salt River Pima-Maricopa Indian Community. Persons who are not members of the Salt River Pima-

35. MICCOSUKEE TRIBE OF INDIANS OF FLA. CONST. art. VI, § 1.

36. PUEBLO OF LAGUNA/N. M. CONST. art. VIII, § 2.

37. ALA.-QUASSARTE TRIBAL TOWN/OKLA. CONST. art. IX.

38. COCOPAH TRIBE/SOMERTON, ARIZ. CONST. art. VII.

39. GILA RIVER INDIAN COMMUNITY OF ARIZ. CONST. art. IV.

Maricopa Indian Community may not act as missionaries or ministers of religion within the boundaries of the Salt River Pima-Maricopa Indian Community except upon proof satisfactory to the community council that they are of good moral character and that their presence within the reservation will not disturb peace and good order.<sup>40</sup>

Obviously, this provision limits religious freedom as it is ordinarily understood. A more limited but similar provision is part of the constitution of the Cherokee Tribe of North Carolina, which is part of the *Private Laws* of North Carolina. This document states that "Free exercise of religion, worship and manner of serving God shall be forever enjoyed, but not contrued [sic] as to excuse act of licentiousness."<sup>41</sup>

A few tribal constitutions contain at least partial bans on an establishment of religion. For example, the constitution of the Menominee Indian Tribe of Wisconsin states that the tribe "shall not . . . establish an official government religion. . ."<sup>42</sup> The governing document of the Chickasaw Nation states, "No religious test shall ever be required as a qualification for any office of public trust in this Nation", and this language is repeated almost exactly in the constitution of the Choctaw Nation of Oklahoma.<sup>43</sup> The constitution of the Quechan Tribe requires that "[t]he Council shall at all times be non-partisan and non-sectarian in character."<sup>44</sup>

The one provision in a tribal constitution which can be construed as establishing a religion, at least in part, is a provision of the *Private Laws* of North Carolina, the constitution of the Cherokee Tribe of North Carolina. This statute states that no person is eligible to an "office or appointment of honor, profit or trust" within the tribe "who denies the existence of a God or a future state of rewards and punishments."<sup>45</sup> However, the bylaws of the Salt River Pima-Maricopa Indian Community permit some support of religious activities, in these words:

No public money shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of

40. SALT RIVER PIMA-MARICOPA CONST. art. IV, § 7.

41. N. C. Priv. L., ch. 207, § 18 (1897).

42. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2.

43. CHICKASAW NATION CONST. art. IV, § 3; CHOCTAW NATION OF OKLA. CONST. art. IV, § 2.

44. QUECHAN TRIBE/FORT YUMA, CAL. CONST. art. IX, § 1.

45. N. C. Priv. L., ch. 207, § 18 (1897).

any religious establishment; but this shall not prevent the community council in its discretion from setting apart areas of tribal land for use rent free as sites of houses of worship or other religious activities. No religious qualifications shall be required for any public office or employment. . .<sup>46</sup>

The same bylaws contain a unique provision stating that no person shall be "incompetent as a witness or juror in consequence of his opinion on matters of religion nor be questioned touching his religious beliefs in any court of justice to affect the weight of his testimony."<sup>47</sup>

Several constitutions limit freedoms of expression. For example, the constitution of the Chickasaw Nation states, "Every citizen shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege, and no law shall ever be passed curtailing the liberty of speech, or of the press."<sup>48</sup> The constitution of the Gila River Indian Community of Arizona states, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."<sup>49</sup> Two constitutions apparently restrict freedom of speech guarantees to tribal activities. The constitution of the Choctaw Nation of Oklahoma states that "[t]he right that every member has to speak, write or publish his opinions on matters relating to the Choctaw Nation shall never be abridged".<sup>50</sup> The constitution of the Crow Tribal Council says, "Every member of the Crow Tribe, outside of the exception herein provided for, shall have equal opportunities to discuss any and every question of tribal concern before the council, and to participate, without interference, in all votes taken upon any such questions."<sup>51</sup> (It is not clear what the exception is).

The constitution of the Chickasaw Nation and the Choctaw Nation of Oklahoma contain virtually identical provisions to the effect that "[t]he citizens shall have the right, in a peaceable manner, to assemble together for their common good and to apply to those vested with powers of government, for redress of grievances or other purposes by address or remonstrance."<sup>52</sup>

46. SALT RIVER PIMA-MARICOPA BYLAWS art. IV, § 7.

47. *Id.*

48. CHICKASAW NATION CONST. art. IV, § 4.

49. GILA RIVER INDIAN COMMUNITY OF ARIZ. CONST. art. IV, § 3.

50. CHOCTAW NATION OF OKLA. CONST. art. IV, § 3.

51. CROW TRIBAL COUNCIL CONST. art. VII, § 10.

52. CHICKASAW NATION CONST., art. IV, § 5; CHOCTAW NATION OF OKLA. CONST. art. IV, § 4.

A unique provision regarding freedom of speech appears in the constitution of the Quechan Tribe, which states, "Nothing herein stated in this article shall serve to prevent the exercise of free speech and action in any matter not having to do with the deliberations of the Council."<sup>53</sup>

The constitution of the Gila River Indian Community of Arizona contains another unique provision to the effect that "[a]ll elections shall be free and equal, and no power shall at any time interfere to prevent the free exercise of the right of suffrage."<sup>54</sup> A number of constitutions include provisions specifying who may vote in tribal elections; these have not been included here because they do not directly create rights of individuals against tribal governments. But of course, they do so indirectly; where voting rules are specified in constitutions, a right to vote undoubtedly exists.

