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Kwesi Baffoe

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Abstract

This thesis is the study of the Indigenous peoples of Ghana, Canada and the United States. What links these three groups together is the colonial moment. These peoples are linked together because they have all been affected by the process and legacy of colonization.

The "colonial moment" presents an opportunity to analyze the ways in which the Indigenous peoples of these three geopolitical units have experienced the colonization process and its impact as well as to analyze its implications for post-colonial sovereignty.

If one goes back to the early days of colonization, Europeans were only a minuscule minority in the territories that would one day become Ghana, Canada and the United States. The evolution from that point forward is totally different.

The scene at Ghana's independence celebration eloquently expresses this contrast:

> At the Black Star Square, as the midnight bell tolled, on March 6, 1957, the Union Jack slipped beneath the floodlights.[2]
> Rising in its place was the tri-colour flag of red, gold and green, with a black star at its centre, the standard of the new, independent nation of Ghana.
> On the platform, President Kwame Nkrumah, his faced streaked with tears, electrified the crowd when he declared:
> "At long last, the battle has ended. Your beloved country is free forever."[3]

What American or Canadian Indigenous leader can boast of his or her country being free on Independence Day? Free from whom and what?

It is tempting, for the sake of simplicity, to suggest that this thesis is comparing apples to oranges. After all, Ghana is not a settled country.

That argument begs the question – why? Why did Ghana, which is much closer

and more accessible to Europe, not become the target for mass migration? There is nothing wrong comparing apples to oranges if there is a common denominator. Apples may be classified as "sweet fruit." If the "tangy" taste of apple can earn it a spot in the "sweet fruit" family, then oranges can also claim a spot in that family. Similarly, if the Indigenous peoples of Ghana, who were considered too primitive to engage in treaty"[4] as exemplified by the Berlin Conference of 1884, could achieve a form of sovereignty approximately equivalent to that of the other nations of the world, then why should the Indigenous peoples of the Americas, whose international treaty powers were affirmed by the Royal Proclamation of 1763, not employ Ghana's sovereignty as a yardstick?

This thesis uses the "Ghanaian lens"[5] to examine the above questions and many more, including the notion of statehood, and anchors them in the evolving nature of sovereignty in the colonial and post-colonial context. The aim is to link the analysis of the "shifting" European definition of statehood with the unconscious forces that shaped the colonial prismatic view of Indigenous sovereignty.

What might be useful and unique about the thesis is its invitation to uncouple the train of thought from North America and examine the colonial moment and its implications for American and Canadian jurisprudence from an African perspective. It is hoped that this will provide a useful basis for helping to correct some of the injustices perpetrated against the Indigenous peoples of North America.

The thesis starts by analyzing the methods that the Christian Europeans used to deprive the Indigenous peoples outside Christian Europe of their statehood and sovereignty. The starting point was to label Indigenous peoples as "uncivilized." When this approach lacked credibility because of the great achievements of these peoples –

achievements that in many cases were far superior to those of Europe – the positivists scrambled onto the platform claiming that the Indigenous peoples had no laws. That argument, of course, was a complete fabrication because the indigenous nations could not have governed themselves without laws. Not to be deterred, the *Respublica Christiana* asserted the need to be part of a club – that membership in the "family of nations" was the criterion for statehood. While this seemed to work for a period, eventually greed, competition among the Europeans and local factors such as tough Indigenous resistance compelled the individual European nations to form alliances that resulted in the introduction of nations outside Europe into the club.

This thesis does not rest on the failure of the European nations to establish their case but instead uses a scientific approach to uproot and turn their arguments on their head. It then proceeds to show how the Indigenous peoples of the three geopolitical units satisfy all the terms and conditions of statehood and sovereignty that the members of the *Respublica Christiana* applied to themselves but not to Indigenous peoples outside Europe.

The "Ghanaian lens" is then directed at the contact period to reveal that, despite the introduction of European goods and the concomitant fruits of so-called "civilization," the Indigenous peoples of the world generally suffered throughout this period and did not benefit from the presence of the Europeans who exploited their friendliness. The colonial moment is where the "Ghanaian lens" is analytically most helpful. To avoid double-vision, the author advises the reader to study the table on the *Comparison of Colonizing Processes* provided on page 235 of this thesis. It reveals the multiplicity of factors that have contributed to the different forms of sovereignty enjoyed by the Indigenous peoples

of Ghana, Canada and the United States. This will help the reader appreciate the events of the colonial era.

The struggle for independence is the next phenomenon viewed through the "Ghanaian lens." The method used by the Indigenous peoples in each country is different and is developed in response to the actions of the British colonial power. The word "independence" means different things to different peoples. From the Ghanaian point of view, it represents freedom from oppression and outside interference in internal state affairs. Based on that definition, the lens examines the various means by which the Indigenous peoples in the three countries under study have worked towards independence. The reader can easily decide whether these three Indigenous peoples have succeeded or failed to achieve "freedom." The conclusion of this thesis is that colonization never actually ended for the Native peoples of North America and that the Native American is still at the mercy of the European settlers.[6] The acid test will emerge from an assessment of the constitutions of the three countries and of those of two selected Indigenous nations in each of the North American countries. The "Ghanaian lens" will then focus on the role of the Canadian and United States courts in shaping the lives of the Indigenous peoples of the Americas, a matter that is covered in Part VI of this paper.

Part VI then illustrates the manner in which the importation of American jurisprudence into the Canadian context has distorted the traditional British legal notion of Indigenous sovereignty to the detriment of the Indigenous peoples of Canada.

Part VIIA explains why the Western world and the "settled" nations should refrain from perpetuating doctrines of international law that define sovereignty as the

exclusive preserve of Europe, which subordinated and excluded "uncivilized" indigenes, resulting in the current neo-colonial state of the Indigenous peoples of North America.

Finally, Part VIIB develops a set of doctrines that could coherently account for Indigenous personality, in order to more adequately formulate the potential of the concept of sovereignty to remedy the enduring inequities and imbalances resulting from the colonial confrontation. The thesis then takes the reader on the solution path.

It is too simplistic to accept the proposition that it is too late to do anything about these inequities and imbalances because "too much water has gone under the bridge." This is just as cruel as telling the Indigenous peoples to put on their red dancing shoes and dance the blues. The North American experience did not have to be that way. This experience has short-changed the Indigenous peoples of North America of their sovereignty. Ghana offers an alternative vision. There needs to be a reconsideration and reformulation of the relationship between the United States and Canada on the one hand and the Indigenous peoples of North America on the other hand. If the courts were truly neutral, an Indigenous person who agrees with the proposition in this thesis could take the argument to the courts and seek redress. However, the court system based on the doctrine of precedence has placed judges in straightjacket from which they cannot easily escape. Nevertheless, the courts can play an important role in resolving the issues.

A typical example of the courts' response is to refer these cases back for negotiations. While this is laudable, the counts must be more proactive by working to create a new atmosphere, new relationships and new partnerships between the Indigenous peoples and the respective Governments. With respect to changing the atmosphere, the mere suggestion of negotiations is not good enough. The courts, in addition to directing

the parties to engage in a dialogue, must encourage the establishment of an atmosphere of trust for the negotiations to succeed. The forum for discussion must be as unbiased and neutral as possible. In Canada, the courts must also be aware of the need for an authentic nation-nation relationship. It is not enough for the court to pay lip service to this proposition. It has the duty to ensure that the notion of "nation to nation" becomes a reality.

New Partnerships (Or Re-establishing the Original Partnership)

As stated below in the introduction, sovereignty may be stratified and divisible. For example, Crown sovereignty is a reality in Canada. The powers of Canada's federal and provincial governments descend from the Crown. According to Chief Justice Dickson,"[7] there exists three distinctive powers in Canada – the federal government, the provincial governments and the Indigenous nations. It is immaterial whether the Crown-Indigenous power relations are equal or not. It is a different kind of power relationship. Ideally speaking, Canada is a three-legged stool. The problem is that the dominant group in Canada has failed or refused to recognize the third leg, which has resulted in instability. It is unlikely that the dominant group will of its own accord put the third leg back on and the Courts are very slow or unable to force them to do this. Given the fact that the Crown-Indigenous relationship is "nation-nation," it follows that Canada's Indigenous peoples may call on international organizations for assistance. These organizations may be barking dogs without teeth; however, they often have a psychological impact on even the most stubborn countries. For example, Canadian

Aboriginal women have already experienced the potential of international bodies in the form of Bill C-31.[8]

On September 13, 2007, the United Nations adopted the Declaration on the Rights of Indigenous Peoples. This was the result of twenty years' work of progressive development of international human rights standards, which has become the focus for the aspirations of Indigenous peoples throughout the world. The Canadian government was supportive from the start, but its attitude changed in 2006 with the change in the federal government. Canada proceeded to join a chorus of four affluent, quasi-European and Western countries that refused to sign the declaration. It was Canada, the United States, Australia and New Zealand that voted against the adoption of the Declaration, though it should be acknowledged that Australia had a change of heart and signed the Declaration in April of 2009.

The Indigenous peoples of the world share much in common: faith in divine providence, hope in an eternal universe and the aspiration to be free and happy. Indigenous peoples in settled countries are many distinct natives in many countries, but with common concerns and a common voice. One of their prime concerns is to be heard.

As is confirmed by the "Percentage of Aboriginal Peoples v. Provincial Population" table in Part V, Indigenous peoples in settled countries cannot effectively express themselves politically. They are politically mute. To claim that they are represented at the United Nations by the countries in which they reside is, therefore, an insult. Indigenous peoples in Western and Westernized countries are mute and, when mutes dream, they keep such dreams in their heads and hearts. The cries of the Indigenous peoples resonate through the world bodies, but their dreams need a different

means of expression. This is a seat in the General Assembly of the United Nations. To create such a seat would be easy from a logistical standpoint. Indigenous peoples fully participated in the drafting of the Declaration on the Rights of Indigenous Peoples. By the same token, they should be able to elect or select their representatives in the Assembly. Only then can the dreams of the Indigenous peoples internationally flourish into creative choices based on Indigenous nations' cultural past and aspirations.

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Introduction

Indigenous Sovereignty from the Ghanaian Perspective

This thesis is the study of the Indigenous peoples of Ghana, Canada and the United States. What links the three entities together is the colonial moment. The peoples of the three countries are linked together because they have all been affected by colonization. When it comes to Ghana and its former colonial master, Britain,

> ...the Aborigines of the Gold Coast triumph in the wave of imperialism which at present sways the public sentiment of Great Britain. It may overwhelm them, and play havoc with all that is dear to them of law, custom and practice; it may reduce them to the condition of bondsmen and captives in their own fair domains; it may denationalise them and make them a people of no reputation, a by-word and a reproach among men; but, for all these things, they would rather have the ills that they know of than fly to others that they know not of. It is nothing but common sense.[9]

The assertions above also aptly apply to the Indigenous peoples of Canada and the United States. Out of that colonial moment is an opportunity to analyze the way in which the Indigenous peoples of these three different geopolitical units have experienced the colonization process, its impact on them and what it has meant in terms of post-colonial sovereignty. The indigenous peoples of Ghana, just as in Canada and the United States, are not a homogenous group. Yet pre-colonial international law[10] and some governments treat them as if they were. As Fergus Bordewich notes with respect to the Indigenous peoples of the Americas, "[t]he Indian, as such, really exists only in the leveling lens of federal policy and in the eyes of those who continue to prefer natives of the imagination to real human beings."[11] Therefore, it is imperative to stress at the onset that these entities under study are not three groups of Indigenous peoples but heterogeneous multiple groups of Indigenous peoples in each location. To deal with each group would be temporally and spatially impossible.

As a result, the author has selected the Akan (Fanti and Ashanti) tribe of Ghana, the Nisga'a tribe of British Columbia, Canada and the Cherokee nation of the United States as representative groups for more detailed consideration. The three tribes were selected because they all have long histories, sophisticated legal structures and well-developed Indigenous governmental systems. They all existed prior to European contact and have manifested the ability to retain their cultures. All of them have attained some form of self-government. The Akan tribe fully enjoys all the privileges of the Ghanaian Constitution, and the Nisga'a and the Cherokee had their own Constitutions modified or attained in the same era.

This selection allows for fair comparison of these geopolitical units in terms of their experiences during the colonization process, as well as analysis of the colonial impact on these groups and what colonization has meant in terms of post-colonial sovereignty. Most importantly, materials on these tribes are accessible to enable readers to follow the analysis and to form their own opinion. This is essential because, just as generalizations blur details, the focus on details distorts the larger picture. Thus, the observations regarding these selected units are just that – observations. So the paper will point the reader in the direction to a deeper understanding of the Indigenous peoples of Ghana, Canada and the United States. To that end, the paper will furnish the materials for an in-depth consideration not only of the diversity within the selected units, but also of their place among the peoples of the respective geopolitical group.[12]

Why Ghana?

Ghana, not Britain, is the centre of the universe when it comes to Indigenous sovereignty. The origin of humans is philosophically, theologically and scientifically

contentious. This thesis will not engage in the uproar over the much-debated and often controversial out-of-Africa subject on the origin of modern humans. The notoriety started in May 1924, when a fossilized skull of no recorded specimen found in South Africa was purported to be of that of a creature between an ape and a human.[13] An article in the British scientific journal *Nature* on the 6th of January 1925 suggested that the finding served as proof that Africa is the origin of modern human.

The Chinese scientists have their own missing link. The Yuanmou Man fossil,[14] excavated in the Yunnan Province in 1965, is believed to have lived about 1.7 million years ago.[15] However, even before that discovery, in 1929, the skull fossil of the Peking Man[16] (Homo erectus) was unearthed in Zhoukoudian, Fangshan, in suburban Beijing. The Peking Man lived 200,000 to 700,000 years ago.[17] Not to be outdone, Western scientists came up with their primitive man who lived more than 1.2 million years ago. Dr. Albert Chuchward, a distinguished scholar in the fields of anthropology and archaeology, hypothesised that "the earliest member of the human species appeared about two million years ago in the Great Lakes region of Central Africa."[18] At that time, Dr. L.S.B. Leakey came upon "primitive" human fossils 1.2 million years old in East Africa In 1963.[19] *Newsweek Magazine* of January 11, 1988, extensively discussed the discovery in an article entitled "The Search for Adam & Eve."[20]

There can be no debate in these days without stepping into the technological field. This issue is no exception. On February 21, 2008, ABC News came up with the report that the "study of genetic details from 938 individuals from 51 populations"[21] by researchers under Richard M. Myers of Stanford University has led to a DNA confirmation of the African origin of humans.[22] Behind the scientific scene is also the

theological version of the anthropogenesis of humans. Regardless of the version of the origin of humans that the reader elects, the fact that Indigenous peoples of the world have something in common in one way or another is uncontroversial. Since the lifestyles of the Indigenous peoples of North America at the time of contact was closest to the lifestyles of the peoples of sub-Saharan Africa, this thesis will assume that Africa is the origin of "Homo sapiens."[23]

Since antiquity, peoples, cultures and societies clearly ancestral to the African culture dotted the global landscape.[24] Their lifestyles mimicked those of the African ancestors up to the point of European contact, as in the case of the Indigenous peoples of the Americas. All practiced their economy of gathering and hunting for food and of obtaining other necessary materials. All or most of the nations have legends about how they came into existence, and all or most employed oral history as means of transmitting their cultures. This is not to say that the Indigenous peoples of other continents, including Europe, did not engage in the practices mentioned above, but that some or most of the Indigenous peoples of the Americas, like the Indigenous peoples of sub-Saharan Africa, maintained such practices until the arrival of the Europeans. It is documented that humans have a common origin.[25] This thesis is thus justified in grouping the Indigenous peoples of Africa with the Indigenous peoples of North America.

