SOVEREIGNTY

A Brief History in the Context of U.S. "Indian law"

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Sovereignty is classically defined as supreme legal authority. The concept was formulated by sixteenth century legal philosopher Jean Bodin and elaborated by many theorists since then. One basic controversy has been whether to trace supreme authority to the people or to a "divine right" of rulers. Another has been about the relation between legal authority and political-economic power which may influence or dominate law. The definition of sovereignty in federal Indian law partakes of both ancient controversies. An ambiguous concept from the start, surrounded by disagreement, sovereignty is perhaps most cryptic in federal Indian law.

The legal history of "tribal sovereignty" starts with colonialism. From their earliest contacts with the "new world," colonizing powers asserted sovereignty over indigenous peoples, based a theological-legal theory built on "divine right." Spain, Portugal, France, England, and other colonial regimes explicitly based their sovereignty claims on religious doctrines decreed by the Pope, who was regarded as having power to grant titles to portions of the earth for purposes of Christian civilization.

The result of colonial assertions of sovereignty was that indigenous nations were legally stripped of their independent status. Their existence was in some instances not recognized at all and their lands treated as legally "vacant" (*terra nullius*). In other instances, indigenous peoples were declared to have a "right of occupancy" but not ownership of their lands. In either instance, the fundamental principle was that supreme legal authority lay outside the indigenous nations.

In 1823, in *Johnson v. McIntosh*, 8 Wheat. 543, the Supreme Court adopted for the United States the "right of occupancy" version of colonial sovereignty. This remains the basic legal position of federal Indian law, despite the fact that "divine right" is not accepted elsewhere in United States law. The *Johnson v. McIntosh* decision may be seen as a laundry for sovereignty theory, washing out the theology and transferring "divine" powers to a secular state.

The debate about legal authority versus political and economic power also informs the definition of sovereignty in federal Indian law. In the earliest treaties, statutes, and cases, indigenous nations were regarded as having a "subordinate" sovereignty related to their "right of occupancy." Denied full sovereignty as independent nations, they were nevertheless regarded as having authority over their own relations

amongst themselves --an "internal" or "tribal" sovereignty. In *Worcester v. Georgia*, 6 Pet. 515 (1832), for example, the Supreme Court declared that the Cherokee Nation possessed "its right to self-government," even though it was "dependent" on the United States. Justice McLean concurred, saying, "At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty." McLean went on to question whether there could be any end to this "peculiar relation": "If a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government. the protection of the local law, of necessity, must be extended over them."

The Court picked up Justice McLean's suggestion in 1886, in *United States v. Kagama*, 118 U.S. 375, when it reduced indigenous sovereignty almost to a nullity, declaring, "...Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two." The Court did not base its assertion of a broad federal power over Indians on any clause of the Constitution, but on the "right of exclusive sovereignty which must exist in the National Government." The Court went on to state, "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." In half a century, Justice McLean's suggestion that political and economic factors might override legal sovereignty was manifested in the Court's broad assertion of general federal power over Indians.

But the Kagama case was not the end of "tribal sovereignty." The concept rose again in the "New Deal" administration of the federal government. Felix Cohen, whose efforts as a high-ranking lawyer in the Interior Department made him a major architect of the new deal for Indians, resurrected "tribal sovereignty" as an organizing principle of the *Indian Reorganization Act of 1934*, 48 Stat. 984. He wrote, in his Handbook of Federal Indian Law , "...[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Cohen did not suggest that Congress could not extinguish all Indian sovereignty; he merely argued that until extinguished by federal authority, it remained part of federal Indian law.

The Indian Reorganization Act provided for the formation of "tribal governments" under federal authority as vehicles for Indian "self-government." The Act provided a model of government based on democratic and corporate structures often at odds with the original forms of organization among indigenous nations. The fact that the New Deal abandoned some of the grosser exercises of federal authority typical of the allotment era that preceded it made it appear attractive to native peoples; but the contradictions embodied in a concept of "dependent sovereignty" would continue to produce conflict and confusion in federal Indian law.