### *Guarantees of Equality*

After first amendment rights, guarantees of equality are most common in tribal constitutions. A total of seventy-three constitutions contains some guarantee of equality, usually more detailed than the equal protection clause of the ICRA and the fifth and fourteenth amendments to the United States Constitution. A guarantee of "equal protection of the laws" does occur in eleven constitutions; however, in one of these, that of the Menominee Indian Tribe of Wisconsin, the clause is qualified by the provision that "this clause shall not be interpreted to grant to non-tribal members those rights and benefits to which the tribal members are entitled by virtue of their membership in the Tribe."<sup>55</sup>

Twenty-seven constitutions contain a provision for equality of economic participation in tribal activities, of which the constitution of the Blackfeet Tribe is typical: "All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the reservation."<sup>56</sup> A very similar statement, but including "political rights", is found in eleven constitutions. An example of this approach is the constitution of the Cocopah Tribe, which reads: "All members of the tribe shall be accorded equal political rights and equal opportunities to participate

53. QUECHAN TRIBE/FORT YUMA, CAL. CONST. art. IX, § 2.

54. GILA RIVER INDIAN COMMUNITY OF ARIZ. CONST. art. IV, § 6.

55. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2(g).

56. BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION OF MONT. CONST. [hereinafter BLACKFEET TRIBE CONST.] art. VIII, § 2.

in the economic resources and activities of the tribe.”<sup>57</sup> Still another very similar provision is found in six constitutions, of which the constitution of the Ely Indian Colony is an example: “All members of the Ely Indian Colony shall have equal rights, equal protection, and equal opportunity to participate in the economic resources, tribal assets, and activities of the Colony.”<sup>58</sup> Still another form of such a constitutional provision guarantees life, liberty or pursuit of happiness to members; three constitutions contain such provisions.

Twelve constitutions contain a provision essentially like the section of the constitution of the Absentee-Shawnee Tribe of Indians of Oklahoma which states: “All members of . . . the Tribe . . . shall be accorded equal rights pursuant to tribal law.”<sup>59</sup>

Finally, several other constitutions contain pledges of economic equality more specific than any of those cited above. For example, the governing document of the Cheyenne-Arapaho Tribes of Oklahoma states, “All enrolled members of the tribes shall be eligible for all rights, privileges, and benefits given by this constitution and by-laws, such as claims, credits, acquisition of land, all educational grants, and any other future benefits.”<sup>60</sup> The constitution of the Pueblo of Santa Clara states that “all lands of the pueblo . . . shall forever remain in the pueblo itself and not in the individual members thereof,” but that “[a]ll the members of the pueblo are declared to have an equal right to make beneficial use, in accordance with ordinances of the council, of any land of the pueblo which is not heretofore or hereafter assigned to individual members.”<sup>61</sup>

A related provision of the bylaws of the Salt River Pima-Maricopa Indian Community reads: “No law granting irrevocably any privilege, franchise, or immunity shall be enacted.”<sup>62</sup>

A number of the equality provisions allow for exceptions specified in the constitution. For instance, the constitution of the Lovelock Tribe guarantees “equal rights, equal protection and equal [economic] opportunity” except for assignment of lands; another provision states that in tribal assignment of lands,

57. COCOPAH TRIBE/SOMERTON, ARIZ. CONST. art. VII, § 1.

58. ELY INDIAN COLONY CONST. art. VIII.

59. ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLA. CONST. art. X.

60. CHEYENNE-ARAPAHO TRIBES OF OKLA. CONST. art. III, § 7.

61. PUEBLO OF SANTA CLARA/N. M. CONST. art. VII, § 1.

62. SALT RIVER PIMA-MARICOPA BYLAWS art. IV, § 5.

“preference shall be given first to members of the . . . Tribe who are heads of a household.”<sup>63</sup>

### *Protection of Property Rights*

Protection for individual property rights, in some cases specifically allotted lands, is provided for in thirty-five constitutions. In 14 cases, the wording of the provision is essentially the same as a provision of the constitution of the Alabama-Quassarte Tribal Town, which reads: “The individual vested property rights of any member of the Tribal Town shall not be altered, abridged, or otherwise affected by the provisions of this Constitution by [sic] By-laws without the consent of such individual member.”<sup>64</sup> Another fifteen constitutions contain essentially the same wording except for omission of the word “vested.” Other provisions saying essentially the same thing include the constitution of the Cheyenne-Arapaho Tribes of Oklahoma, which declares, “Individual rights in allotted and inherited lands shall not be disturbed by anything contained in this constitution and by-laws,” by the constitution of the Santee Sioux Tribe, which states that “Nothing contained in this article shall be construed to deprive any Santee Sioux Indian of any vested right,” and by the constitution of the Tule River Indian Tribe of California, which states that the Council has the authority to provide for future memberships and adoption in the tribe, “provided that property rights shall not be changed by any action under this section.”<sup>65</sup> The constitution of the Yankton Sioux Tribe provides that:

All allotted lands including heirship lands, belonging to any member of the Yankton Sioux Tribe . . . shall continue to be held as heretofore by their present owners. . . . The rights of the individual Indians to hold their lands under existing law shall not be affected by anything contained in this Constitution and By-Laws.<sup>66</sup>

Further, another provision of this document states, “In the process of negotiating a lease all heirs shall be notified thereby indicating rights will not be violated.”<sup>67</sup>

63. LOVELOCK PAIUTE TRIBE CONST. art. VII, § 2.

64. ALA.-QUASSARTE TRIBAL TOWN/OKLA. CONST. art. IX.

65. CHEYENNE-ARAPAHO TRIBES OF OKLA. CONST. art. III, § 2; SANTEE SIOUX TRIBE OF THE SIOUX NATION OF THE STATE OF NEB. CONST. art. II, § 7; TULE RIVER INDIAN TRIBE/CAL. CONST. art. 11, § 2.