But there is a more pressing reason for linking the Indigenous peoples of Africa with the Indigenous peoples of the New World. The slave trade had a clear and demonstrable effect on the plight of the Indigenous peoples of the American continent, since Africans were one of the instruments used to displace the American Indians when their labour displaced Indian labour. Given the fact that there was not much Indian labour

in the Americas (due to Indian resistance and speedy death when enslaved, but not due to lack of available population), it should be remembered that the Spaniards still used the Indians as slaves and this could have happened in the United States had the African slaves not arrived. The African slaves fuelled the bulldozer that changed the landscape of America during the slave-trade era. That is, Africa changed the Americas, or at least altered the Indian-settler relationship in America. Since colonization is about human suffrage, it stands to reason that Africa, not Europe or America, is the prime candidate for the centre of the universe on Indigenous issues in the three countries being considered. Ghana is a prototype not only for Equatorial Africa, but in fact for the whole of Africa. It served as the centre of the slave trade to America. It ended up being a colony of Britain just like Canada and the United States. It was the first African colony to liberate itself and emerge from colonial rule. The first Prime Minister, Dr. Kwame Nkrumah, was the champion of Pan-Africanism,[26] a movement that was instrumental in liberating many countries not only in Africa but also in other places around the world. In essence, Ghana had a great impact on the changes in the political scene in the Americas.

This thesis will look at the Americas through the Ghanaian experience. It will start from Ghana and anchor the Ghanaian achievements in a theoretical and critical framework that is not centred in known American and European consciousness or literature. That framework will be the major – but not the only – contribution of this thesis, and will take the reader to a different point for deconstruction and reconstruction of the examined historical events. It will be different for the typical American reader, who will have a chance to re-evaluate what he or she has always known and thought. For example, Western literature and historic accounts generally treat the American War of

Independence as the transition from colonialism to freedom for all Americans. However, from the Ghanaian perception it was just a change of colonial powers for the Indigenous peoples of the United States,[27] just as if the Spanish[28] had overthrown the British. The author would invite the reader to reflect on the cultural anthropology of both the Indigenous peoples of North America and the early European settlers. This can shed so much light on history and make the characters come alive. Just as the time of an event is critical in most legal matters, history loses some aspect of its meaning without the concept of time.

Western culture conceives time in linear terms. If time is an arrow, then the future is open to radical new possibilities. Human beings can effect change. In other words, human agency allows the future to be free of the past. Thus, from the distance provided by progress, Western culture easily absolves its conscience from past misdeeds. If any culture is underdeveloped economically, socially or politically, then this is seemingly due to its own inability to better itself. But what if time is not like an arrow? Other cultures have different concepts of time. Some Indigenous peoples, for instance, perceive time in cyclical terms. A personal anecdote of the author will help the reader grasp the point.

While the author was working as a dentist at Cross Lake in Manitoba, an Indigenous patient called and told him that she would like to cancel her appointment. When the author asked her about the time of her appointment, she answered that it was yesterday. That patient was not being silly. Neither was she ignorant. She just had a different concept of time. To her, more of the past is in the present. The wrong done in the past has to be put right. Time is a circle. The future repeats the past. Freedom thus is conceived of in terms of an acceptance of the inevitable.

Both history and daily life tells us that there is a degree of truth in both concepts. Time shapes our present the way a potter shapes clay, moulding each moment as presented by past rotations, thus determining the form of the future. It is best to conceive of time as a spiral. At any point one is not far from a similar situation – past or future. Europeans, as a broader category, have a way of dealing with the past which lacks accountability. The Western concept of time has made it so difficult, if not impossible, for North Americans to look back far enough to see a point in time when the Indigenous majority status was overwhelmingly present in the Americas. If one goes back far enough, Europeans were a minuscule minority in Ghana, Canada and the United States. But the evolution after that is totally different.

The question is, why? Why did Africa, which is much closer to Europe and easier for Europeans to get to, not become the target for mass immigration? The answer, in essence, has little to do with proximity. As a matter of fact, the proximity worked against settlements. While the French and the English did not have much pressure in Canada and Eastern shores of the United States respectively, the proximity of Africa to Europe allowed easy access to the Portuguese, the Dutch, the English, the Swedes, the Danes, the French and the Brandenburgers who came one after the other in search of gold and slaves.[29]

It is wrong to assiduously inculcate that the only motive of the Europeans in Africa was trade. One may argue that, since trade follows the flag, occupation was the free expansion of trade. That is not totally correct. Call it the sphere of influence, territories or what you may; there was no European power that would not fight for their acquisition. In some cases there was insane thirst for that sphere of influence. The flood

of European powers into the region led to stiff competition among the European colonizers. Therefore, the lack of settlements is more related to past events and conditions arising from those events. Ghana, for instance, was not as isolated as North America and had already gone through multiple colonizations. At the time of the arrival of the Europeans, Arabs were competing in Ghana and in other parts of West Africa, while the Indigenous Americans had had their first outside contact with the Europeans. Ghana had encountered other colonizing forces and had learned how to deal with colonization before the Europeans arrived. The next factor is that Africa was not empty for the Europeans. They had been battling over the continent for ages. Notable examples are Othello, as well as the notions of "heathens," as the opponents in religiously interpreted wars. Africa was not an easy area to settle. One cannot put its subjects unnecessarily in a war zone. In short, Africa was not quiet or easily tamed.

That does not in any way minimize the experience of colonization for the American Indigenous peoples. There were struggles among the American Indigenous peoples before Western contact and some tribes had emerged as strong and powerful empires. The point here is that the Indigenous Americans were not just run over by the Europeans. They offered as much resistance as the Ghanaians, but were not as suspicious of the newcomers as the Ghanaians were and could not sustain the pressure on the Europeans as the Ghanaians did with the aid of other forces that will be discussed later. The above analysis projected the present imbalance into past equality. It is part of a doctrine in psychology termed synchronicity.[30] It is a meaningful way of connecting the present moment to the past and propelling us into the future. The practical consequences can be illustrated by this event. A white lady picking berries along the Hope Similkameen

highway today is not a spectacle. But in 1860, Susan Moir Allison, wife of John Fall Allison, was – so much so that her memoirs record one particular incident:

> I never met him again but was told he was a Hudson's Bay Company officer in charge of the Colville train and that he was never more surprised in his life than to see a white girl on the trail – he had lived so long without seeing anyone except Indians.[31]

Taking a glance at the past circumstances is worthwhile because holding it in our recollection might shed some light on existing pretensions. The process of synchronicity could beam the reader into a day in the future when whites in Canada would be in the minority.[32] They may still be more affluent, but their security may depend on how they deal with the minorities at the present.

Synchronicity is a process of getting into the governing dynamic transformation of events or experiences in present conscious life and linking them with unconscious forces that project the world into the past, with the hope that such experience leads the world to fulfillment of a common destiny for all humans. A good starting point would be to use the "Ghanaian lens" to examine the notion of statehood and anchor it to the evolving nature of sovereignty in the colonial moment. The aim is to link the analysis of the "shifting" European definition of statehood with the unconscious forces that shaped the colonial prismatic view of Indigenous sovereignty.

What is the "Ghanaian Lens"?

There is a well-developed, or at least an ongoing, critique from North American Indigenous scholars on the jurisprudence in the Aboriginal legal area. The purpose of my thesis is not to replicate that. What might be useful and unique about my thesis is to uncouple the train of thought from North America and look at the colonial moment and its consequences for American jurisprudence from the lighthouse in Africa in order to see

whether it provides a useful analytical tool that allows for fresh insights in regard to the colonial moment. Of course, there would be clear similarities with some of the existing critiques from North American Indigenous scholars. That is what the Ghanaian lens is all about – looking at the colonial moment from all possible angles without the fear of having its strength tainted by ideas coming from elsewhere.

The "Ghanaian lens" is a term that I have coined as a proxy for the elements that constitute the Ghanaian colonial experience that has moulded the Ghanaian worldview. It is not about Ghana itself. Its development predates European colonization, expanding beyond the boundaries of Africa through education.

Ghana is emblematic in several ways. The genesis of Ghanaian (African) thought and understanding about statehood is psychologically simple and very fundamental. "There is a keen pleasure in the sense of possession. My land, my house, as contradistinguished from your land, your house, will remain, until the end of time."[33] Individual ambition for worthy objects extends to all nations. "To state the proposition broadly, it is simply the primitive instinct of acquisitiveness in man which operates in the case of nations, no matter the extent of their boasted civilization."[34] The evolution of statehood, according to the proposition by Caseley Hayford, a Ghanaian philosopher and lawyer, is simply the transference of "mine" to "ours." The logical conclusion is obvious. The "ours" needs to be shared and regulated, whilst the "we" needs to be governed. In this thesis, then, statehood is defined as

> a community of persons living within certain limits of territory, under a permanent organization which aims to secure the prevalence of justice by self-imposed law. The organ of the state by which its relations with other states are managed is the government.[35]

Ghana is emblematic in another way. African intellectual history is global, constitutes a part of the "Ghanaian lens" and thus is very important to this paper. Africans have a large pre- and post-colonial legacy that they share. Apart from that, some African intellectuals, notably Dr. Kwame Nkrumah, the first Prime Minister of Ghana, were influenced by the Eastern European developments of Karl Marx's doctrines. In addition, Marcus Garvey, Ralph Bunche, Dr. Martin Luther King, Jr., A. Philip Randolph and Adam Clayton Powell, Jr.[36] all had great influence on African leaders. Feno also influenced both Africa and America, but has had very limited impact on the Indigenous scholars of North America.

As stated above, some parts of Ghana underwent multiple colonizations prior to European contact. The impact of these colonizations affected the psychology and the philosophy of the Ghanaian scholars, and consequently forms part of the "Ghanaian lens." Some Muslim Arabs were motivated by trade, others based their colonization on appropriation, still others attempted assimilation. The Ghanaian world-view incorporated these colonial processes and retained an awareness of these effects before the arrival of the Europeans, and this remains a part of the Ghanaian lens. Moreover, Ghana is surrounded on all sides by former French colonies, and the manner in which the French dealt with those territories, impacting the post-colonial sovereignty process, has also become part of the "Ghanaian lens." Many Ghanaians, educated or not, are aware of the fact that the post-colonial structures of these former French nations are different. For one thing, while Ghanaians owned most of the businesses in post-colonial Ghana, French nationals owned most of the prominent businesses in these former French nations. The thesis will explore how this came about and project it into the North American scene.

Polishing the Ghanaian lens is the author's personal experience. On the same day that the author of this thesis was born, the Nazis executed 5,000 Jews of Rivne, now on the territory of Ukraine.[37] It was a very sad day indeed. How one group of human beings could subject others to this type of cruelty is beyond reason. Around the same time, in the Gold Coast which was then under British rule, the Indigenous peoples were living under humiliating conditions. The Executive Council consisted entirely of British officials. By the time of the author's birth, the Indigenous peoples had had enough. The resentment and unrest led to the addition of two African unofficial members to the Executive Council in the year 1942. The new-born baby did not know what was in store for him, not that it mattered. His parents brought him up as best as they could. For three years, he did not know that there was another world just beyond the hill under which he lived.

Then one evening, his parents suited him up and told him that they were going to the European club. He did not ask where because he did not want to dislocate his tongue pronouncing the word "European." That evening, the driver arrived and took them to the new world. The place was secured by barbed wire fences, iron gates and uniformed police officers. There was a school, swimming pool, tennis courts, football fields, cricket fields and in the centre was the clubhouse. The scene, according to the author, was breathtaking. They were taken into the clubhouse. Dinner was served, and after dinner came drinking and dancing. It was years after the ceremony that the author began to understand why his father was sometimes so upset with the people that he always referred to as "they."

This is his father's story. The author's father started working in the Ashanti Gold Fields Corporation (AGC) as a typist in the store affiliated with the mine. Gradually, he

educated himself through correspondence courses from the London School of Accountancy, earning an accounting diploma with distinction. He moved slowly but methodically through the clerical ranks, eventually becoming the assistant store keeper, which was the end of the professional line for the Indigenous workers. From then on, the store keepers and the chief store keeper were sent from Europe. Most of the store keepers knew nothing about accounting, much less about the functioning of the mine store. Almost all of them had to be educated by the author's father. When the chief store keeper retired, one of the author's father's students got promoted to replace the chief store keeper and new recruits were sent from Europe to become the "student" store keepers.

The author's father did most of the work while his superiors received hefty pay for doing very little. At the end of each month the author's father was compelled to bring home large volumes of ledger books to balance them for the store keepers while they golfed. The chief store keeper was no exception. It was at the end of the month that the name calling peaked. Then on March 6, 1957, came Ghana's Independence Day and everything changed. The author's father became a store keeper. He was made a member of the European club and his family had access to all the amenities in the fantasy land over the hill. Those privileges were extended to all the Indigenous peoples who were in the same position as the author's father. Within a few months, more than fifty percent of the senior positions reserved for Europeans were filled by the Indigenous staff. Within a year, that figure had risen to a remarkable eighty percent.

Ghana's Independence made a difference and was felt all over the country. Even God noticed the change. Before independence, there were hardly any Indigenous bishops, parish priests or ministers, and this applied to all Christian denominations. While there

were some, they mostly worked under the parish priests who were of European origin. Then, after Independence, Indigenous members of the clergy began to spring up like mushrooms. How the Indigenous clerics became holier, more capable administrators in such a short time can only be described as a miracle. The Indigenous peoples of Ghana saw, smelled, heard, felt and tasted their Independence. The author was not in Canada on December 11, 1931, but from what he came to see here, he doubts that the Independence of Canada had the same impact on the Indigenous peoples of this country.

This paper relies heavily on twenty years of the author's personal experience gained living as a fascinated outsider within the local Indigenous communities. In attempting to systematically understand the author's own experience, the author is indebted to the people and elders of northern Manitoba. During the winter of 1986, the author was working there as a dentist in the community of Lac Brochet. One day, after the author's morning appointments had been completed, he went to the post office at lunchtime. The crowd congregated inside looked dead. Their faces were empty.

He walked up to Mrs. Cook, his dental assistant, and asked what the problem was. Without looking up, she mumbled an inaudible reply. In her arms, she was holding her baby. The child's nose was running. He pulled Mrs. Cook over, handed the child a package of crackers and repeated his question. Mrs. Cook shrugged her shoulders and shyly replied that the welfare cheques had not come in. The weather was bad. The planes couldn't fly from Thompson. Leaving her, the author went directly over to the general store and gave the manager one hundred dollars, instructing him to give five dollars worth of baby food to each mother in need.

Whole communities in the North rely solely on welfare for their survival. When the author came to Canada, he was drawn by the bountiful opportunities this country offers. Yet, simultaneously, the social malaise that permeates many Aboriginal societies shocked him. In a wealthy land possessing a limitless future, its First Peoples tenuously cling to a mere fraction of their past riches. It is an injustice that demands restitution.

As a Ghanaian-born medical professional entrusted with serving the peoples of northern Manitoba, the author was baptized by both the joy and the pain of the North. It is heart-breaking to see a beautiful way of life rendered desperate by diminishing opportunities and expectations. It is the author's dream to help remedy this tragedy. This thesis is part of that attempt. The author must confess that his "study" of the Indigenous peoples was originally in no manner, shape or form academically disciplined. He was a dentist living in the North and not an anthropologist, but that did not prevent him from noticing the difference between the concepts of sovereignty of the Indigenous peoples in Ghana versus those in Canada.

From the Ghanaian viewpoint, there are, commonly,

> ...two ethical sanctions to the fact of possession. In the first place, you must come by your possession honestly, and secondly, you must bear manfully its responsibilities; which two sanctions are generally not observed, if recognised at all, by the great nations of the earth.[38]

The propositions that led to the definition of statehood above are universal. A key concept in that definition is the idea of "self-imposed law." It is that phrase that retains power in the community, upholds the identity of the community and preserves its culture. This is what defines sovereignty in the Ghanaian mind. So in this thesis, sovereignty, at its basic level, is meant to be "an assertion of power and authority, a means by which a people may preserve and assert [their] distinctive culture."[39] Any factor that affects that

power reduces the quality and diminishes the potency of sovereignty. Nonetheless, sovereignty may be stratified and may be divisible. Indigenous Ghanaian states, such as those of the Fanti or Ashanti, may consist of multiple communities that may unite under one central paramount authority such as the king. Each of these communities is sovereign in its own right within an imperium in imperio-relation to the central state. They exist as "several distinct, native states federated together,"[40] with the individual states owning allegiance to a paramount king who then represents the sovereignty of the entire state.