The situation after 1934 remained complexly disordered. One might say of Indian sovereignty, "now you see it, now you don't." In 1973, in *McClanahan v. Arizona*, 411 U.S. 164, the Supreme Court invalidated a state income tax on individual Indians on an Indian reservation. The Court relied on the principle of "tribal sovereignty," yet suggested that such sovereignty might not be inherent, but rather derived from federal power. The Court referred to "platonic notions of Indian sovereignty" and referred to Indian sovereignty as "a backdrop" for analyzing treaties and federal statutes. The Court did not suggest that the whole concept of sovereignty was "platonic," or that it was only a "backdrop" for analyzing all political and economic power.

Subsequent to McClanahan, the Court swung back and forth repeatedly. As Vine Deloria, Jr., wrote in *Of Utmost Good Faith*, in federal Indian law the Supreme Court "skips along spinning off inconsistencies like a new sun exploding comets as it tips its way out of the dawn of creation." In 1978 alone, the Court went

from almost completely subordinating indigenous sovereignty under federal law in *Oliphant v. Suquamish*, 435 U.S. 191, to an affirmation of it as a third kind of sovereignty in the United States in *United States v. Wheeler*, 435 U.S. 313. The latter decision was a complete contradiction of the analysis in Kagama. In 1997, in *Idaho v. Coeur d'Alene Tribe*, No. 94-1474, the Supreme Court held that "Indian tribes ... should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity." This was a startling contrast to the foundational federal Indian law decision in *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831) that the Cherokee were not sovereign as a "foreign nation."

The concept of sovereignty, however convoluted and contradictory, remains an important part of federal Indian law. Tribal councils established under the Indian Reorganization Act are regarded as vehicles of "tribal sovereignty"; they act as governments and not just as corporations, though they are often limited by federal funding and authority. Indian hunting and fishing rights have been protected against state and local regulation, though an ultimate authority has been reserved outside the realm of tribal sovereignty. Indian nations are regarded as immune from suit without their consent, under the doctrine of "sovereign immunity," yet their power over non-members of the particular nation is sometimes severely limited.

In short, the idea that indigenous nations have at their roots some aspect of their original, pre-colonial status as independent nations operates -- sometimes directly and sometimes by implication -- throughout federal Indian law today. This idea is accompanied by the colonial legacy of superior authority claimed over indigenous nations by the federal government. Both these ideas have been part of federal Indian law from its inception, and are the reason why Chief Justice Marshall could say, in formulating the foundations of this law in the *Cherokee Nation* case, "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."

In assessing the results of "tribal sovereignty" at the close of the 20th century, Vine Deloria, Jr., and Clifford Lytle wrote, "Local institutions that served Indians were in a much stronger position even though they now resembled the local units of government that served other Americans and possessed little that was distinctly Indian. Indians themselves had assimilated to a significant degree...." This may be the ultimate irony, that "tribal sovereignty" could prove to be the vehicle for incorporating indigenous nations within the colonizers' civilization. It may also be true that the persistence of "tribal sovereignty" has kept alive the idea of local sovereignty, of "the people" as the ultimate source of legal authority.

The idea of indigenous sovereignty surfaced internationally and with intensity in the *Draft United Nations Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub. 2/1994/56, issued in 1994 as a report to the U.N. Commission on Human Rights. This document, which may eventually become the basis for an international protocol or convention, stirred up the ancient debates. The United States took an official position that the word "peoples" was inappropriate in a statement of "rights," because it implied group rights, which would threaten the sovereignty of states. The United States and others argued that "rights" adhere only to individuals, and that no group may be recognized as having any legal existence independent of a state. Indigenous nations, on the other hand, asserted that the Draft Declaration was meant to embody just such group rights, that these were essential for the survival of indigenous peoples worldwide. Struggles about indigenous sovereignty continue into the 21st century, on as grand a scale as in any other era.

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