66. YANKTON SIOUX TRIBAL BUSINESS AND CLAIMS COMM. BYLAWS art. IV, § 3.

67. *Id.* at art. IV, § 4.

Finally, two constitutional provisions require tribal governing bodies to respect individual property rights in making assignments of tribal lands. The constitution of the San Carlos Apache Tribe states that tribal land shall not be allotted to individuals, "but assignment of land for private use may be made by the council in conformity with ordinances which may be adopted on this subject, provided, that the rights of all members of the tribe be not violated."<sup>68</sup> The Southern Ute Indian Tribe's constitution contains an almost identical statement.<sup>69</sup>

These provisions obviously grew out of the creation of private property in land within the reservations by allotment, followed as a general policy by the national government and exemplified in the General Allotment Act of 1887. While the Indian Reorganization Act of 1934 halted all new allotments, some parcels of land within many reservations are still privately owned, by both Indians and non-Indians.<sup>70</sup>

### *Due Process of Law*

Due process of law is guaranteed by thirty-three constitutions. In all but five cases, the constitutions merely say that "no person shall be denied . . . due process of law." In the cases of the Gila River Indian Community and the Rosebud Sioux Tribe, the terminology is the same as that of the due process clauses of the United States Constitution: "No person shall . . . be deprived of life, liberty, or property without due process of law."<sup>71</sup> The constitution of the Skokomish Indian Tribe uses the same wording except that it refers only to liberty and property, while the bylaws of the Salt River Pima-Maricopa Indian Community add "be expelled from the . . . Community" to this clause.<sup>72</sup> The constitution of the Menominee Indian Tribe of Wisconsin states that the tribe will not "[d]eprive any person of liberty or property (1) without fully complying with procedural processes of tribal law or (2) application of tribal laws which have no reasonable relation to the purpose for which they were enacted."<sup>73</sup>

68. SAN CARLOS APACHE TRIBE OF ARIZ. CONST. art. X.

69. SOUTHERN UTE INDIAN TRIBE OF THE SOUTHERN UTE INDIAN RESERVATION, COLO. CONST. art. VIII.

70. F. COHEN, *supra* note 1, at 127-43.

71. GILA RIVER INDIAN COMMUNITY OF ARIZ. CONST. art. IV, § 1; ROSEBUD SIOUX TRIBE OF S. D. CONST. art. X, § 3.

72. SKOKOMISH INDIAN TRIBE CONST. art. IX; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY BYLAWS art. IV, § 1.

73. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2(h).



### *Discrimination by Gender*

No constitution prohibits discrimination on the ground of sex, but one constitution prohibits discrimination by sex in the filling of tribal offices; the constitution of the Sac and Fox Tribe of the Mississippi in Iowa states, "No person shall be disqualified on account of sex from holding any office created by this Constitution."<sup>74</sup>

Four tribal constitutions discriminate by gender in establishing membership in the tribe. The constitution of the Cachil Dehe Band of Wintun Indians provides that:

[i]f a female member marries a non-Indian, she will automatically lose her membership and will be required to leave the Community within ninety days after written notice has been served upon her by the Business Committee; Provided, That this provision shall not apply in the case of any marriages consummated prior to the approval of this Constitution and By-Laws.<sup>75</sup>

The governing document of the Hopi Tribe of Arizona provides that members shall be those on a tribal roll taken in 1937, those born of mothers and fathers who were on this roll, and "[a]ll children born after December 31, 1937, whose mother is a member of the Hopi Tribe, and whose father is a member of some other tribe."<sup>76</sup> The constitution of the Kiahlegee Tribal Town provides that "[a]ll adult offspring of a marriage between a male member of the Kiahlegee Tribal Town or Tribe may become members of the Town by applying for admission, when accepted and approved by a majority vote of the members present at any regular Kiahlegee Tribal Town membership meeting."<sup>77</sup> One of the categories of possible membership in Laguna Pueblo, as stated in its constitution, is, "All persons of one-half or more Laguna Indian blood born after approval of this revised Constitution (1) whose mother is a member of the Pueblo of Laguna; or (2) whose father is a member of the Pueblo of Laguna, provided the child is born in wedlock."<sup>78</sup>

Two constitutions discriminate by gender in setting minimum

74. SAC AND FOX TRIBE OF THE MISS. IN IOWA CONST. art. IV, § 4.

75. CACHIL DEHE BAND OF WINTON INDIANS OF THE COLUSA INDIAN COMMUNITY/CAL. CONST. art. II, § 4.

76. HOPI TRIBE/ARIZ. CONST. art. II, § 1.

77. KIALEGEE TRIBAL TOWN/OKLA. CONST. art. III, § 5.

78. PUEBLO OF LAGUNA/N. M. CONST. art. II, § 1(d).

ages for voting in tribal elections. The Crow Tribe's constitution states that "[a]ny duly enrolled member of the Crow Tribe, except as herein provided, shall be entitled to engage in the deliberations and voting of the council, provided the females are 18 years old and the males 21 years."<sup>79</sup> A resolution of the Quapaw Tribe adopted in 1956, which functions as its constitution, states that

it is the desire of the individual male members, 21 years of age and over, and female members, 18 years of age and over, to establish a responsible administrative body to represent, speak and act for the individual members of the Quapaw Tribe on matters affecting the properties and general business of the Tribe.<sup>80</sup>

Presumably this language specifies the voting rules for the Tribe.