Most of the Indigenous peoples of Ghana, Canada and the United States possessed their lands. They governed themselves by self-imposed laws, maintaining the power and the authority necessary to preserve and assert their unique cultures. By definition, they were sovereign states. Did Britain "legally" acquire these territories during the colonial period? Casely Hayford compares the process of colonization to the doctrine of the survival of the fittest: "I will have your land, or your hut, if you will give it to me. If not, I will take it. When I have taken it, and you cannot retake it, of course, I will keep it."[41] If that is true, then Britain did not acquire these territories legally. If that is so, then Britain bore its responsibilities cowardly, by employing what this thesis terms "the shifting definition" or the "prismatic view" of statehood and sovereignty. During the colonial era, Britain accepted the definition of statehood and sovereignty as outlined above and applied them to itself, but denied the application of the same definitions to the Indigenous nations in the three countries under consideration. From the Ghanaian perspective, this denial continued even after colonization in Canada and the United States.

In modern times, sovereignty has been dissected into various fields, such as legal, economic political and so on. These divisions do not considerably affect the arguments in this thesis, nor does it affect the situation of the Indigenous peoples of America to any considerable extent. The problem with the sovereignty of the Indigenous peoples of North America is that it keeps changing or has the potential to change due to the wrongful interpretation of the plenary power in the United States and of section 91(24) of the BNA Act in Canada respectively. The lack of stability is all encompassing. For instance, the Indigenous peoples of the United States once had nearly full control of criminal jurisdiction in their territory. The United States courts have reduced this power considerably. In Canada, Chief Justice Lamer declared at para. 128 of *Delgamuukw* ([1997] 3 S.C.R. 1010) that, if the Aboriginal peoples decide to develop their land or to convert the land for commercial use, such as for mining or parking, they must surrender that land to the Crown in order to do so. Chief Justice Lamer rendered this decision more than 10 years after the rights of the Indigenous peoples had been entrenched in the 1982 constitution of Canada. The two examples show how fluid sovereignty is in the Americas. One deals with criminal law (legal sovereignty) and the other with land sovereignty. In other words, sovereignty is constantly changing and it does not matter how one teases it. After outlying the inaccuracies, contradictions and the differential applications of the definition of sovereignty and statehood, the author will take the reader on a trip into the past and visit a few selected nations in Ghana, Canada and the United States.

The purpose is to use the "Ghanaian lens" to reveal that, despite their numerous technological leaps, the Europeans did not invent statehood, nationhood, government or

sovereignty. Long before the Europeans knew there were lands beyond the limits of Europe, civilizations, some of which were in many ways superior to the European culture, spotted the entire world where these powerful Indigenous empires made their lasting mark. The Ashantis had a federal system of government without the help of the Europeans. Similarly, the Aztec, the Adena, the Hopewell and the Mississippian cultures all flourished in the Americas at the time when the Europeans were living under very poor conditions.

The "Ghanaian lens" will then be directed at the contact period to reveal that, despite the introduction of European goods and the trappings of so-called "civilization," the Indigenous peoples of the world generally suffered, and did not benefit from the presence of the Europeans who took advantage of their friendliness. The colonial moment is where the "Ghanaian lens" will be most helpful. To avoid double vision, the author advises the reader to study the table on the *Comparison of Colonizing Processes* provided on page 235 of this thesis. It will reveal the multiplicity of factors that contributed to the different forms of sovereignty enjoyed by the Indigenous peoples of Ghana, Canada and the United States. That will help the reader appreciate the events of the colonial era.

The struggle for independence will be the next phenomenon viewed through the "Ghanaian lens." The method used by each country under study is different and was developed in response to the actions of the British colonial power. The word "independence" means different things to dissimilar peoples. From the Ghanaian point of view, it represents freedom from oppression and outside interference in the internal state affairs. Based on that definition, the lens will examine the various means by which the three countries under study achieved independence. The reader will be able to decide if

the three groups of Indigenous peoples in the respective countries achieved or failed to achieve "freedom." It will lead to the conclusion that colonization never actually ended for the Native people of North America and that the Native American is still at the mercy of the European settlers.[42] The acid test will emerge from the consideration of the constitutions of the three countries and of those of two selected Indigenous nations in each of the North American countries. The "Ghanaian lens" will then focus on the role of the Canadian and United States courts in shaping the lives of the Indigenous peoples of the Americas, a subject matter covered in Part VI of this paper. At this point, a short introduction of the American courts' continuation of Britain's differential application of the definition of statehood and sovereignty will demonstrate the efficacy of the "Ghanaian lens." This is essential at this point, because the unique aspect of this thesis is in drawing a contrast between the Ghanaian perspective and those of Canada and the United States.

Looking at the American Seminal Cases through a "Ghanaian Lens": The Shifting Definition of Sovereignty and Statehood

Looking at the American seminal cases through a Ghanaian lens, one notices that what the cases purport to say is very different from what is actually happening in America. The American sovereign Indian nation, for instance, is an unacceptable contradiction in contemporary political theory. The paradox of being sovereign and dependent raises vexing unanswered political and legal questions.

The reader is urged to reflect on Ghanaian sovereignty and compare that with the situation in the United States, where the Indians appear to be "sovereign but not sovereign."[43] The reader will also note that the Canadian courts have sidestepped the

issue of sovereignty altogether,[44] resulting in a situation where what the Government gives the courts could take back, and vice versa.[45]

At one point in history, the Indigenous peoples of Ghana, Canada and the United States were self-governing societies. They lived in communities that were, to varying degrees, talented, sophisticated and organized through highly developed socio-political systems. All three lands eventually came to be colonized by Britain. And all the three nations eventually gained independence – either through war, political struggle or negotiations. Yet the Indigenous sovereignties that emerged from colonization for the three countries are very varied. Ghanaians enjoy a form of sovereignty that approximates the definition used above, where "at the most basic level, [it is] an assertion of power and authority, a means by which a people may preserve and assert [their] distinctive culture."[46]

Ghana was colonized by Britain with no intermediary settler population. When Ghana became independent, the Indigenous people were "freed" as one geopolitical unit. The Indigenous peoples of the Americas, within a short period of colonization, had a settler population that managed to get on top of the Indigenous peoples.[47] The settler population, in essence, had come between the colonial master and the Indigenous people. As the settler population increased and became more powerful, the Indigenous population diminished (relatively) and became weaker. British actions were channeled through this intermediary. At the time of Canada's Independence, the settler population had eclipsed the Indigenous population. As a result, the Indigenous population saw little, if any, of the light of freedom. The irony is that, due to the slave trade, it is inconceivable that Britain could have considered the Ghanaians (Africans) as equals. The Spanish used the

Indigenous peoples of South America as slaves, but the trade of humans in Canada and the United States was not a major phenomenon. Moreover, the positivist[48] "African tribes were too primitive to understand the concept of sovereignty and, hence, were unable to cede it by treaty."[49] All their rights were subsumed by the European powers in the Berlin Conference[50] and, in positive terms, "only dealings [among] European states with respect to those territories could have decisive legal effect."[51] (Please note that, currently, the generally accepted expression for "tribes" as this applies to Africans is "ethnic groups." Nevertheless, this thesis deliberately retains the original term in order to reflect the reality of the colonial moment.)

In contrast, the Royal Proclamation confirmed treaty relations with the Indigenous peoples of Canada and the United States. The Indigenous peoples in North America at contact demanded, and generally received, respect as equals[52] in terms of statehood as exemplified by the treaties, but ended up with self-government that falls short of the definition of sovereignty accepted in Ghanaian terms. And while Ghana is hanging tenaciously to its acquired sovereignty, the Indigenous peoples of the Americas are grasping at straws.[53] That is because the apparent acceptance of the Indigenous tribes of the Americas as nations was born of necessity. Incipient settler communities needed the goodwill of their native neighbours if they were to survive. But as the power relationship began to shift, amnesia set in and the Europeans forgot about their indebtedness to the Indigenous peoples. As a result, the agreements between the Europeans and the Indigenous peoples lost their legal force. This was possible due to the "shifting" definition of statehood and sovereignty[54] employed by the Europeans – in this instance, the British. Nevertheless, in terms of post-Westphalian international law, the treaties

maintain their formal significance and offer recognition that Indigenous peoples are indeed legitimate actors within the community of nations.

For instance, in 1832 the United States Supreme Court observed in *Worcester* v. *Georgia*[55] that, with respect to American-Indian dealings, the use of the words "nation" and "treaty" by the British Crown, and later by the United States government, placed Indians within the ambit of inter-state relations.[56] As a consequence, since the early nineteenth century, the inherent sovereignty of the Indigenous peoples, hollow[57] as it may be, has been an established principle of American jurisprudence. More than any other area of law, U.S. Indian law is the product of complex historical relationships between two distinct and sovereign peoples: Americans and Indians (please note that Indians are not one people but are instead comprised of a multiplicity of peoples).[58]

However, as the American example illustrates, Congress may reduce the extent of Indian sovereignty, although an "inherent" residue will still exist (*Major Crimes Act* cf. *Lone Wolf*).[59] Jurisdiction over "Indian Country" is drawn from art. I, s. 8, cl. 3 of the U.S. Constitution, which provides Congress with the power to "regulate commerce with the Indian Tribes."[60] Furthermore, pursuant to art. II, s.2, cl.2, the President has the power, by and with the advice and consent of the Senate, to make treaties. Thus, tribes are legally distinct from states (*Oneida* v. *Oneida County*; *Kagama*; *Lone Wolf*).[61] In brief, state regulatory authority over activities on Indian Land is pre-empted by both the operation of federal law (*New Mexico* v. *Mescalero Apache Tribe*)[62] and tribal sovereignty (*California* v. *Cabazon Band of Mission Indians*)[63].

Despite the legal confirmation of Indigenous sovereignty, Indigenous American sovereignty nowhere approaches the sovereignty enjoyed by the Ghanaians because

Congress, through political and hermeneutic acrobatics, could potentially[64] strip the American Indigenous nations of their rights, not to mention effect the loss of their international status.

In Canada, the Canadian courts are not even receptive to the notion of Aboriginal sovereignty. Although Canadian courts have not had much of a chance to address the issue, they have had ample opportunities to offer their opinion. The *Sioui* decision[65] did recognize that sovereignty once existed, while *Campbell* at the BCSC[66] did suggest that it still exists, albeit within a domestic context. A current example of a similar legal situation is the relationship between Italy and the Holy See where the Vatican is entirely within Italy yet is sovereign in its own right and enjoys international status. The court could have been firm and clarified the issue in *Guerin* v. *The Queen*.[67] Pursuant to s. 91(24) of the 1867 Constitution Act, legislative jurisdiction over "Indians, and Lands reserved for the Indians" is a federal responsibility. Thus, in Canada, the vision that Indians became British subjects,[68] though not citizens until much later when their territory was brought under British jurisdiction, gradually became the accepted norm.[69]

In the language of "positivism,"[70] there can be only one ultimate sovereign.[71] Given the fact that the Queen is the sovereign head of Canada, the British Crown, by necessary implication, also governs all those within its dominion.[72] This explanation is obfuscation. It was designed to side step the true meaning of sovereignty (Italy and the Holy See; USA). Since sovereignty is stratified and divisible, the King or Queen can be the ultimate sovereign with subordinate sovereigns, and still not reflect competing sovereignties from different sources. After all, in the Canadian federal system, the federal and provincial governments are sovereign in their own right.[73] After reviewing *Mitchell*

v. *Peguis Indian Band*[74] and *Guerin* v. *The Queen*[75] in *Campbell* v. *B.C.*,[76] the Honourable Mr. Justice Williamson commented that "[a] consideration of these various observations by the Supreme Court of Canada supports the submission that aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten 'underlying values' of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867."[77]

On the basis of the Royal Proclamation[78] of 1763, Aboriginal peoples alone hold a position that extends beyond the sovereignty of the Crown.[79] Yet, judicial recognition of this fact would require a repudiation of decades of wrongly decided case law. As a result of increased litigation of Aboriginal issues, British colonial law is being revisited and the reality of Aboriginal sovereignty is becoming more difficult to ignore. As mentioned above, the Supreme Court of Canada finally affirmed the contemporary legal implications of historical treaty obligations through Justice Lamer's 1990 *Sioui* decision.[80]

There is a deep irony here. In stark contrast to the relatively peaceful acquisition of Indigenous lands through treaties in Canada, American settlers, driven by a faith in their Manifest Destiny, blazed a bloody trail through the frontier. Yet, despite this dreadful legacy of warfare, American jurists are far ahead of their Canadian counterparts in recognizing Aboriginal sovereignty.

To explore the differences, similarities and contradictions within and among the Ghanaian, American and Canadian experiences, Part I of my thesis will examine the Western (British) concepts of statehood, sovereignty and international law, their development, and their application to the Indigenous peoples within the colonial moment. It will be argued that the intangible and porous international law has been purposefully

misapplied by colonists and, furthermore, that the notion of "statehood" and "sovereignty" within colonialism is not, in fact, based on any organized legal system but rather on power, politics and economics.

Power rests on the notion that the powerful could appropriate any desired property and that the colonized must do as the colonizer says, "or else." As noted by one observer, tribes have moved with stepped-up vigour during the 1970s to exert more of their powers, implicitly respecting the poignant maxim that "domestic dependent nations are permitted an existence in the United States so long as they are weak."[81] *Politics* is reflected in a concept of "us and the others,"[82] while *economics* is based on the idea that the colonized can "do what [they] want as long as it does not adversely affect us financially."[83] Hence, American and Canadian jurisprudence have wielded this blunt and flexible legal instrument (i.e. sovereignty) to the detriment of the Indigenous peoples of North America.

Part II will subject the Western (British) concept of statehood and sovereignty as it applies to the Indigenous peoples of Ghana, Canada and the United States to the disinfecting sunlight of legal scrutiny. Analyzing and comparing pre-colonial Indigenous sovereignty in Canada and the United States with pre-colonial Indigenous sovereignty in Ghana will confirm the hypothesis expounded in Part I – namely that there was no justification for colonization based on lack of civilization, lack of law, lack of social organization, lack of government or lack of the concept of property of the colonized. It will further argue that post-colonial sovereignty of Indigenous peoples is not based on any coherent system of law or on the civilized state of the Indigenous peoples, but instead on the factors outlined in Part I, notably power and greed.

Part III will link the past to the governing dynamic transformation of events or experiences in conscious life to reveal the unconscious forces that manifested themselves within the colonizing moment. It will beam the reader to the point of contact between the British (Europeans) and the Indigenous peoples of Ghana (1492-1850), Canada (15th century but mostly the 17th century) and the Atlantic coast around the 17th century.[84] It will outline the factors that enabled the colonizers to take advantage of the Indigenous peoples and show how that led to the varied forms of sovereignty enjoyed by the Indigenous nations under consideration.

Part IV will outline the colonial processes in Ghana, Canada and the United States and bring forth the most essential factors that contributed to the nature of sovereignty that the Indigenous peoples acquired in the "post colonial" era, as reflected in their constitutions analysed in Part V.

Part VI will then illustrate the manner in which the importation of American jurisprudence into the Canadian milieu has further distorted the traditional British legal notion of Indigenous sovereignty to the detriment of the Indigenous peoples of Canada.

In Part VIIA, the thesis will explain why the Western world and the "settled" nations should refrain from perpetuating doctrines of international law that define sovereignty as the exclusive preserve of Europe, which subordinated and excluded "uncivilized" indigenes, resulting in the current neo-colonial state of the Indigenous peoples of North America.