### *Rights of the Accused*

A relatively small number of constitutions provide explicitly for rights of persons accused of crime. One form of a provision in this area, which is essentially the same in four other constitutions, is that of the Confederated Salish and Kootenai Tribes of the Flathead Reservation:

Any member of the Confederated Tribes accused of any offense shall have the right to a prompt, open, and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses in his own behalf and trial by jury shall be accorded, when duly requested by any member accused of any offense punishable by more than 30 days' imprisonment, and excessive bail or cruel or unusual punishment shall not be imposed.<sup>81</sup>

Essentially the same provision is found in eight other constitutions, except for the provision "trial by jury may be demanded" is substituted for "trial by jury shall be accorded, when duly requested." These provisions set different penalties which will trigger a jury trial. In ten cases, a jury trial is required if an offense is punishable by more than 30 days' imprisonment; in two cases

79. CROW TRIBAL COUNCIL CONST. art. III.

80. Resolution Delegating Authority to the Quapaw Tribal Business Committee (August 19, 1936).

81. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION/MONT. CONST. art. VII, § 4.

trial by jury is required if punishment may exceed 30 days' imprisonment or a fine of \$45, and in one case trial by jury is required if the punishment exceeds 60 days' imprisonment or a fine of \$45.

The constitution of the Rosebud Sioux Tribe states, "Any Indian accused of any offense shall have the right to the assistance of counsel and to demand trial by jury." Also, under this document criminal defendants have the right to "a speedy and public trial."<sup>82</sup> The governing document of the Menominee Indian Tribe of Wisconsin provides a right to a jury trial of not less than six members for anyone accused of a "major offense" as defined in the bylaws of the tribe, but the accused must request the trial and must pay the expenses of the trial if the penalty for the offense does not include the possibility of imprisonment.<sup>83</sup> The constitution of the Colorado River Indian Tribes of the Colorado Indian Reservation guarantees the rights enjoyed under the United States Constitution, including the right to "expeditious trial after legal indictment or charge with opportunities for bail and protection against excessive punishment."<sup>84</sup> The constitution of the Gila River Indian Community of Arizona provides that "justice in all cases shall be administered openly, and without unnecessary delay."<sup>85</sup> The constitution of the Menominee Indian Tribe of Wisconsin essentially repeats the protections for persons accused of crime in the ICRA, but with slightly different wording. The Salt River Pima-Maricopa Indian Community's bylaws provide that "[e]xcessive bail shall not be required, no excessive fines imposed, nor cruel or unusual punishment inflicted."<sup>86</sup> This document also provides that "[a]ll persons charged with crime shall be bailable by sufficient sureties", and also contains a complicated set of guarantees for the accused, with some significant variations from the pattern laid down in the ICRA. This provision states that:

In prosecutions or offenses against the Salt River Pima-Maricopa Indian Community, the accused shall have the right to appear and defend in person and to have some member of the Salt River Pima-Maricopa Indian Community act as his

82. ROSEBUD SIOUX TRIBE OF S. D. CONST. art. X, § 2.

83. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2(f)(3).

84. COLO. RIVER INDIAN TRIBES CONST. art. III, § 3.

85. GILA RIVER INDIAN COMMUNITY OF ARIZ. CONST., art. IV, § 5.

86. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 1(f); SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY BYLAWS art. IV, § 8.

counsel, to be informed of the nature and cause of the accusation against him, to testify in his own behalf, and to have a speedy public trial; and in no instance shall any accused person be compelled to advance money or fees to secure the rights herein guaranteed.<sup>87</sup>

Two constitutions protect the privacy of the home. The constitution of the Gila River Indian Community of Arizona states that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law”, and the bylaws of the Salt River Pima-Maricopa Indian Community contain a provision identical except for punctuation.<sup>88</sup> The constitution of the Menominee Indian Tribe of Wisconsin provides elaborate protections against illegal searches and seizures in this provision, which prohibits the Tribe to:

permit searches and seizures unless a Tribal Court issues a warrant upon a sworn statement presented to the Tribal Court showing reasonable grounds to believe that an offense against tribal law has been committed and that the person or place to be searched holds evidence of the offense or that the person to be seized committed the offense; or that the thing to be seized is evidence of the offense, and describing specifically the person or place to be searched or the person or thing to be seized; provided that, searches and seizures may be permitted without a warrant where justified by compelling circumstances as shall be defined by ordinance.<sup>89</sup>

The privilege against self-incrimination is guaranteed by only three governing documents, the constitutions of the Rosebud Sioux Tribe and the Menominee Indian Tribe of Wisconsin plus the bylaws of the Salt River Pima-Maricopa Indian Community. The Menominee provision states that:

In any criminal proceeding against any person, [the Tribe shall not] compel such person to be a witness against the person's own interest including any instance where the person's testimony reasonably might lead to the institution of criminal proceedings against that person.<sup>90</sup>

87. *Id.* at § 10 & 11.

88. GILA RIVER INDIAN COMMUNITY OF ARIZ. CONST., art. IV, § 4; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY BYLAWS art. IV, § 4.

89. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2(d).

90. *Id.* at art. IX, § 2(f)(1).

The protection against double jeopardy is provided only by the same three documents. Only the constitution of the Blackfeet Tribe states that anyone accused of a crime shall have "the right to a bond", and only the constitution of the Menominee Indian Tribe of Wisconsin and the bylaws of the Salt River Pima-Maricopa Indian Community prohibit "excessive fines."<sup>91</sup>

### *Miscellaneous Provisions*

There are a number of miscellaneous provisions protecting civil liberties which are found in a small number of constitutions.

Six constitutions provide a right of tribal members to examine tribal records. The constitution of the Cold Springs Rancheria states, "Tribal members shall have the right to review all tribal records, including financial records, at any reasonable time in accordance with procedures established by the tribal council."<sup>92</sup> The other provisions on this topic are essentially the same except that two of them omit the phrase "including financial records", and two omit the word "all".