Finally, Part VIIB will develop a set of doctrines that could coherently account for Indigenous personality, in order to more adequately formulate the potential of the discipline of sovereignty to remedy the enduring inequities and imbalances resulting from

the colonial confrontation. Out of that will emerge the corrective framework for the interpretation of sovereignty that should be based on each individual Indigenous group's cultural past and aspirations.

It may seem odd that the author does not spend more time on or address all aspects of international law. It is the opinion of this thesis that not much has changed in international law. The super powers, like the Respublica Christiana, have placed themselves above the law. There are many examples but two world events will eloquently convey the notion. The majority of the members of the United Nations were against the invasion of Iraq. The United Nations pleaded for more time and further investigation. Despite the protests, the United States with its chief ally Britain attacked Iraq, which they claimed was making or was in possession of weapons of mass destruction. The world later discovered that accusation to be false. Thousands have needlessly lost their lives and the international bodies and their laws can do nothing about it.

On September 13, 2007, the United Nations adopted the U.N. Declaration on the Rights of Indigenous Peoples. This document is pertinent to this topic because it deals with international human-rights standards, which would become the focus for the aspirations of Indigenous peoples throughout the world. Out of the massive United Nations membership, only 11 countries abstained, but most importantly, the settled nations of Canada, the United States, Australia and New Zealand voted against the adoption of the Declaration. Incidentally, Australia reversed its stand and signed the Declaration in April of 2009. This example is very significant because Canada and the United States, which are under study in this thesis, may not be bound by the declaration. International bodies and international law have great potential and an important role to

play in the issues dealt with in this thesis, but, as shown above, they may be impotent. Instead of the thesis describing aspects of international law that may be ignored by the super powers, this thesis focuses on the useful basis on which the international bodies and their laws can help in correcting some of the injustices perpetrated against the Indigenous peoples of North America.

PART IA – SHIFTING DEFINITIONS OF SOVEREIGNTY

Prologue

At the outset, it should be pointed out that the European nations and/or Christianity were not the authors of colonization. Almost all civilizations have employed colonial tactics in one form or another in their assent to power. Colonization predates biblical times and tales of colonization, slavery, genocide and other acts of barbarism abound in the Bible, in other religious writings and in numerous historic documents that predate these religious texts. The Chinese empires used colonizing methods[85] and Muslims colonized nations, just as the Indigenous empires of Africa[86] and North America conquered and subordinated other cultural entities that came under their control. The Christian European nations (*Respublica Christiana*), however, are being singled out for a variety of reasons.

In an attempt to justify and legitimate their actions, the Western Christian European nations constructed the legal system that determined which states to include in what we now know as the *family of nations*. By constructing the legal system that constitutes the foundation of international law as it currently exists, they opened that legal system and themselves to scrutiny by this generation. Most importantly, the three nations that are being compared all received or declared independence from Britain. Finally, the fact that all civilizations or empires have engaged in colonization does not necessarily make colonization an acceptable phenomenon. Colonization is a manifestation of the doctrine of the survival of the fittest, which collides with civilization. Since Britain ended up being the colonial master of the three nations under consideration, it will remain the focus as we explore the notions of statehood, sovereignty and international law. That is,

even though every European nation may have its own theories on these subjects, they will receive little attention. It is assumed that the non-British ideas that influenced Britain manifested themselves through British actions. By the same token, there are numerous theories in the literature on these subjects, and this thesis will focus on the theories that are best reflected in the British actions. To illustrate the point, the Austinian criteria for sovereignty are totally different from those of Lawrence. Lawrence's theory of the roaming hunter found itself all the way into the Marshall trilogy. Since British actions more or less parallel Lawrence's theories, Lawrence will receive most of the attention, while the Austinian theory will only be used to rebut the applied theory. To reiterate, this thesis is not about European colonizers. As stated in the introduction, it is about Ghana, Canada and the United States and their British colonial master. It is a given that France, Portugal, Spain, Holland and Germany all have their own theories about colonization. Whatever influence those theories had on Britain should have been manifested in the ways in which Britain dealt with Ghana, Canada and the United States.

Why the Chameleon?

The chameleon is the most famous of all lizards because of its ability to change its colours through its chromatophore cells. Sovereignty can do the same. The Christian European nations can be viewed as those specialized cells that change the colour of sovereignty. These mutable pigmentation cells can rapidly relocate their pigments, thereby influencing the colour of both the chameleon and sovereignty respectively.

The comparison of sovereignty to the chameleon is incredibly apt. Sovereignty, like the chameleon, has a transparent outer skin. That is, sovereignty, on the outside, is abstract or invisible. Both change colour to suit not only the environment but numerous

other factors as well. With respect to sovereignty, the surroundings play a large role. In Mexico, for instance, climate, topography and the wealth of the Indigenous nations acted as a magnet for expropriation by the Spaniards, leaving the Indigenous peoples with neither land nor sovereignty.[87]

Like the chameleon, sovereignty's skin colour also changes under the influence of mood, as can be seen in the oppression of the Irish.[88] The colour of both the chameleon and sovereignty also plays an important part in communication and rivalry fights. With respect to sovereignty, there are two aspects to these pronouncements. In the case of Ethiopia, the colour of sovereignty changed with respect to the Indigenous peoples due to their fighting abilities. The Europeans recognized the Ethiopians as equals, exchanged diplomatic missions and entered into treaties with them.[89] This exemplifies sovereignty changing its colour in response to a formidable opponent. In the case of the Hopewell people, sovereignty changed its colour as the United States became allies with the Indigenous people and even offered the Hopewell people a seat in the United States Congress as partners.[90] This is a situation where sovereignty changed its colour for external support in rivalry conflicts within the family. The arrangement did not materialize, but that is beyond the point. The scientific classification of the chameleon is well known, but what about the scientific classification of sovereignty?

Scientific Classification of Sovereignty

> What is sovereignty? If there are questions political science ought to be able to answer, this is certainly one. Yet modern political science often testifies to its own inability when it tries to come to terms with the concept and reality of sovereignty; it is as if we cannot do to our contemporaneity what Bodin, Hobbes and Rousseau did to theirs.[91]

Sovereignty is not fixed, stable or monolithic. Rather, it is a very fluid concept.[92] Colonial jurists deliberately left sovereignty undefined so that it could be extended or withdrawn in line with colonial interests.[93] As a result, sovereignty has different shades of meaning. In the European world, "sovereignty represents at the most basic level an assertion of power and authority, a means by which a people may preserve and assert their distinctive culture."[94] Except for China, Japan and few others,[95] an Indigenous group had to modify or abandon its culture in order to be accepted into the family of nations, which is a requirement for sovereignty. With respect to the official status of a wandering tribe, Lawrence declares that "none of these communities would be subject to International Law, because they would want various characteristics, which, though not essential to sovereignty, are essential to the membership of the family of nations."[96]

This means that wandering tribes have to abandon their culture to be accepted into the family of nations. Japan and Siam[97] had to modify their cultures to meet the standards of "civilization" in international society. To that end, "Japan had to extensively revise its civil and criminal codes to be admitted to the Family of Nations,"[98] which essentially amounted to idealized European standards in both their external and, more significantly, internal relations.[99] In the words of Westlake, "the 'Asian Empires' were capable of meeting this standard, but even so, this meant only that European international law had merely to 'take account' of such Asian societies rather than accept them as members of the Family of Nations." These nations were compelled to sign treaties of capitulation before acceptance into the Family of Nations. These treaties granted the "European powers extra-territorial jurisdiction over the activities"[100] of the European expatriates in these non-European states.

The only reason for which Japan was not colonized was that it proved to be too formidable. With the exception of Nagasaki, the Japanese drove out the Europeans around 1641 and banned gunpowder weapons until the mid-19th century. The situation in China, on the other hand, was more complex. The West had a very profitable trade with China in the 17th and 18th centuries, through which the Europeans exchanged Mexican silver for gold. When the supply of Mexican silver dried out, the British replaced the silver trade with opium from India. The Chinese attempted to stop the opium trade, but the British defeated them in the Opium Wars. The Chinese later attacked the Western trading posts in the Boxer Rebellion. It took military contingent forces from Japan, Germany, the United Kingdom and the United States to put down the rebellion. The Japanese got a foothold in Manchuria, the British got Hong Kong (1841), the Germans got Tsing Tao (hence the lager) and the U.S. landed in Shanghai. The significance of all this is that it proves that Japan and the other Asian nations were not recognized as members of the Family of Nations and that they were not immune to colonization attempts. The only reason for which they escaped full colonization was that they proved to be too powerful.

The formalist model of sovereignty, which advocates "an absolute set of powers bound by no higher authority and properly detached from all the imprecise claims of morality and justice,"[101] falls short in the recontextualization and reinterpretation of terms and concepts that went into creating the situation at the time of its conception. "[S]uffer[ing] from genesis amnesia,"[102] this model fails to recognize the colonial encounter that was definitely an interaction between the more powerful Christian nations like the United Kingdom and the weaker Indigenous nations like those of sub-Saharan

Africa and the Americas. It was an interaction between the sovereign Christian European society of states and non-European Indigenous states that were denied sovereignty. Certainly at contact, when the Europeans were weak they almost treated as equals the Indigenous peoples of Ghana[103] and, even more so, the Indigenous peoples of Canada and the United States.[104] But as soon as the power differential clearly favoured the Europeans, treaties were ignored, faith gave way to credit and friendship yielded to oppression. Oppenheim argues that European states interacted with non-European states on the basis of "discretion, and not International Law."[105]

The Indigenous peoples were of course in Canada before the British. Yet Sir John Beverley Robinson, who became Attorney General in 1814, wrote an official letter to Robert Wilmot Horton, Undersecretary of State for War and Colonies, on March 14, 1824, in which he had the following to say about treaties with the Indians:

> To talk of treaties with the Mohawk Indians residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Government, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke Street or with the French emigrants who have settled in England.[106]

Even Japan had to meet the standards embodied in the capitulation system[107] before being admitted into the Family of Nations.

Like a dog chasing its tail, international jurists[108] account for this awkward relationship by recourse to the recognition doctrine rejected in subsequent sections, as well as to the "Expansion of International Society,"[109] described by Antony Anghie as

> an ambiguous, euphemistic, and somewhat misleading term that refers not to an open process by which the autonomy and integrity of non-European states were accepted, but to the colonial process by which Asian and African societies were made to comply with European standards as the price of membership into the family of nations.[110]

Crude as it may sound, the best analogy is to compare the situation to an Olympic game where the European team amputated parts of the Indigenous athletes and fitted them with prostheses to suit European taste before admitting them into the game (recognition doctrine). The formalists then come along and claim that all the athletes are the same so "let's play ball."[111] In the final analysis, sovereignty is "the complete negation of independent power, authority and authenticity"[112] to the Indigenous world.

To illustrate the point, the *Ghana Independence Act* confers what may be called *Statute of Westminster* powers[113] on the Parliament of Ghana. Ghana ceases to be restricted by the doctrine of repugnancy and the *Colonial Laws Validity Act*.[114] Ghana was also empowered to repeal or amend any United Kingdom legislation forming part of the law of Ghana and was given full power to legislate with extraterritorial effect.[115] However, "the powers ... conferred on the Parliament of Ghana do not include power to repeal, amend or modify any of the 'constitutional provisions' in force on or after"[116] Independence Day. This means that, in the exercise of its powers, the Parliament of Ghana was subject to the Constitution and could not remove the limits imposed by Britain upon Ghana's sovereignty.[117] Of course, Ghana could have repatriated and amended the Constitution, which it did when it became a Republic in 1962, but this could have been costly, since Britain could have withheld its financial aid if it did not approve of the changes.

This meant that the poor independent nations who could not support themselves were held at a ransom. Due to the amorphous nature of the standards (nature of amputation) required by the society of Christian European states, Indigenous sovereignty, as we shall discover, comes in prismatic colours. For instance, the Indigenous people of

North America, especially those in Canada, were not instantly recognized as "nations" and much less as belonging to the Family of Nations. Nor were they offered the watered-down sovereignty afforded to the African and Asian people.[118] In short, the absorption of the noble Indian into the rhetoric of American identity depended on the disappearance of the actual Indians from the local landscape.[119] This section will establish that sovereignty was not defined, or that its definition contained defects and that the term "civilized" has been used improperly.

If one were to define liquid as a substance that visibly flows, many liquids would be inadvertently excluded from the category. Glass is a liquid, yet it does not seem to flow. The glass under consideration is not in the molten state but rather in the form in which it is normally used, such as in windowpanes, beer bottles and so on. Another example of liquids that do not appear to flow is amalgam, which is used in dental restorations. Both substances appear and feel "solid." In the same manner, many Indigenous nations were denied sovereignty through the processes that led to the incorrect definition of sovereignty in the nineteenth century.

The critical word in the erroneous definition of liquid is "visible." Because this word is subjective, every scientist will jump to condemn the above definition of liquid. It can be proven to the eye that glass flows, but the question is how this fact can be proven when glass cannot be seen to flow. The answer lies in the temporal arena. Given time, glass can be proven to visibly flow. That is, with time, glass can be seen to flow. This means that, while the definition is technically correct, scientists will reject the use of "visibly" because it is not precise. To be precise, the definition should incorporate the element of time. On the other hand, when highly subjective words are embedded in

definitions that deal with social structures, these highly subjective words are generally ignored – so much so that some scholars have indicated that exemplars, the hallmark of scientific maturity, are lacking in political science.[120]

One such word is "uncivilized," which features prominently in the definition of natural law, international law and sovereignty. The subjective nature of the word can be seen in its application to the Pueblos of New Mexico through the judgments in the cases of *Joseph 1876*[121] and *United States* v. *Sandoval*.[122] In *Joseph*, the Pueblos were defined by the court as a highly civilized people and so they did not need the protection of the United States government when that classification was in the interest of the white settlers. By contrast, in *Sandoval*,[123] the same Pueblos were found to be an uncivilized people who needed the protection of the United States government. Of course, the latter judgment was to the detriment of the Pueblos. Most fascinating is that *Sandoval (1913)* was delivered 37 years after *Joseph*, so it cannot be argued that the Pueblos in *Joseph* advanced with time. The word "uncivilized" was even applied to the Irish[124] when the time seemed to be right. Despite the fact that the application of "uncivilized" is uncertain, ambivalent and fraught with numerous contradictions, yet the Positivist international lawyers who "sought to present their discipline as 'scientific' in character"[125] did not question its use in the processes that led to the definition of sovereignty.[126]

Reasons for Rejecting "Civilized" in the Definition of Sovereignty

Civilization is a bent mirror; one sees short or long depending on the angle of vision. After all, the freedom brought about by modernity has come to constrain us by isolation: private individuals who are paying millions for space visits are isolated from the realities of those who have to sleep on manholes in the winter nights to keep warm. If

that is civilization, then the Indigenous villagers who share a bowl of rice as the only meal of the day are far more advanced in "consciencism,"[127] a critical element of civilization.

> Simple acceptance of [the "civilized"] framework precludes inquiries into how this distinction was made and why one set of states becomes sovereign while another does not, even though anthropological and historical research subversively suggests various disconcerting parallels between these apparently disparate societies.[128]

It will also be proven that the notion of "law" has been improperly used to define a nation. "In the naturalist world, law was given; in the positivist world, law was created by human societies and institutions."[129] Thence, the positivists carved for themselves the implement for "racialization of law by delimiting the notion of law to very specific European institutions."[130] Here is the dilemma: given the fact that stable societies cannot not govern themselves without law, it follows that the exclusion of non-Europeans from nationhood by claiming that they have no laws is baseless. Furthermore, engaging these "backward nations" in treaty relationships means entering into a contract with them. One cannot enter into a contract with a nation that has no legal personality. When "civilized" and "law" failed, colonial jurists turned to the idea that the requirement for sovereignty depended on membership in a "society."[131] This means that, regardless of civilization or law, a nation had to be European Christian in order to be sovereign.