Only two governing documents provide for just compensation for the public taking of private property. The governing document for the Cherokee Tribe of North Carolina states that the council may "appropriate to school, church or other public purposes for the benefit of the band . . ." land owned by the band and occupied by individuals. However, if it does so it is required to pay just compensation to the owner for "improvements and betterments" on the land, as determined by a jury of not less than six members.<sup>93</sup> The section outlines various details of the procedure which must be followed in such trials to determine the amount of compensation. The bylaws of the Salt River Pima-Maricopa Indian Community provide that:

Private property shall not be taken for public or private use except for public ways of necessity, and for drains, flumes, or ditches, on or across from the lands of others for mining, agricultural, domestic, industrial, or sanitary purposes.<sup>94</sup>

This statement is followed by the provision, noted above, requiring that just compensation be paid for any such taking.

91. BLACKFEET TRIBE CONST., art. VIII, § 4; MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2(f)(4); SALT RIVER PIMA-MARICOPA BYLAWS, art. IV, § 8.

92. COLD SPRINGS RANCHERIA CONST. art. X, § 4.

93. N. C. Priv. L., ch. 207, § 28 (1897).

94. SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY BYLAWS art. IV, § 9.

Two constitutions and the bylaws of a tribe prohibit bills of attainder. The constitution of the Menominee Indian Tribe of Wisconsin forbids the tribe to “[e]nact any law imposing punishment on one person”, and the constitution of the Pueblo of Isleta states that the council may not “enact any ordinances discriminating against individuals specifically named.”<sup>95</sup> The bylaws of the Salt River Pima-Maricopa Indian Community state, “No bill of attainder . . . shall ever be enacted.”<sup>96</sup>

Three governing documents have specific provisions against ex post facto laws. The constitution of the Cherokee Nation of Oklahoma states that “[n]o laws passed by the Council shall have retroactive effect or operation”,<sup>97</sup> and the constitution of the Menominee Indian Tribe of Wisconsin says that the Tribe shall not:

enact any law which makes an action a crime which was not a crime when such action was committed, or which increases the punishment for a crime committed before the effective date of the law, or which deprives a person in any accusatory proceeding of any substantial right or immunity to which the person was entitled before the effective date of the law.<sup>98</sup>

The bylaws of the Salt River Pima-Maricopa Indian Community provide that “No . . . ex post-factor law . . . shall ever be enacted.”<sup>99</sup>

The Salt River Pima-Maricopa Indian Community is unique in prohibiting laws impairing the obligation of a contract. The bylaws of the tribe state, “No . . . law impairing the obligation of a contract shall ever be enacted.”<sup>100</sup>

The Zuni Tribe’s constitution is unique in guaranteeing that “no member shall be denied . . . the right to bear arms.”<sup>101</sup>

One constitution embodies protections for employees in the constitution. The governing document of the Chickasaw Nation states, “No employee having served in a position at least one (1) year shall be removed from employment of the Chickasaw Nation ex-

95. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2(i); PUEBLO OF ISLETA, N.M. CONST. art. III, § 1(j).

96. SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY BYLAWS art. IV, § 12.

97. CHEROKEE NATION OF OKLA. CONST. art. V, § 8.

98. MENOMINEE INDIAN TRIBE OF WIS. CONST. art. IX, § 2(i).

99. SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY BYLAWS art. IV, § 12.

100. *Id.*

101. ZUNI TRIBE/ZUNI RESERVATION, ZUNI, N. M. CONST. art. III, § 1.

cept for cause. The employee shall be given a hearing under the rules and procedures prescribed by the Tribal Council."<sup>102</sup>

### *Waiving Sovereign Immunity*

The constitution of the Paiute Indian Tribe of Utah is unique in including an article partially waiving sovereign immunity in cases involving the ICRA. This document states that:

[t]he tribe shall be subject to suit for declaratory and injunctive relief in tribal courts by persons subject to tribal jurisdiction for the purpose of enforcing rights and duties established by this constitution, by the ordinances of the tribe, and by the Indian Civil Rights Act . . .<sup>103</sup>

However, another section of this article states that "members of the tribal council and employees acting within the scope of their authority or employment shall be personally immune from suit, and said personal immunity shall extend beyond their term of office for actions occurring [sic] during said term." A third section states that tribal immunity is not waived automatically by this provision but has to be "expressly authorized by a majority of the tribal council in writing."<sup>104</sup> The same constitution states specifically that the writ of habeas corpus is available to any person against the tribe.<sup>105</sup>

### *Discussion*

The 220 tribal constitutions examined for provisions relating to civil liberties obviously display no uniform pattern. Many do not deal explicitly with civil liberties at all, and those which do reflect several basic approaches, some of which seem to be incompatible, and deal differently in detailed statement of rights from federal or state constitutions. Several aspects of these provisions deserve additional comment.

1. While a small minority of constitutions states that the tribe is culturally different from the surrounding society, a look at specific provisions dealing with civil liberties reveals that such cultural differences exist. Particularly, the heavy emphasis on

102. CHICKASAW NATION CONST. art. IV, § 6.

103. PAIUTE INDIAN TRIBE OF UTAH CONST. art. VII, § 1.

104. *Id.* at 2, 3.

105. *Id.* at art. XIII, § 3.

economic equality and the different treatment of rights of the accused reveal these differences. Nevertheless, it seems puzzling that more constitutions are not explicit on this point.