As established above, in order to be recognized as sovereign, a state had to belong to the Family of Nations. Lawrence emphasizes this point when he declares that wandering tribes are not subject to international law because they lack the characteristics that "are essential to the membership of the family of nations,"[132] even though he admits that these characteristics are not essential to sovereignty. Westlake places more

restrictions by stating that the "Asian Empires" were capable of meeting the standards mentioned by Lawrence, "provided that Europeans were subject to the jurisdiction of a European consul rather than subject to the local laws; but as stated above, it did not guarantee acceptance into the family of nations but for the European nations to merely 'take account' of such Asian societies."[133]

To rectify injustices, many wrong solutions were employed. The recognition doctrine and the formalist model did not address the issues as they were contructed on a faulty foundation. The result is that sovereignty for the Indigenous society is what is allowed by the colonial powers. Many factors have influenced the decisions of the colonial powers, but the most important are military might, size of population and economics, which is usually controlled by land acquisition and use. Comparing Ghana, Canada and the United States will help illustrate this point. It will also help to prove the above observation that the Indigenous people of North America did not receive the recognition into nationhood that was afforded to the African and Asian peoples.

Contradictions Leading to the Shifting Definition of Statehood and Sovereignty

Within the realm of international order, the concepts of statehood, international personality and sovereignty[134] are made more complex than nuclear physics due to contradictions in law and policy, where "each of these subjects is characterized by some measure of variety in its essential components as defined by international law."[135] For example, the essential criteria for the constitutive elements of statehood are often considered to be: "(1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states."[136]

Close examination of terms related to statehood and their application lead to bizarre conclusions, rendering the entire doctrine of statehood meaningless. The reason is that most pertinent words are defined in terms of pre-colonial international law when the world did not know what was beyond the horizon. Furthermore, most terms related to statehood are meta-historical. They stand for very general historical spheres or traditions that have been constructed entirely by hindsight. There are several ways in which the Europeans erred in terms of how they described the people whom they encountered. When the terms "Indian" and "African" were being formed, the people involved had their own names. And, notwithstanding the fact that the term "Indian" was wrongly applied, it still stood.

As we are all aware, the international law of the nineteenth century excluded many legitimate nations. To fully grasp this point, we have to examine the relationship between the words "truth" and "sovereignty." The concept of sovereignty is related to questions of authority, and questions of authority are, in turn, more closely linked to truth than political philosophers and historians have been capable or willing to admit.[137] This thesis is a dissertation on political knowledge. At one point in time, philosophers[138] and theologians[139] all believed that the world was flat until the Greeks began to question this myth in the fourth century B.C.. The Pythagorean theory that the sum of the angles in a triangle adds up to 180 degrees did not apply to the surface of the Earth, suggesting that the Earth's surface was not flat but probably curved. This led to the discovery that the shape of the world approximated a sphere.

Those pre-Socratic Pythagoreans swore to the flat-Earth concept by their throat. They based that belief on what they thought they knew and that knowledge, in turn, was

based on what they thought they saw. Pre-Socratic Pythagorean scientists gave evidence of what they saw or thought they saw. If a substantial number of witnesses can give the same account of the same thing then that account is labeled "truth." Consequently, the belief that the world was flat was the "truth" at that time. It is therefore safe to state that "truth" is related to knowledge obtained through evidence. It is also safe to state that such evidence comes from observation and not necessarily facts. For even elementary students now know that the world is a close approximation of a sphere and what the scientist of the past regarded as truth is similar to the situation in the art room where parallel lines meet, forming an optical illusion. Truth can simply be illusory. What is even more important is that knowledge is never complete, so truth is an ongoing process and may never be fully known. Einstein's theory of relativity was taken to be complete until it was recently found to be only one part of the story. It does not apply to anti-matter.[140] In law many have been convicted on what was supposed to be the truth only to be cleared after important advancements in DNA technology. It is the view of this thesis that most features that are integral to the modern concept of statehood were ignored or absent from political knowledge during the late Middle Ages and the Renaissance. Hence, both the knowledge upon which Indigenous peoples were excluded from statehood, as well as the European world view of Indigenous people, could be illusory.

The true meaning of a state accepted in Ghanaian terms and stated in the introduction is "a community of persons living within certain limits of territory, under a permanent organization which aims to secure the prevalence of justice by self-imposed law. The organ of the state by which its relations with other states are managed is the government."[141] Wherever the Europeans went, they encountered self-governing

societies. Some, like the Aztec, were in some ways more advanced than the European states. At the time of the arrival of Columbus in North America, Europe was riddled with plagues and famines, while the Indian cities were flourishing. In the words of the eminent geographer, Carl O. Sauer: "For the most part, the geographic limits of agriculture have not been greatly advanced by the coming of the white man. In many places we have not passed the limits of Indian farming at all."[142]

On the political front, the Five Nation confederacy of the Iroquois League, founded in the middle of the fifteenth century, and their sophisticated domestic political systems, together with their formal networks of international alliances, have withstood the test of time. Nevertheless, the Europeans were able, through "political myths,"[143] to systematically reduce the size and cultural significance of these Indigenous populations. These stories constitute what Leonard Thompson, the South African historian, labels as "political mythology."[144]

While political mythology has many facets, the one most pertinent to the issue above deals with the fabricated notions embedded in colonial histories. Thompson aptly shows this phenomenon in the Afrikaner imperial history, which claims that the "blacks of South Africa – apart from being barbaric, so called Hottentot brutes – were themselves fairly recent arrivals in the southern part of the continent and that they were relatively few in number when the first European colonizers arrived."[145] Even if it is true that the Afrikaners arrived to find few Indigenous peoples, as was the case in Newfoundland where the Mi'kmaq are alleged to have arrived after the British, these stories could be a myth for two very important reasons. First the Indigenous peoples were nomadic people and could have just temporarily moved from the newcomers' point of embarkation in

order for the land to "fallow." Secondly, it is possible that the settlers who arrived to find the vacant spot may not have been the first newcomers, and that the first newcomers introduced diseases that killed off the Indigenous peoples in that particular area. A good analogy can be found in the tales of Squanto.[146]

Squanto and another Indigenous youth, Samoset, were kidnapped and smuggled to England[147] by Captain George Weymouth. Squanto later became the saviour of the Pilgrims, who arrived in what is now Massachusetts, New England[148] on September 16, 1620. It is recorded that when Squanto returned from England, he found his entire tribe decimated by diseases introduced by the Europeans. One account shows that "about one year before the Pilgrims arrived, Squanto found that every man, woman and child at his home of Patuxet had been wiped out by the plague since he had visited in 1614."[149] The Pilgrims came to find Patuxet empty. Does it mean the Indigenous peoples of that area who came to join the newcomers arrived after the newcomers? Definitely not! This is how Squanto himself explains the ensuing situation: "As a result, the Indians believed the area to be haunted by evil spirits. Therefore, no one remained at the site to contest the land when the Pilgrims decided to settle there."[150] The areas surrounding the Ghost town were still teeming with Indigenous peoples. Hence, as in the mythical version of the South African Afrikaners, the European settlers moved into a conceptually vacant land. If that sounds familiar, it is congruent to the doctrine of *terra nullius*[151] in North American political mythology.

The second mode of historical myth cited by Thompson centres on Indigenous social structures. The Indigenous peoples are described as "savages who in time succumbed to progress and – thanks to the material comforts provided by the modern

world, compared with the dark barbarism of their African ancestors – ultimately wound up benefiting from their own conquest."[152] Thompson is not the only author to take note of political mythology. Francis Jennings, a historian, actually assigned a function to political mythology. He contended that "in cases where an invading population has done great damage to an existing native culture or cultures, small subsequent population estimates regarding the pre-conquest size of the Indigenous population nicely serve 'to smother retroactive moral scruples' that otherwise might surface."[153] Robert F. Berkhofer reasserted Thompson's claim more bluntly, expanding the function of historic myths and bringing the issue home[154] to North America by stating that "the image of the savage" serves "to rationalize European conquest."[155]

According to the definition of statehood just reviewed, statehood cannot conceivably be limited to European countries. Yet the Western world saw it differently. This can be done only by distorting the truth or by using imagination creatively. In this instance, both methods were employed. The newcomers destroyed the cities that they found[156] or claimed that these cities had never existed. They then became creative by equating civilization with Christianity.

The destruction of the Aztec civilization[157] is too remote to comprehend, so it is best to turn our attention to events closer in space and time. The Oklahoma tragedy took place in the United States in the twentieth century. The Oklahoma civilization had its remains so badly plundered that virtually nothing of it still exists. "The once-massive Spiro Mound, a monument of an eastern Oklahoma people"[158] was looted of its treasures in the 1930s by the farmer who came to possess the land on which the monument stood.

After selling the tons – literally – of precious objects it contained, the farmer had the monument dynamited into rubble.[159]

The destruction was not limited to artefacts. Even if that civilization ceased to exist a hundred years ago, it is possible that, with modern advancements in technology such as DNA testing, those artefacts could be linked to existing Indigenous groups. Therefore, the blasting of monuments and infrastructure could be the destruction of the most important and fundamental element: the Indigenous culture.

The Ultimate Myth: Equation of Civilization with Christianity

> Though it appeared to the casual white observer that anarchy reigned in Indian [reservations], those societies had evolved their own patterns of law and order…Clearly understood rules developed by consensus and were strengthened by the tribes' pantheism, which blended religion into all aspects of Indian life. The result was a "complex and smooth-working social organization of the tribes which functioned without the need for written laws or the paraphernalia of European Civilization."[160]

The arrival of Christian missionaries in the Indigenous world was catastrophic to traditional cultures. The European Christians viewed the Indigenous peoples as morally inferior[161] and sought to save the Indigenous peoples from the evils of their own traditions.[162] Thereafter, Indigenous cultures were under attack. For instance, the first missionaries to arrive in the Lac Brochet area were Oblates of Mary Immaculate. They were mostly French-speaking Roman Catholics from Belgium. In contrast, the first missionaries in the Sayisi territory were Anglicans. Both the Cree of Lac Brochet and the Sayisi shared common boundaries and lived together as neighbours. The Indigenous peoples were thus not only torn between their own culture and the ways of European missionaries, but they also became divided according to the schisms within Christian theology.[163]

The early Christian missionaries criss-crossed the Indigenous territories, denigrating each other and the Indigenous cultures that they were both committed to destroying.[164] Unfortunately, their accounts have become the primary written historical source for understanding traditional Indigenous cultures. As a Ghanaian proverb has it, "Until lions have their own historians, tales of hunting will always glorify the hunter."[165]

The most serious damage to Indigenous cultures was the paradigm shift from community life to individual responsibility. In some cases, residential schools took children away from their families and placed them in a European education system, within which both Indigenous languages and cultural traditions were forbidden. The same Christians then concocted the stories that Indigenous peoples had no history or culture, a fallacy that was still part of the curriculum by the 1980s in some Western school systems. This thesis is justified in going back to the 1980s because no improvements thereafter can reverse the centuries of damage.

Len Jeffries,[166] on reviewing the 1987 curriculum for the school systems of New York State, discovered that the social-studies manual not only purported to take Egypt out of Africa and place it in a world comprising "Mesopotamia, Tigris, Euphrates and the ancient Hebrews,"[167] but even worse, the section on Egypt and the Nile Valley had no content. There was no "mentioning of the literature of the ancients of Africa. No mention of the science of the Africans of the Nile... No mention of the philosophy, the ethos and ethics, the morality that's carved in their tombs and temples."[168] The only knowledge presented is "[o]ne side of the river being the place of the living, the other side being the preserve of the dead. And the two are opposites that are complementary. That the living and the dead beget each other and there is life after death."[169] And even though the

Egyptians were mixed with the Hebrews, there was no mention of the fact that "Africans had put in place the concept of the oneness of God before the ancient Hebrews."[170]

In contemporary terms, who would believe that the Statue of Liberty in the New York harbour had nothing to do with the immigrant forebears? But that is exactly the case. The Statue of Liberty represents Black slaves "fighting for liberty in these United States."[171] The originator of the idea was Edouard Rene Lefebvre de Laboulaye. As the head of the French anti-slave society, he came up with the idea of the Statue of Liberty in 1865.[172] The first model was of an image of a black woman holding the broken chains of enslavement and with the broken chains of enslavement at her feet.[173] The original is now hidden at the New York French Cultural Center.[174]

The last example of such "cognitive dissonance"[175] to consider is the symbol of the pillared temples attributed to Greek civilization. These temples had their source in Africa:[176] the architectural design is from the greatest buildings of the Luxor University temple.[177] This great pillared temple was the inspiration for the Parthenon, the temple on Acropolis in Athens. The two lions in front of the New York Public Library are replicas of the sphinx, also from Africa.[178] The lions are the Luxor University temple's symbol of the guardian forces of the temples of learning. It should come as no surprise to learn that professional eminence is no bar against cognitive dissonance,[179] but the honour of the distinction should go to Hugh Trevor-Roper,[180] a former Regius Professor of Modern History at Oxford University, who wrote at the start of his book *The Rise of Christian Europe* of "the unrewarding gyrations of barbarous tribes in picturesque but irrelevant corners of the globe," who are nothing less than people without history.[181] "Perhaps, in the future, there will be some African history to teach," he conceded, "but at present there

is none, or very little: there is only the history of Europeans in Africa. The rest is largely darkness, like the history of pre-European, pre-Columbian America. And darkness is not a subject for history."[182]

So, in crude terms, political mythology involved eliminating the criteria for the constitutive elements of statehood. This mythology incorporates genocide – that is, wiping out the permanent Indigenous population. When that fails or is not practical, the Indigenous people are forced off the land[183] and deprived of a defined territory. These two steps, of course, eliminate the Indigenous government, rendering the Indigenous people impotent with respect to international relationships. This is followed by the suppression of Indigenous histories that could contribute to meaningful definition of international law. The final step comprises the construction of fabricated tales that minimize the importance of the Indigenous population and justify the brutal force used in denigrating the Indigenous people into insignificant beings. The equation of civilization with Christianity will be explored, but before then a few legends and tales will help the reader grasp the full picture.

The reader must have heard about the "savage Indian"[184] roaming about on horseback, punching holes in the sky with his arrow. Well, what is not told is that some of these Indians were forced to abandon their sedentary lives by the advance of the European settlers and had to look for a new place and a new way of life. The Europeans even forgot that it was the Spaniards who re-introduced horses into North America,[185] so the Indians could not have been roaming about on horseback before contact. Laughter is the best medicine, so the author would like the readers to take a break and heal their souls with one of the first European reports from Brazil:

> There were men with eight toes; the Mutayus whose feet pointed backwards so that pursuers tracked them in the wrong direction; men born with white hair that turned black in old age; others with dogs' heads, or one cyclopean eye, or heads between their shoulders, or one leg on which they ran very fast.[186]

These hallucinations are not so easy to discard, because even though they are unbelievable, they work on the psyche of the reader and leave imprints that flavour their judgment of the denigrated tribe. The collected tales are then transmitted from one generation to another and accepted as "truth" that are really nothing but illusions. These illusions are used to formulate laws and policies that govern the world order. In this situation, it all boils down to the fact that, in order to be considered a state, the group must be a powerful European Christian nation. In the notorious words of Wheaton, the prevailing sentiments of the time were that "The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin."[187]

François Guizot has offered one explanation of this exhortation:

> Christianity considered all men, all peoples as bound together by other bonds than force, by bonds independent of the diversity of territories and governments [...]. While working to convert all nations, Christianity wished also to unite them, and to introduce into their relations principles of justice and peace, of law and mutual duties. It was in the name of the Faith, and of the Christian law that the Law of Nations was born in Christendom.[188]

Furthermore:

> Within the axiomatic framework of positivism, which decrees that European states are sovereign while non-European states are not, there is only one means of relating the history of the non-European world, and this the positivists proceed to do: it is a history of the civilizing mission, the process by which peoples of Africa, Asia, the Americas, and the Pacific were finally assimilated into a European international law.[189]

In other words, the whole concept of statehood was built on a faulty foundation. As noted by Antony Anghie, the problem related to defining the associated terms has been peculiar from the time of the origin of international law:

> Positivist jurisprudence is premised on the notion of the primacy of the state. Despite subsequent attempts to reformulate the foundations of international law, the fundamental positivist position, that states are the principal actors of international law and they are bound only by that to which they have consented, continues to operate as the basic premise of the international legal system.[190]

No matter how many intellectual arguments are offered against it, "few would deny that modern political reality has the state as one of its constituent parts, however intangible and porous it seems at closer inspection."[191]

This means that we cannot rely on present or past definitions or on historic events to ascertain the true meaning of sovereignty. Nor would it be wise to drive in reverse to pick up the lost pieces in order to formulate a new concept. Rather, it would be more illuminating to get out of the sovereignty vehicle, climb onto a surveying plane and construct a map from above. That is, the notion of highly emotionally charged political concepts such as sovereignty necessitates a change in "methodological orientation from what is established practice within the study of political ideas."[192] We can achieve this by tabulating the elements of each associated term and plugging each group into its individual situation without reference to the temporal frame of rhetorical and inferential European history. The table below will also establish that sovereignty can easily be defined scientifically and that the link of sovereignty to law, government, nationhood and, in particular, "the family of nations"[193] concept is uncalled for.