2. The large number (fifty-nine) of constitutions stating that tribal members have the same rights against the tribal government as those provided in state and/or federal constitutions against non-Indian governments may constitute a potential threat to tribal sovereignty, because the most obvious meaning of these provisions is that they go far beyond the ICRA to apply against tribal governments the full panoply of individual rights developed in non-Indian contexts. If this interpretation is correct, little is left of the "right to be different" in this field. William B. Bengé, Chief of the Branch of Law and Order of the Bureau of Indian Affairs in 1961, told the Ervin Committee that:

some tribes have seen fit when adopting their own tribal constitutions to declare their intention to support and uphold the laws and Constitution of the United States. In these cases, it is my opinion that tribal members have the benefit of the same constitutional guarantees that non-Indians have in relation to the Federal and State governments.<sup>106</sup>

Arthur Lazarus, Jr., appearing before the House Interior and Insular Affairs Committee in 1968 as counsel for six tribes whose constitutions had such a provision, noted "the question whether such language already makes the Federal Bill of Rights applicable to tribal actions . . ." but did not attempt to answer it.<sup>107</sup> If tribal governments have deliberately adopted this stance, they of course have the right to do so. But if these provisions have been adopted because tribal members were unaware of their potential sweep, perhaps they should be reexamined.

3. Few tribal constitutions recognize explicitly any difference between the rights enjoyed by members and those enjoyed by non-members. Failure to spell out such differences could adversely affect tribal self-government in several ways. First, the restriction of the right to vote in tribal elections to tribal members could

106. *Constitutional Rights of the American Indian: Hearings on S. Res. 53 (Pt. 1) Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 139 (1961) [hereinafter American Indian].*

107. *Rights of Members of Indian Tribes: Hearings on H.R. 15419 Before the Subcomm. on Indian Affairs, House Comm. on Interior and Insular Affairs, 90th Cong. 2d Sess. 115 (1968) [hereinafter Tribes].*



be crucial in preventing takeover of tribal governments by non-Indians, particularly on reservations where there are substantial numbers of non-Indian residents and landowners. In societies with provisions incorporating the federal Bill of Rights, in the absence of an explicit statement to the contrary, it might be argued that the fifteenth amendment of the United States Constitution prohibits restricting voting to tribal members.

Second, economic patterns on most reservations are different from those of the wider society; unrestricted application of the Equal Protection provision of the fourteenth Amendment might undermine these patterns. In 1969, after passage of the ICRA, Wendell Chino, president of the Mescalero Apache Tribe, told the Ervin Committee that the ICRA should be amended to "preserve communal living patterns of Indian people . . . which give to each tribal member his undivided interest in all the tribal resources and assets. Indian tribes must reserve the right to maintain such a community and the tribal structure . . ." <sup>108</sup> Burnett, in his study of the legislative history of the ICRA, noted that the draft bill from the Interior Department which closely resembles the ICRA as it finally cleared Congress had an equal protection provision applicable only to members of the tribe. However, Senator Ervin's revision of this draft bill made the equal protection provision applicable to any person within the jurisdiction of the tribe. "The significance of the altered wording", said Burnett, "was that it might be construed to extend equal benefits of tribal affiliation to non-Indians residing, leasing, or owning property on reservations, and subject to regulations established by the tribal councils." <sup>109</sup> Again, the constitutions which incorporate all of the federal Bill of Rights might be read as guaranteeing such a right.

Apart from specific constitutional provisions, an assessment of the health of both the right to self-government and of individual liberties in the tribal government context involves many factors. This article cannot deal fully with all of these questions, but an attempt will be made here to identify some relevant questions and comment on some of these having direct bearing on the ICRA.

A crucial but unanswered question is the extent of civil liberties violations by tribal governments. Although the Ervin Com-

108. *Amendments to the Indian Bill of Rights: Hearings on Title II of the Civil Rights Act of 1968 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 77 (1969) [hereinafter *Amendments*].

109. Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. ON LEGIS. 4, 602 (1972).

mittee studied the civil liberties of Indians for several years, it produced no estimate of the extent of the problem, for several reasons. The Committee investigated "civil liberties violations by federal, state, and local agencies" as well as by tribal governments. Moreover, as Burnett concluded, "if the volume of complaints is any guide to the seriousness of a problem, the greatest threat to the civil liberties of Indians was presented by the enforcement of state criminal laws by local authorities in communities relatively near Indian reservations."<sup>110</sup> Provisions of the ICRA dealt with this issue and others not directly related to civil liberties against tribal governments.

While no one can doubt that some violations of civil liberties protected by tribal constitutions occur, it is unfortunate that there is no evidence on the extent of the problem.

Knowledge of constitutional provisions affecting civil liberties is only one aspect of the question, however. For one thing, a majority of Native American governments today may operate without benefit of written constitutions. The 220 societies whose constitutions were examined for this article are only 44.1 percent of the 499 "Indian entities" recognized by the Bureau of Indian Affairs in 1981, although they constitute 78.5 percent of such societies in the "Lower Forty-Eight."<sup>111</sup> The other societies presumably deal with civil liberties in traditional ways and the categories developed to understand civil liberties in the context of nation states with written constitutions are not applicable to these societies.

Moreover, as with nation states, the actual state of civil liberties undoubtedly depends on factors not accounted for by formal institutional analysis.

A particularly interesting illustration of this fact, although it cannot be dealt with in detail here, concerns the changing viewpoints of the Navajo Nation toward religious freedom. In the 1950s and early 1960s, the Tribal Council of the Navajo Nation, the largest Native society in the United States today, attempted to prohibit the practice of the peyote religion on the Navajo reservation.<sup>112</sup>

Although its right to do so was upheld by the courts, the Tribal Council gradually abandoned the effort and moved toward support for religious freedom. The first step was a 1967 resolution

110. *Id.* at 584.

111. Memorandum from Patricia Simmons, Tribal Relations Specialist, to Chief, Branch of Tribal Relations, Bureau of Indian Affairs (July 21, 1981) (unpublished).

112. See P. IVERSON, *THE NAVAJO NATION* 84-87 (1981).

entitled the "Declaration of Basic Navajo Human Rights . . ." <sup>113</sup> The first article of this Declaration states, "The Navajo Tribal Council shall make no law respecting any establishment of religion, or prohibiting the free exercise thereof . . ." and subsequent clauses enumerate other rights which will be respected by the Navajo Tribal Council. While this Declaration did not specifically repeal the anti-peyote ordinance, it stated that it repealed resolutions "inconsistent therewith." In 1982, the Tribal Council adopted three nearly identical resolutions specifically protecting religious observances by the major religious groups represented on the reservation; the resolutions directed the Navajo Law Enforcement officials to protect from disturbances "ceremonies performed by Navajo Medicine Men", "ceremonies of the Native American Churches", and "religious activities of any recognized religious denomination."

In addition to demonstrating growing tolerance for religious diversity, it is noteworthy that these actions were in the form of legislation, not constitutional amendment. This is because the government of the Navajo Nation is conducted without benefit of a written constitution. In fact, the basic structure of their government was first established by executive action of the Bureau of Indian Affairs in the 1920s. However, over the decades it has become a genuinely Navajo structure; when the Collier administration during the Indian New Deal attempted to get the Navajos to adopt a written constitution, they refused to do so. <sup>114</sup> In other words, growing protection for civil liberties takes a different form in traditional Native American societies without written constitutions than in federal, state and local governments in this country. Undoubtedly the same thing is true of the actual protection of civil liberties in societies which do have written documents.

Another issue is the question of the status and nature of courts in Indian governments. In few cases are courts independent of the elected tribal councils which appoint them. <sup>115</sup> Tribal constitution-makers might examine documents such as the Constitution of the Menominee Tribe, one of the newer ones which does provide for an independent judiciary.

113. Copies of the resolutions cited here were provided to me by Luke P. Deswood, Director of Records and Communications for the Navajo Nation.

114. For history of the government of the Navajo Nation, see L. KELLY, *THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY, 1900-1935* (1968), and D. PARMAN, *THE NAVAJOS AND THE NEW DEAL* (1976).

115. For a study of Indian courts, see NAT'L. AM. INDIAN CT. JUDGES ASS'N, *INDIAN COURTS AND THE FUTURE* (1978) [hereinafter NAT'L. AM. INDIAN CT. JUDGES ASS'N].

Another important question is the nature of remedies for violations of civil liberties. After *Martinez*, not only the definition of civil liberties, within the restraints of the ICRA, but also the provision of remedies is largely left up to tribal governments. Only where a writ of *habeas corpus* is called for may a federal court intervene. This situation could change, however, in one or more of three ways:

A. Section 301 of the ICRA, if implemented in a manner suggested by the United States Supreme Court, could radically change the remedies available to persons accused of crime in tribal courts. Section 301 directs the Secretary of the Interior to develop a model code to be recommended to Congress "to govern the administration of justice by courts of Indian offenses . . ." The code is to contain provisions giving persons accused of crime in tribal forums "the same rights, privileges, and immunities" as persons being tried for similar offenses in federal courts.<sup>116</sup> This language presumably would extend the elaborate protections for persons accused of crime in the U.S. Constitution to all Indian courts governed by such a code; if such a code were imposed by Congress on all Indian courts, in effect the ICRA would be extended dramatically in the criminal area.

Such a code has not yet been presented to Congress, however, for several reasons. First, there is an existing law and order code which may be adopted by Indian courts. Second, the Bureau of Indian Affairs believes, as its representatives told the Ervin Committee repeatedly, that the differences between Native American societies are so great that a single model code would be of little value. Third, on its face Section 301 applies only to Courts of Indian Offenses, which are courts established by the BIA rather than tribes. Most reservation courts are tribal courts; in 1961, for example, there were only four Courts of Indian Offenses, of which only two used the law and order code. By 1977, there were thirty-two Courts of Indian Offenses, but seventy-one tribal courts, sixteen traditional courts, and fifteen conservation courts.<sup>117</sup>

Nevertheless, there is a potential for use of Section 301 to undermine tribal government by wholesale introduction of rights of the accused developed in non-Indian contexts. The BIA once drew up such a code and published it in the *Federal Register*, but has

116. 25 U.S.C. 1311.

117. *American Indian*, supra note 106, at 50-51; NAT'L. AM. INDIAN CT. JUDGES ASS'N, supra note 115, at 42.

never carried the process further.<sup>118</sup> Moreover, although undoubtedly this is a misunderstanding, the Supreme Court in the *Martinez* case remarked, "Although [Section 301] by its terms refers only to courts of Indian offenses, . . . the Senate Report makes clear that the code is intended to serve as a model for use in all tribal courts."<sup>119</sup> A House report on the bill in 1968 stated that:

The Secretary of the Interior would be directed to draft a model code of Indian offenses which would apply uniformly to all Indian courts in Indian country, thus assuring that all Indians receive equal justice under Indian law. It is also envisioned that the model code would incorporate those rights enumerated in title I . . .<sup>120</sup>

Nevertheless, the other evidence from the legislative record contradicts this conclusion, and makes it clear that the code was not intended to apply to all tribal courts. After representatives of the New Mexico Pueblos protested that imposition of any code on them would destroy their traditional systems for dispensing justice, Senator Ervin sent the House Interior and Insular Affairs Committee a communication in which he said that "Title II would be directed only toward Courts of Indian Offenses, which are to be carefully distinguished from tribal courts."<sup>121</sup> A letter from Attorney General Warren Christopher to the same Committee stated, "Apparently the code would be made applicable only to those courts of Indian offenses governed by the Department of the Interior's law and order regulations. . . ."<sup>122</sup> In a colloquy between Solicitor Barry of the Interior Department and William A. Creech, Chief Counsel for the Ervin Committee, the limited applicability of the model code was again stated. After Barry suggested that the provision might apply to other courts, Creech assured him that it would *not* have such wide applicability, finally stating, "I do think we should reiterate that this particular bill recognizes and specifies that it would be a model code for the

118. On April 8, 1975, the Department of the Interior published a notice in the Federal Register of a proposed model code for courts of Indian offenses and announced several public hearings on the proposal. It was stated that this proposed code was being considered for presentation to Congress, but evidently the document was never actually presented to the body. See 40 Fed. Rep. 72, 16689-704 (1975).