Elements of Statehood: A body of people	**Elements of Government:** Structure of principles and rules determining how a state or organization is regulated	**Elements of Nation:** A large group of people (common origin, common language, but not critical)	**Elements of Sovereignty:** In the ordinary popular sense: supremacy, the right to demand obedience
	The sovereign power in a nation or state		Indirect implication of power
System of rules			
	Political authority		Nation not critical
	The machinery by which sovereign power is expressed		State not critical
		Tradition political entity not critical	
	Political organs of a country	common history common sentiment, and usually, though not always, common heritage	Political organization not critical
Political system			
Defined territory		Defined territory but not critical	Territory not critical
Government functions as basis and condition of peace, order and civilization.		Government not critical	Government not critical
			May not be physical (hence an abstract term e.g. God, the Supreme Sovereign)

Table: Interrelations: Sovereignty, Self-Government and Nationalism

If one were to plug the Indigenous peoples of the world into the table individually, most would have governments, possess nationality, be considered states and definitely qualify as sovereign nations. Out of the definition of sovereignty, one word sticks out like a sore thumb: "civilized." Here are the reasons:

Numerous civilizations throughout the world existed before and after Christianity's rise to the status of a major world religion. Hinduism was and is still a vital civilization. Many of the "uncivilized" Asian and African states easily met both the definition of sovereignty and the requirement of control over territory. The historical reality, as Alexandrowicz points out regarding the East Indies, for example, was that "[a]ll the major communities in India as well as elsewhere in the East Indies were politically organized; they were governed by their sovereigns, they had their legal systems and lived according to centuries-old cultural traditions."[194] In Africa, the Europeans engaged in treaty making with the kingdoms of Benin, Ethiopia and Mali. These nations were "sophisticated and powerful political entities that were accorded the respect due to sovereigns by the European states with which they established diplomatic relations."[195]

Elsewhere in the world, historians "analyzed the negotiations that led to the making of various treaties, and included these treaties within larger collections of international treaties."[196] The works of eighteenth-century jurists, for instance, gave accounts of diplomatic usages in countries such as Persia, Siam, Turkey and China.[197] Confronted with the dilemma presented by the immense historical evidence of other civilizations, "positivists resorted to the concept of society. The broad response was that Asian states, for example, could be formally 'sovereign;' but unless they satisfied the

criteria of membership in civilized international society, they lacked the comprehensive range of powers enjoyed by the European sovereigns who constituted international society."[198] According to Lassa Oppenheim, the criteria were not outlined and no explanation was offered for this distinction.[199]

That is, "despite positivist preoccupations with sovereignty doctrine, 'society' and the 'family of nations' are the essential foundations of positivist jurisprudence and of the vision of sovereignty that it supports."[200] All said and done, non-European states were not sovereign just because they were not a part of the European Christian family of nations. The incorrect usage of "society" that stripped non-European nations of their sovereignty, however, did not explain why the European states entered into treaties with these nations that they considered to be non-sovereign, uncivilized or primitive.

It is obvious from the above that:

A) The word "civilized," defined by the Oxford English Dictionary (2nd edition, 1989) as "made civil; in a state of civilization," and "civilization," defined by the OED (*ibid*) as "a developed or advanced state of human society," are very subjective and fraught with Eurocentric arrogance.

B) It is a situation where cultural distinctions such as religion, farming, industrialization and manufacturing are utilized as the basis for establishing a legal status.

C) It is part of the elaborate vocabulary employed by the colonists to legitimize the brutal realities of conquest and dispossession. Its main function is to denigrate the colonized states and to justify the brutal force used and "the tragedies and ironies that attend it."[201] Secondly, it can be noted that statehood is not critical to the definition of sovereignty.[202]

As Thomas Lawrence[203] acknowledges, even the wandering tribe might "obey implicitly a chief who took no commands from other rulers"[204] and pirates, similarly, "might be temporarily under the sway of a chief with unrestricted power." [205] These entities satisfied the essential Austinian criteria of sovereignty.[206] In modern terms, "governments-in-exile, regional conferences of states such as the European Union, national liberation movements, and even organizations such as the United Nations enjoy non-State international personality."[207] From the practical point of view, after the occupation of the Papal realm in 1870, "the Holy See did not disappear as a subject of international law, nor did it lose its international personality due to the loss of the Papal States."[208] Despite the obvious, positivists insisted that sovereignty could be most clearly defined as control over territory. Thus Lawrence states: "International Law regards states as political units possessed of proprietary rights over definite portions of the Earth's surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organised and civilized, to come under its provisions."[209]

It is apparent that the positivists' mind is set in concrete. John Westlake admits that "[i]f we give the name of law to anything which we so discover in a remote state of society before we have fixed in our minds what we mean by that name, we beg the question, and have no security that our language has any consistent, or therefore useful, sense."[210] That is, "[t]he 'analytical school'[211] establishes a definition, adheres to it and applies it rigorously and unyieldingly."[212] In the words of Antony Anghie, any conflict between the realities disclosed by the historical researchers and the definition must be

resolved in favour of the definition in order to maintain its "consistent or therefore, useful sense."[213]

In short, the positivists would do anything to justify the amputation of Indigenous territories by the Christian European countries. They claim not only that only European countries have laws but also that sovereignty is more tied to land than to human beings. Sovereignty, even to the uneducated, is a relationship – a human[214] relationship. It would be absurd for any person to claim sovereignty over a herd of cattle. No person can form a government with or over a herd of cattle. Similarly, no person can form a government with the land. Yet, Lawrence incredibly posits that jurisdiction over territory takes precedence over jurisdiction over the citizens in terms of international law. Thus Lawrence argued that "[m]odern International law, being permeated throughout by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental."[215] To further illustrate the determination of the positivists to appropriate Indigenous lands, the positivists endorsed the doctrine of "conquest,"[216] even though conquest is absolutely contrary to the very "concept of law as it legitimizes outcomes dictated by power rather than legal principle."[217]

The positivists, through their concept of international law,[218] diabolically constructed statehood to be congruent to Western Christianity – congruent in the mathematical sense in that the states recognized by the positivists practically coincided with Western Christian nations. "Heathens," civilized or not, could not enjoy the full attributes of statehood. A notable example is the Byzantine Empire and later the Ottoman Empire, entities that were "civilized" by all standards, but failed be accepted into the community of nations. Even when the evidence of civilization was overwhelming and the

nations were powerful, such as in the cases of China, Japan, Ethiopia and others, various means were employed to curtail their participation in international affairs. Statehood was purposefully contrived to be the foundation of sovereignty. But to be sovereign, a state had to be recognized by the European Christian society that arbitrarily decides what sovereign should be. What they forget is that a tree may exist in a forest when no one has seen it.[219]

The evidence that the Aztecs, in certain aspects, were more advanced than the Europeans is very convincing. That nation met all the criteria for statehood. It was sovereign by any conceivable definition. Yet, they were not recognized as a sovereign state. This means that the positivists' concept of sovereignty and the distinction between civilized and uncivilized is not based on an actual state of affairs but on membership in a society. The interaction of European culture and simple international law can produce systems behaviour of extraordinary complexity and richness. Conversely, Indigenous systems of inordinate complexity are able to generate patterns of beautiful simplicity. After all, simplicity is the hallmark of ingenuity. Statehood in nineteenth-century international law is an ideology of illusions. The geographical element was introduced by the positivists to effect colonization. "The colonial arena promised international jurists a chance to develop a jurisprudence that demonstrated the efficacy, coherence, and utility of international law free of the ubiquitous and unanswerable Austinian objections."[220]

As such, it would not be incorrect to define statehood in the colonial era as a powerful Western Christian nation. A nation could be Christian but could still not be considered sovereign if it were not powerful – as in the cases of Ireland and Wales. Had it not been for the sheer numbers and strength of the Chinese, and the power of the

Japanese empires, they too would have fallen under the colonial hammer. After all, Vietnam was colonized and its culture was not significantly different from that of China. Hinduism is a well-recognized civilization, which is, for all intent and purposes, comparable to the Chinese civilization. It fell prey to a series of colonizations because the factors such as proximity, accessibility and some non-violent strands of Hindu traditions made them vulnerable to Mughal, and later European, interference. The absurd nature of pre-modern statehood is demonstrated by the fact that pre-1957, the year in which Ghana became independent, Liberia and Ethiopia were the only African countries recognized as independent states by the "international community." Less than three decades later, only Namibia out of the entire African continent had not achieved independence. So it is not civilization, law or systems of government but, rather, the emergence of the power of the Indigenous peoples and the relative decline of the major European states after the two world wars that re-defined statehood in that era.

Nationalism is spiritual: it is the most important vehicle for the realization of the cultural, political and economic aspirations of a group. Government is politics and economics. Sovereignty is the total sum of all the elements – ideology, power, economics, politics and emotional spirituality or the opium of the powerful, with apologies to Karl Marx. The definition of sovereignty during the colonial period is thus grounded in principles of property acquisition and cultural relativism with no regard to prior sovereignty. It is based on Western legal principles that assign group rights based on the victimization of the weak and that ironically ignore the fundamental Christian doctrine of equality. It would be trite and unnecessary to dwell on the self-evident fact that international law is a product of the special civilization of modern Europe, a highly

artificial system with incomprehensible principles designed to fulfil European stealth and greed. It would be more illuminating to point out that brutality usually accompanies claims to civilization. In his illuminating *Theses on the Philosophy of History*, the German-Jewish writer Walter Benjamin wrote that "[t]here is no document of civilization which is not at the same time a document of barbarism."[221]

PART IB: EVOLUTION OF SOVEREIGNTY

A. Power and the Definition of Sovereignty

1. Sovereignty Dressed in Power – Non-physical or Non-violent

Within the older European political thought, the source and locus of sovereignty is very clear. Power is distributed chronologically and systematically downwards from God to the Church (Pope), from the Pope to the monarch (prior to the Protestant Reformation in England, Scandinavia and some other parts of Europe), and then from the monarch to the people. Thus, under the *Requerimiento*, the inhabitants of the New World were required to "acknowledge the Church as the ruler and superior of the whole world, and the high priest called Pope, and in his name the king and queen . . . in his place, as superiors and lords and kings of these islands and this mainland."[222]

In pre-modernity, humans saw themselves as being one with life. In that light, the Greeks saw themselves under the *Umbra*,[223] seeing the Supreme Being and his agents (gods) as being in everything[224] and as being the ultimate source of power. Somehow, that power found itself in the hands of the Church:

> And I tell you, you are Peter, and on this rock I will build my church, and the gates of Hades will not prevail against it. I will give you the keys of the kingdom of heaven, and whatever you bind on earth will be bound in heaven, and whatever you loose on earth shall be loosed in heaven.[225]

The world had a glimpse of the Church's interpretation of that biblical passage in the preface of the Papal Bull, *Romanus Pontifex* (1455),[226] by which the Pope recognized and affirmed Portuguese title to its African colonies.

> The Roman Pontiff, successor to the bearer of the keys of the heavenly kingdom and Vicar of Jesus Christ, looking with paternal interest upon all the regions of the world and the specific natures of all the peoples who dwell in them, seeking and desiring the salvation of every one of them, wholesomely orders and arranges with careful consideration those things which he perceives will be pleasing to the

> Divine Majesty and by which he may bring the sheep divinely committed to him into the one fold of the Lord.[227]

With that power, the Church not only carved for itself the fictional notion of sovereignty, it also projected who was sovereign to the world. The power of the Pope was both religious and secular, so the Papal Bull had to be respected by all nations. The theory of universal papal jurisdiction[228] sprang up from debates and the constellation of thoughts and legal wiles advanced during the Middle Ages by the Roman Catholic Church in order to attain both spiritual and secular sovereignty among the Christian nations of Europe.

The epistle of the "two swords" doctrine is found in the 1302 *Unam Sanctam*[229] of Pope Boniface VIII, 1302, stating that:

> [W]e are informed by the texts of the gospels that in this Church and in its power are two swords; namely, the spiritual and the temporal…Certainly the one who denies that the temporal sword is in the power of Peter has not listened well to the word of the Lord…Both [swords], therefore, are in the power of the Church, that is to say, the spiritual and the material sword, but the former is to be administered for the Church but the latter by the Church; the former in the hands of the priest; the latter by the hands of kings and soldiers, but at the will and sufferance of the priest.[230]

In the words of Robert A. Williams:

> Informing this Church ideology was a worldview essentially hierarchical and universal in complexion. The State, being of earthly origin and therefore without the power to raise itself above the insufficiency of a piece of human handiwork, required the authority of the divinely willed Church to acquire the divine sanction as a legitimate part of that Human Society which God has willed.[231]

Even declassifying the Holy See as purely a religious institution and cloaking it with a royal cape does not allow the Holy See to fit comfortably within the criteria for international personality or within the parameters of state sovereignty. Yet, the Holy See

has survived and still has an international personality, with no parallel among other religions with the possible exception of the Dalai Lama.

The Holy See

The convocation of the Holy See to the status of international personality was not based on statehood[232] but on the belief in epiphany and a sequence of historical events. The genesis was a chain of important councils[233] through which the Catholic Church dealt with issues of spiritual, secular and temporal concern that had international dimensions. Pope Leo the Great seized that opportunity and sent ambassadors to "entities that exercised temporal sovereign power."[234] In this regard, the Pope "sent Julian of Cos as his legate to the Emperor in Constantinople to serve as his representative at court."[235] These emissaries were not purely spiritual but dealt with temporal and secular matters. Such legations were replaced by permanent diplomatic representatives of the Holy See throughout Europe[236] by the end of the sixteenth century.[237] The aim was to advance the Church's political presence in the international arena. The successful advancement of the Papal political influence led to the acquisition of territories "on the Italian peninsula during the reigns of Pepin and Charlemagne."[238]

The fleeting[239] acquisition of these territories enabled the Holy See to take on the mantle of other temporal powers. With territorial acquisition came the responsibility of territorial protection, which became a primary preoccupation of the papacy and led to its acquisition of all the paraphernalia of a temporal leader. Thus, "[a]t the dawn of the Second Millennium, Europe essentially functioned as a Christian realm united in faith under the Papal tiara."[240] The power of the Holy See became manifest when Pope Adrian IV issued a papal bull[241] that empowered King Henry II to conquer Ireland in 1155.[242] In

1302, King Phillip the Fair of France came under the hammer of Pope Boniface VIII.[243] Paradoxically, while the papacy authorized the conquering of the Catholics in Ireland, Pope Gregory X[244] in 1272 exhorted Christians to acknowledge the rights of "self-determination and existence of the Jewish people."[245]

To muddy the waters of inconsistencies further, Pope Alexander VI gave his blessing to the colonization of the Indigenous peoples when he promulgated the Line of Demarcation between the zones of colonial exploration among the then-contemporary imperial powers, Portugal and Spain.[246] In this sense, and based on what followed, there is at least intuitive appeal to the conclusion that the Church either participated or acted as a silent bystander in the brutal exploitation of Indigenous peoples. The feeble attempt to rectify the situation by Pope Paul III's *Sublimus Dei* came a little too late.[247] The aforementioned display of diplomatic acrobatics categorically reflected the acceptance (even if reluctantly) of the Holy See as a participant in international politics by the temporal sovereigns.

The Challenge to Papal Authority

Of course, the power of the Church did not go unchallenged. The attack came from three fronts: the Protestant Reformation, the quest for power by the temporal powers and ideological divisions within the Church itself. The brutal treatment of the Indigenous peoples of Mexico by the Spaniards led some humanistic elements within the Church to question the validity of the Papal bull which had granted these colonies to Spain. The Protestant Reformation had a dramatic effect on the power of the Papacy, but the most potent force came from the temporal powers. "The Act of Succession, enacted under the

reign of King Henry VIII, asserted a new vitality in the temporal sovereigns' power against, and conflicts with, the Holy See."[248]

In the early part of the nineteenth century, Napoleon Bonaparte attacked the Papal States, took control of the Pope's domain and briefly incarcerated the Pope. The Papal States thus came under the control of the French Empire, remaining so from 1809 to 1814.[249] The fatal gust to the Papal States came during the movement toward Italian unification, which dealt a critical blow and ultimately wiped out the physical elements of the temporal sovereignty of the Holy See. It is not surprising then that Italy objected at the League of Nations Conference when Germany wanted the Holy See to help resolve some of their disputes. Some commentators attribute this rejection of the Papal role to the fact that the Italian government was still uncomfortable in conferring international status to the Holy See.[250]

Of most interest to this paper is the ideological battle against the supremacy of the Papacy. The Aristotelian conception of the State as "a body of citizens sufficing for the purposes of life"[251] provided the emerging new governments with a bolt cutter to free themselves from the bondage of the *Unam Sanctam* that was so integral to the medieval Church's celestial perspective.

The accelerating fragmentation of Europe resulted in the emergence of fully independent territorial states free from any cosmological, theocentrically tacit ancestry.[252] The theory that flows from the Aristotelian assessment draws a line of demarcation between ethics and politics, since a "good citizen need not be a good man, and vice-versa."[253] That was the genesis of the separation of Church and State, though the Church did not relinquish its overarching power without a fight. Rather, that period (1250-1274)

saw the most fruitful development in Christian ontological and political theories "in response to the challenges presented by the naturalistic viewpoint."[254] Heading the defence was "the great Dominican scholastic and theorist, Thomas Aquinas (1225-1274)."[255]

The Famous Synthesis of St. Thomas

As this study is particularly concerned with examining the development of the theory of the state, its primary focus will be on the natural right as the earliest mode of liberal legal thought which informed the modern state. For this reason, this paper will dwell on the natural-right aspect of the Thomistic dualism. St. Thomas, in warding off the proponents of natural rights, acceded to the Aristotelian conception of "nature," but he emphasised that "man's nature was divine in its origins and that only through divine creation did this nature attain its autonomous standing."[256]

The "scholastic's maxim,"[257] expressive of the "paradigmatic statement of the Thomistic-Aristotelian synthesis" states that "grace does not do away with nature, but perfects it."[258] From this maxim, the human state could be seen as valid in its own right. St. Thomas Aquinas, acceding to the State and to individual right, actually provided an ideological battering ram for a full-scale attack on the dissolving papal theory of universal territorial jurisdiction. "The Thomistic theorist, armed with what has been called the 'opening bars of Renaissance humanism,'[259] could safely substitute Man's consent, instead of his faith, as the constitutive ingredient of secular terrestrial law."[260]

The "Thomistic conception of natural law and the idea of Man as an individuated political animal helped give definition and content" [261] to the modern theory of natural

rights, from which the contemporary liberal state evolved. The modern theory of natural rights is based on the premise that "rights precede rules."[262] This notion stems

> ...from the premise that the circumstances of reciprocal hostility and need, and the universal interest in comfort and glory, carry implications of their own for how society ought to be arranged. Intelligence can spell out the implications and then take them as a basis for impersonal legislation. Thus, the solution to problems of order and freedom pre-exists the making of the laws.[263]

The theory of natural law started robust debates that shaped the fifteenth and sixteenth century frame of mind. Part of the debate centred on the controversial papal power of granting Spain possession of most of the New World (with the exception of Brazil) and rights over the original inhabitants. While secular natural law proponents increasingly questioned the validity of the Spanish Crown's "papally granted hegemony in the Indies,"[264] missionaries and scholastic theologians avidly employed natural law ideas to attack the Spanish colonial system. These humanist theorists zeroed in on the core notion of the Thomistic philosophy – namely that everyone possesses the common element of human reason divinely endowed on all humans, whether Christians or non-Christians. This central tenet includes the natural-law right and duty to design rationally their political and social lives.[265] This theory radically goes against the Spanish colonial philosophy exemplified by the *Requerimiento* and the *Laws of Burgos*, which stripped the Indians of all their rights and self-determination.[266] The humanist attack intensified following Montesinos's outcry[267] in 1511 against the barbarous Spanish treatment of the Indians. Those with mercantile interests and the pro-colonial advocates countered the humanistic challenge with the well-known argument that the Indians lacked the rational capacity to order their political and social life in the manner of the Europeans.[268] The Spanish theologians and missionaries were not deterred by this frivolous argument.

Rather, they became increasingly strident in their demands for fair treatment of the Indians.[269] The most important and influential of these Spanish Renaissance thinkers was the Dominican scholar Franciscus de Victoria.

Franciscus de Victoria and Thomistic Natural Law

Franciscus de Victoria was the first Spanish thinker to scientifically apply Thomistic natural-law theory to the relations between nations, thus greatly impacting the history of international law. The tangled legal aspects of the "Indian problem"[270] first became apparent to the Spanish monarch after Antonio de Montesinos's rancorous sermon in Mexico,[271] but the Europeans were more enlightened in 1532 when the King of Spain was advised by Franciscus de Victoria as to the nature of aboriginal title. His juridical system of natural law[272] "established the foundations of modern international law,"[273] in which Victoria summed up his theory by stating that the Indians were the "true owners" of the New World.[274]

> The upshot of all the preceding is, then, that the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners. It would be harsh to deny to those, who have never done any wrong, what we grant to Saracens and Jews, who are the persistent enemies of Christianity. We do not deny that these latter peoples are true owners of their property, if they have not seized lands elsewhere belonging to Christians.[275]

A) He disputed the notion of *terra nullius* (Australia still hung on to this theory until the fairly recent *Mabo* ruling).

B) He used St. Thomas Aquinas's idea of *natural right* to declare that the original inhabitants could not be deprived of their property without legal cause. This stance was contrary to the Papal bull,[276] even though Franciscus de Victoria was a member

of the Church.[277] Colonization implies dispossession of Indigenous lands. Pope Alexander VI gave his blessing to the colonization of the Indigenous peoples when he promulgated the Line of Demarcation between the zones of colonial exploration among the then-contemporary imperial powers, Portugal and Spain.[278]

C) Natural law dictates that people, even foreigners, should not be denied access to the natural resources of the land. If the natives denied them access, then there would have been a transgression of the law of nations by the native people, and just war could ensue. This means that the Spaniards could appropriate communally held and shared resources, so long as they did not harm the inhabitants. That concept creates a problem. Once we get past vital resources such as water, food and habitation, how far appropriation goes is a debatable issue.

D) Since the inhabitants were considered uncivilized, or not as sophisticated as the newcomers, their properties could be put under the guardianship of the "civilized" nation. "Civilized" newcomers could hold title to native properties, meaning that the Europeans would be responsible for effectively administering the properties for the good of the natives. The problem with that arrangement is the question as to who defines "uncivilized" and "effective." The environmental crisis can be squarely put on the shoulders of "civilization."

The reader must be careful not to project the fourth notion into the Marshall cases of the United States Supreme Court.[279] This idea does not really figure into to the concepts of the Marshall trilogy. Marshall was also aware of the Royal Proclamation and the reasons for the insertion of the protective clause, which stated that "it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several

Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed."[280] The foregoing implies that the Indians were being molested and needed the protection of the Crown. It stands to reason that protection of the Indians as instructed by the Crown could have more bearing on Marshall than the Indians being uncivilized. But that does not mean that Victoria's "uncivilized" could not have filtered to and from John Locke's "utilitarian calculations respecting the natural rights of hunters versus farmers"[281] into the courts by osmosis. It was not until the nineteenth and twentieth centuries that formalized trust theory began to appear in U.S. law. The concept of trust was mainly based on treaty and statutes.

Victoria's declarations, outstanding as they may be, offered very little comfort to the Indigenous peoples. What he gave with the right hand, he took back with the left. Together, Victoria's arguments demolished the "legitimacy of the papal hierocratic foundations of Spain's New World Empire."[282] By promulgating the Line of Demarcation between the zones of colonial exploration among the then-contemporary imperial powers, Portugal and Spain,[283] Pope Alexander VI in effect gave his blessing to the colonization of the Indigenous peoples. But Victoria declared that "the Pope's grant to Spain of title to the Indies was 'baseless' and could not affect the inherent rights of the Indian inhabitants."[284] The international community came to accept Victoria's proposition. Thus, Victoria dismantled the authority of the Pope with respect to Indigenous sovereignty. He used St. Thomas Aquinas's concept of *natural right* to declare that the original inhabitants could not be deprived of their property without legal cause – a stance that was clearly contrary to the Papal bull.

However, Victoria went on to reformulate the basis for Spanish title over Indigenous property on the perhaps more palatable "secular Humanist foundations that still maintained the hierarchical orientation of the Spanish colonial system."[285] Through Victoria's synthesis, the two core goals of Spanish imperial policy – assimilation and appropriation – remained intact and were thus incorporated into the emerging European international jurisprudence. The only significant change of interest to the Indigenous peoples was the replacement of the medieval papal ideology with the modern liberal legal thought.

The Effect of Modernity

The transition from pre-modernity to modernity saw humans move from being non-self-conscious to being conscious of their insertion into reality: "We are one with life to a state where humans detached themselves from life (world) in order to critically observe and analyse the world" (Kierkegaard). Humans increasingly saw themselves as little entities in bags of skin looking at the world objectively. It is fascinating how the dynamics of this new philosophy worked its way into Marshall's judgment. While trying to be objective, he inadvertently portrayed himself as a relation that related itself to itself and willed to be itself and in so doing was grounded transparently in the power that had posited Marshall (Kierkegaard).

Marshall demonstrated the effect of his upbringing on his personality, and the battle between his conscience and what was expected of him by the society in which he was raised became very apparent. He was caught in quicksand, and the more he wiggled, the deeper he sank. The use of power to define State-Indian relationship had been so

entrenched that the shift in philosophy could not help Marshall extricate himself from the tangled web of colonialism.

In *Johnson* v. *McIntosh*,[286] the issues were how the United States came to possess the title and what the nature of the Indian title was. Once title is established, then the power to acquire or dispose of the land comes to the fore. The Royal Proclamation[287] gives the Crown (in this case the U.S. federal government) the sole authority to purchase land from the Indians. The Indians could not cede their lands to either states or individuals. As to the nature of the Indian title, a sub-issue, the court went through all the doctrines unconvincingly but reverted to John Locke's "utilitarian calculations respecting the natural rights of hunters versus farmers,"[288] concluding that, despite international law or the rules of nations, leaving the land in the hands of the uncivilized roaming hunters would be wasteful and inappropriate. So the justification of how all of this can come about is tied to the Indian character and habits of the uncivilized roaming hunter. As Westlake puts it, "the occupation by uncivilised tribes of a tract, of which according to our habits a small part ought to have sufficed for them, was not felt to interpose a serious obstacle to the right of the first civilised occupant."[289]

The same idea can be observed in the words of Marshall (*Johnson* v. *McIntosh*),[290] who states that "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness."[291] In *Worcester* v. *Georgia*,[292] Marshall poses a rhetorical question in line with his earlier assertions: "Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?"[293] In lieu

of answering, Marshall proceeded to consider the doctrine of conquest. "But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."[294] The problem is that not all Indian lands were lost through conquest. Thus, the statement that law ought to regulate the relationship between the conquered and the conqueror could not work here, and so Marshall had to resort to new and different rules, which turned out to be the *status quo*. He justifies his ruling based on the actual state of things, or how things actually were on the ground. The current formative law, natural right and uses of the civilized nation are indispensable to the country as it is. Marshall then proposes that the nation adapt to the actual conditions of two peoples, even though, theoretical flaws might exist.[295] That is a fictional justification and, in theory, it represents the mindset that still puts the powerful settlers who conquered and the Indigenous people conquered in an "as it is"[296] relationship – even in situations where no conquest occurred. It all boils down to what Casely Hayford stated in the introduction and is worth repeating: "I will have your land, or your hut, if you will give it to me. If not, I will take it. When I have taken it, and you cannot retake it, of course, I will keep it."[297]

The Sudden Shift

What is history? What is sovereignty and what does it mean? How does one begin to determine the constraints of that sovereignty? The case of *Worcester*[298] is a revision of both *Johnson*[299] and *Cherokee*,[300] and Marshall seems to have practically repositioned his stands on some critical issues.[301] He revisits history to prove that the tribes have the right to some form of statehood. Referring to the Crown, Marshall proclaimed: "He also purchased their alliance and depend once by subsidies; but never intruded into the interior

of their affairs, or interfered with their self-government, so far as respected themselves fully."[302] The following will take the reader on the Ghanaian path through the Marshall trilogy.

From the Ghanaian psychoanalytic perspective, there is a mellowing of Chief Justice Marshall in the Marshall trilogy, which can be found in the progression from *Johnson* to *Worcester*. For even when Marshall repeated his claim of unflattering characteristics of the Indians in *Worcester*, he attributed those sayings to others. For instance, in *Johnson*, Marshall contests that, after conquest, if the conquered inhabitants can be blended with the conquerors, the conquered should be incorporated into the dominant society, declaring that "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[303] He labeled the Indians "savages" and asserted that the Europeans were justified in denying the Indians their property rights. This is inconsistent with the fact that Marshall upheld treaty rights and observed the *Non-Intercourse Act*, which prohibits the private purchase of Indian land. In *Worcester*, Marshall never directly referred to the Indians as savages. Rather, he first used the Royal Charters to camouflage his claim to Indian savagery, such as the charter to William Penn, which states that "in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves, as of other enemies, pirates, and robbers, may probably be feared."[304]

Again in *Worcester*, Marshall refers to the claims of the State of Georgia in labeling the Indians as savages:

> That the means adopted by the general government to reclaim the savage from his erratic life, and induce him to assume the forms of civilization, have had a tendency to increase the attachment of the Cherokees to the country they now inhabit is extremely probable.[305]

Most significantly, it is unclear if the court's agreement in this reference is only with the fact that the federal government's actions have the tendency to increase the Cherokees' attachment to the country that they now inhabit, and is not necessarily an agreement with the label "savage."

Another method Marshall employed to smother the provocative words was by figuratively using them in brackets, in the sense that Marshall isolates one tribe from other Indigenous peoples and thus the provocative word becomes relative rather then direct. "Are not those nations of Indians who have made some advances in civilization better neighbors than those who are still in a savage state?"[306] In this instance, Marshall is not saying as bluntly as he did in *Johnson* that Indians are savages. Nor is he comparing them to the Europeans. Instead, he just implies that some Indians are more advanced than others. This deduction is valid because civilization is an evolution. Every civilization was once in a savage state. Furthermore, he does not indicate whether the court agrees with the "savage" label or is merely referring to what the State of Georgia asserted in its claim or is indirectly challenging its application to the Cherokees. Other methods used by Marshall, such as avoidance, will unfold as the characteristics are analyzed.