119. *Martinez*, 436 U.S. 49 at 70.

120. *Tribes*, *supra* note 107, at 14-15.

121. *Id.* at 136.

122. *Id.* at 27.

courts of Indian offenses only. The code would then have a limited application, as we understand it."<sup>123</sup> Nevertheless, Congress, if it received such a model code, presumably could extend its application to all tribal courts.

B. The Supreme Court in *Martinez* stated that, where tribal constitutions contain "provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval . . . persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior."<sup>124</sup> In the wake of *Martinez*, there have been attempts by the Department of the Interior to develop procedures for punishing tribal governments for "extraordinary and deliberate breach" of tribal constitutions, on the ground that the relationship between the federal government and Native American governments requires the federal government to remedy such a breach. These attempts have been criticized, with the assertion that interference by the federal government in such a manner unacceptably reduces tribal sovereignty, and apparently the BIA has abandoned its attempts to interfere with tribal justice in this fashion.<sup>125</sup> Nevertheless, the potential for future administrative action, given the Supreme Court's apparent endorsement in advance of such an approach, remains.

C. Given the acceptance by the courts of the notion of plenary Congressional authority over Native American societies, presumably the Congress could create new remedies for tribal violations of civil liberties without waiting for action by the executive

123. *American Indian*, *supra* note 106, at 53.

124. *Martinez*, 436 U.S. 49 at 66.

125. GETCHES & WILKINSON, *supra* note 1, at 344-45; Ziontz, *After Martinez: Civil Rights Under Tribal Gov't*, 12 CALIF. DAVIS L. REV. 1, 28-33 (1979). Ziontz ends his article with this comment: "The Secretary of the Interior bears a heavy responsibility to avoid interfering with tribal self-government. (T)he Secretary must proceed with great deference to the autonomy of tribal government. This is clearly required by the central principle of *Martinez*: in the absence of contrary congressional direction, ICRA complaints are to be resolved by the institutions of tribal government. (*M*)artinez allows the tribes to implement the ICRA in a manner which preserves their ability to decide difficult questions in accordance with tribal values, and more importantly, in a manner consistent with tribal sovereignty." *Id.* at 35. Former Commissioner of Indian Affairs, Robert L. Bennett says of this problem: "My view was that the Department should have issued an advisory memorandum pointing out the tribal government's responsibilities in the *Martinez* case with some suggestions as to how these responsibilities might be met rather than through the issuance of an ultimatum to the tribes." (Personal communication, Aug. 30, 1983).

branch. Since *Martinez* the Congress has not devoted much attention to this issue, but in 1988-89 Senator Orin Hatch of Utah began an effort to create more remedies against tribal governments.

Charles F. Wilkinson has recently addressed this question. He begins by asserting that:

One cannot completely reconcile classic political rights, as enjoyed by citizens in other political units in the United States, with the kind of rights that exist within Indian tribal governments for the fundamental reason that Indian tribal governments are literally foreign: they exist outside of the Constitution.<sup>126</sup>

Nevertheless, Wilkinson argues, the present situation is undesirable, partly because it leaves non-Indians with two few protections against abuse of authority by tribal governments. He proposes to expand the jurisdiction of federal courts over tribal governments, but to make a sharp distinction between procedure and substance. That is:

federal courts should have jurisdiction to engage in limited review when ICRA rights are allegedly abridged by tribal institutions. [But] Reviewing courts would be required to respect tribal traditions and reservation conditions.<sup>127</sup>

Wilkinson also argues that there should be an "elevated standard", such as "the arbitrary and capricious standard", before tribal decisions can be overruled, and that there should also be rigorous observance of the rule that tribal remedies should be exhausted before there is recourse to the federal courts. This approach is designed to respect the cultural differences which exist between Native American societies and the general society by allowing the substance of civil liberties to be different in an Indian context. What it overlooks is the cultural significance of deciding issues in courts of the wider society. His proposals would mean substantial alterations in the way tribal institutions operate, and thus the cultural values of the wider society would at least partially replace those of the Indian societies.<sup>128</sup>

126. C. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 112 (1987).

127. *Id.* at 115.

128. See L. METCALF, *LAW AND IDENTITY: LAWYERS, NATIVE AMERICANS, AND LEGAL PRACTICE* (1978).

To avoid further disruption of Native American culture, a better way to deal with the question of guaranteeing civil liberties against tribal governments might be for those governments themselves to devote more attention to the problem than most of them have in the past. The tribes themselves have the authority to adopt, change or abandon constitutions. Thus, they can examine their cultural practices with respect to civil liberties and spell out precisely in their governing documents the cultural differences that divide them from the wider society. Moreover, through the same mechanism they can develop more effective means of allowing individuals to assert rights against tribal governments in ways which will not destroy the limited sovereignty of such governments or further undermine the "right to be different." Finally, Indian societies can create new structures above the tribal level for dealing with civil liberties questions. These structures should be determined by Indians themselves, but it is not difficult to envisage appellate structures on various bases which might develop creative new structures for reviewing tribal governmental decisions.

In the meantime, the bottom line remains the same as it has since the *Martinez* decision: the protection of individual civil liberties in a tribal context remains primarily the responsibility of Indian governments. Indians and non-Indians concerned with civil liberties in a tribal context should pay more attention to this question at the level of tribal government.