Table: The Ghanaian Path through Johnson, Cherokee and Worcester

Taxing Characteristics of the Indian:

	Heathens	**Warlike**	**Indirect labeling as "uncivilized"**	**Savages**
Johnson* v. *McIntosh	"Cabot was empowered to take possession in the name of the King of England, notwithstanding the occupancy of the natives, who were heathens…" (page 689).	"The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted" (page 692).	1. "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired" (page 692). 2. "Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America rests upon the hypothesis that the Indians had no right of soil as sovereign, independent states" (page 687). 3. Claiming that Indians have no property rights and referring to the doctrine of discovery, Marshall remarks: "All the proprietary rights of civilized nations on this continent are founded on this principle" (page 688). Note: Emphasis is on the use of the word "civilized" and is not a	1. "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest" (page 692). 2. Since both parties bought the lands in question from the same source, "[i]t would seem, therefore, to be unnecessary, and merely speculative, to discuss the question respecting the sort of title or ownership which may be thought to belong to savage tribes, in the lands on which they live" (page 694).

			commentary on the distinction between underlying title of discoverer AND tribes still having property rights based on occupation. 4. "So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants … but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations …" (page 693). Note: The use of "civilized" in this quotation does not necessarily imply that the Indians are not civilized.	
Cherokee* v. *Georgia	No mention of heathens	No mention of warlike	Marshall did not mention "civilized" even once, but all the judges who wrote their own opinion jointly mentioned the term a number of times, with the implication that the Indians were "uncivilized" being made numerous times.[307]	There is no mention of "savage" in Marshall's judgment even though other judges who concurred with Marshall did mention the word: Mr. Justice Johnson at page 34 and Mr. Justice Baldwin at pages 36, 37 and 40.
Worcester	No mention of heathens	1. "This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions" (page 495). 2. Marshall also claims that bloody conflicts among the Europeans "gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends" (page 496). Note: While the use of "warlike" in *Johnson* is definitely derogatory, the use of "warlike" in *Worcester* could be viewed positively, or at least of beneficial interest to the	1. "The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe, with whom we have made treaties?" (page 509). Note: This use of "civilized" is not necessarily derogatory and, from the judgment, the court places the Indians on equal footing with the Europeans within the subject. 2. "We have made treaties with them; and are those treaties to be disregarded on our part because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties?" (page 509). Note: This statement being in a	The comments have been dealt with under the "general" section of the table.

Indians and their allies.	form of inquiry, Marshall could be questioning the significance of the claim by the State of Georgia, and not implying that the Indians were uncivilized. 3. "It has also been asserted that the policy of the government, in advancing the cause of civilization among the Cherokees, and inducing them to assume the forms of a regular government and of civilized life, was calculated to increase their attachment to the soil they inhabit, and thereunder the purchase of their title more difficult, if not impracticable" (page 510). Note: Marshall is merely repeating the assertions of the State of Georgia in order to claim later that the Cherokee were more advanced than other Indians. 4. Marshall just quotes from an Act: "In 1819, Congress passed an Act for promoting those humane designs of civilizing the neighboring Indians, which had long been cherished by the executive" (page 500).

Marshall on Discovery

There is no subject in the Marshall trilogy on which Marshall shifted his stance more drastically than on the subject of discovery. In *Johnson* v. *McIntosh*, Marshall apparently implies that the court accepts and agrees with the doctrine of discovery in this proclamation: "The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles."[308]

In the same case, Marshall then demonstrates how all the colonial powers applied this principle and again claims that the court accepts the principle of discovery by making this statement:

> No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England... To this discovery the English trace their title... In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned.[309]

Conspicuously missing from Marshall's judgment in *Cherokee*[310] is the reference to the doctrine of discovery, even though the plaintiff brought up the topic on page 26 and Mr. Justice Johnson mentioned it in his judgment on pages 32 and 40, as did Mr. Justice Thompson on page 44. It appears that Marshall was trying to avoid the controversial subject. This is the clue. In *Worcester*,[311] Marshall places the acceptance of the doctrine of discovery only on the Europeans and suggests that the doctrine did not affect the rights of the Indians who possessed the land. He does not indicate that the court accepts the doctrine of discovery as he did in *Johnson*.[312] Please note that he quotes the principle without indicating the source. The principle

> ...that the discovery of parts of the continent of America gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession," acknowledged by all Europeans, because it was the interest of all to acknowledge it; ... among those who had agreed to it; not one which could annul the previous right of those who had not agreed to it. It regulated the right given, by discovery among the European discoverer; but could not affect the rights of those already in possession, either as aboriginal occupants it as occupants by virtue of a discovery made the memory of man. It gave the exclusive right to purchase, but did not found that right on denial of the right of the possessor to sell.[313]

Marshall reaffirms his new stand on the Indian nations to some form of rights to the land.

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.[314]

And this was a restriction which the European potentates imposed on both themselves and the Indians. The reader is invited to compare the Indian rights to land in *Worcester* to those in *Johnson*:

> In 1609... a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the city of London for the first Colony in Virginia," in absolute property, the lands extending along the sea-coast four hundred miles, and into the land throughout from sea to sea.[315]

This is the mystery. Ghanaians are known to speak in proverbs, but even proverbial interpretation or poetic license will not prevent certain statements in *Johnson* from colliding with others in *Cherokee* and *Worcester*. In *Worcester*, Marshall states that Indians had been the possessors of the land since the memory of Man. Discovery conferred on the Europeans the exclusive right to purchase, but did not found that right on denial of the right of the possessor (Indians) to sell.[316] Marshall reiterated this by stating that

> The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell.[317]

It appears that the respect for Indian rights to land was theoretically[318] carried over past the American Revolution, for the Court states that "[t]hough the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government."[319] Marshall reaffirmed the principle in *Worcester* when he remarked:

> Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States… that the Indian nations possessed a full right to the lands they occupied, until that which should be extinguished by the United States with their consent.[320]

Marshall acknowledges that the Indians did occupy the land at the time of the royal grants in *Johnson*: "[t]hus has our country been granted by the crown while in the occupation of the Indians."[321] The Crown or his/her representatives never met these Indians. So how did the king compensate[322] the Indians for the granting of, for instance, absolute property of Virginia to the "Treasurer and Company of Adventurers of the city of London"? On the other hand, if discovery gave title to the discoverer as avowed in the words "[t]o this discovery the English trace their title,"[323] then what lands was the court referring to when it declared that the "king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them"?[324] Was discovery then restricted to the lands defined by the nine charters? If so, then how does one explain the following statement: "Thus has our whole country been granted by

the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees"?[325] Upon even modest inspection, this proposition is untenable. It seems to me to offend against reason for a king to wish to purchase or borrow from others what belongs to himself. Common sense strongly suggests that the king (or, more accurately, the British government) wrote in that manner, because he well knew that those lands belonged to persons other than himself. Most likely, the king recognized the rights of the Indian nations, just as in Ghana, to transfer their lands through "management committees"[326] without reference to any foreign overlord. These nations may owe allegiance and accept protection from the Crown and may even subject themselves to its jurisdiction without giving up their proprietary rights or their right to self-government. It appears that the distinction between the obligations of allegiance and proprietary rights has become blurred in the Americas. This may be by design.

In *Johnson* v. *McIntosh*,[327] as evidence of the extinguishment of title, Marshall pointed to the terms of nine colonial charters and the treaties. Collectively these documents formed the foundation of British title.[328] Professor Robertson, however, directly questions the veracity of Marshall's characterization of the British claim. As he explains:

> To understand why there is cause for concern, one does not need to look further than Marshall's sources. Despite his ready citation of sources elsewhere in the opinion, Marshall is silent as to his sources for his history of British colonial policy. This is because as to this history the Chief Justice was his own historian.[329]

From Professor Robertson's point of view, Marshall the jurist is also a historical apologist for colonization. Despite considering himself an expert on the historical record,

Marshall relies exclusively on secondary sources. Among these authors, only one actually had access to British colonial records. Thus, the historical reliability of the Marshall judgments is highly questionable.[330]

Considering the importance of history in the proceedings, it is surprising that in his review of previous royal charters, Marshall discussed, but failed to consider, the significance of the Royal Proclamation of 1763,[331] through which the British Crown confirmed possession of reserved land to Indian holders. Such an oversight would lead one to the nearly inescapable conclusion that Marshall selected only those documents that suited his agenda in order to provide the legal foundation for the new reality, and realty, of the United States and to establish that only the federal government possessed the power to purchase land from the Indians and that all intercourse with them would be carried on exclusively by the government of the union.

It was at a critical time in history. Three players were struggling for power: the federal government, the states and the Indians. A struggle was also taking place between the presidency, Congress and the United States Supreme Court. The nullification movement, which became known as the Hayne-Webster Debate, was steaming along. The designation stemmed from Robert Hayne and Daniel Webster, the two lawyers who debated the issue.

Robert Hayne led the coalition that supported nullification. These were advocates of state sovereignty or the interpretation of the Constitution as a pact between sovereign states. That is, the states had the sovereign right and that each state had the right to interpret the Constitution, or even to withdraw from the Union. This, of course, removed the Supreme Court as the arbiter of the meaning of the Constitution. Daniel Webster

represented the opposite view, which stuck to the unionist philosophy of one indivisible nation. Despite the conflicting philosophical foundation, the burning issues were economic in nature. The Unionists believed in the American system and the tariff that had been instituted by President John Quincy Adams to improve roads, canals and harbours and possibly to construct a railway system. The tariffs imposed on foreign imports also protected American producers and developing industries from overseas factories and their cheaper products. Many European goods fell under the tariff and states like South Carolina, whose economy depended on foreign trade, saw a sharp decline in their fiscal standing. Life became more expensive for the planters as well. That is why Senator Robert Y. Hayne, who represented South Carolina in the Senate, was intimately involved with a particular offshoot of the state sovereignty philosophy. The nullification movement outlined a set of procedures whereby a state could declare a federal law, such as the tariff law, "null, and no law."[332] The United States would have fallen apart under such a scheme. Even more important to Marshall, the Supreme Court had a stake in the outcome of the nullification issue. The Supreme Court could lose its power of arbitration if the nullification proposal was adopted. The nullification crisis peaked in the winter of 1832-1833 at the time of *Worcester* v. *Georgia.*[333]

To make matters worse, the economic situation was turbulent and civil unrest could have erupted, especially among the lower classes. Referring to the Royal Proclamation,[334] Marshall proposed that the U.S. not interfere in the internal affairs of the tribes. He listed the characteristics of a sovereign nation according to international law. He now rejected armed occupation as the source of land acquisition and considered that the colonists had limited rights under the Charter by making these pronouncements: "The

extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind."[335] These chartered colonies became the revolutionary states. He then emphasized that even if the Crown interfered with the tribal way of life, national policy has always been that the federal state acquired the rights of the Crown to deal with the Indians. This is what Marshall said, "The ninth article of the constitution is in these words: For the benefit and comfort of the Indians, and for the prevention of injuries, or oppressions on the part of the citizens or Indians, the United States in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper."[336]

Why the Treaties?

Marshall capitalized on the fact that, throughout the history of America, the Indians were enticed to form relations by the French, by the British and by the colonists who were fighting for independence from Britain.[337] So even if the natives were not great powers, they still had military might and their alliance was a formidable weapon. Although the Indigenous peoples of America fought on both sides of the American War of Independence and some remained neutral, a greater number of Indigenous peoples favoured the English because they trusted the English to better protect their land rights. With the nullification crisis at its climax and the looming possibility of civil war, Marshall might have envisaged the potential of Indigenous support in the near future. Marshall recalled: "This was the settled state of things when the war of our Revolution commenced. The influence of our enemy was established; her resources enabled her to

keep up that influence, and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers."[338] The treaties were the means of aligning natives with the United States and in particular with federal government powers.[339] For instance, the 1778 *Treaty with the Delawares*[340] was concluded while the war of independence was raging. The Delaware were told that if the war were successful, they could choose to become a state or to send representatives to Congress. Later, the Confederation Congress signed a treaty with the Indians allowing them to enter the Confederation and Congress.[341] Historical events would intervene to stop this treaty from being realized. The French who were enemies to both the English and the Delaware allied themselves with the independence forces during the American War of Independence, thereby reducing the military importance of the Delaware to some extent. The war ended in 1783 and the 1787 Constitution appears to have shelved the idea of a Delaware State. Nevertheless, the prospect of an Indian state in the American Union had been very real, and this oft-forgotten fact speaks to both the historical importance of Aboriginal peoples and the depth of the contemporary historical amnesia.

The Hopewell Treaty

Even after the war, when the colonists had defeated the British, the French and other foreign powers maintained an interest in America. Hence, other treaties followed. These were not treaties to end the war between the United States and the Indians. Rather, they were treaties with a mutual goal. In the Hopewell treaty, the federal government was to get the support of the Cherokees, while the Cherokees were to be protected against encroachment of their territories by speculators, the colonists and the States. According to Marshall, who gave a very narrow construction of the document, the Hopewell Treaty

was to cement peaceful coexistence between two nations. Marshall was not the author of this concept. In history, there have been a few mutually beneficial treaties. Some of these treaties include France and Monaco, San Marino and Italy as well as Liechtenstein and Switzerland.[342]

Protection does not destroy sovereignty, nor does it imply surrender. This hypothesis can be supported by British rule in other parts of the world. An exchange at the Court at Cape Coast, Gold Coast (now Ghana) in 1856 clearly typifies the interrelationship in progress. The issue concerns the jurisdiction of the tribal chief of Cape Coast to impose a sentence of imprisonment on one of his subjects. British Governor Richard Pine in testifying before the court stated that, although he had

> ...always approved of a country court of conciliation or of arbitration, with a right of appeal to the English court, he now declared that a British Governor could not permit irresponsible tribunals exercising the powers, at all events, of imprisonment.[343]

Richard Pine was closely questioned on this point:

> "That is assuming the sovereignty over the protected country to some extent?"
> "Yes, with the assent of the natives."
> "It is at least a partnership in the sovereignty of the country with the chiefs?"
> "To that extent."
> "Do you mean to say that the King of Cape Coast has assented?"
> "Mean that the assent of all the natives has been obtained."
> "Or rather, should you not say implied?"
> "Yes, implied; the right has been assumed, and never been contested."[344]

In this situation, the British were to protect the Fanti from the more powerful Ashanti and the Fanti were to aid the British in fending off the French and Germans.

International Law Revisited: Why Bring in International Law?

Marshall brought in international law because it was formalized and fact based. The papal donation, Thomistic humanism, Victoria and the four characteristics that

developed from natural law were all there. Victoria had established that the Indians were the "true owners" of the New World and that the Aboriginal peoples undoubtedly had true dominion in both public and private matters. More importantly, international law was also recognized by other countries. Incidentally, the world was getting a glimpse of the fact that the Cherokee were adapting very well and Marshall needed international support for his ideas. The Cherokees had their own constitutions and even their own written laws, which the states later adopted, assumed or borrowed.[345] The Cherokee were the first in North America to allow men to vote at the age of eighteen. The United States had to wait for the Vietnam War for this to happen.

Cherokee women had separate identity and property long before the *Married Women's Property Act* of 1882. By English tradition, a married couple is one legal person, being the legal personality of the husband. Thus, the woman's property rights were "incorporated" and consolidated into that of her husband. "Under coverture, wives could not control their own property unless specific provisions were made before marriage, they could not file lawsuits or be sued separately, nor could they execute contracts."[346] The *Married Women's Property Act* of 1882 and subsequent legislation dissolved this legal arrangement in Britain. The act ensured that married women had the right to enter into contract and own property independently of the husband.

In both North America and Europe, liberalism owes much to Aboriginal culture – if not directly, then through mythology. Thomas More's *Utopia* was set in the Americas as a place of alternative social possibilities.[347]

Considerable controversy has brewed[348] over the role that the Five Nations Confederacy played in the formulation of the United States Constitution. No matter the

outcome, the most important aspect of any constitution and its legal framework is their effect on the citizens. Judging by that standard, the Five Nations were far ahead of the Europeans. As J.N.B. Hewitt of the Smithsonian Institution admitted 50 years ago: [349]

> Some of the ideas incorporated in the League of the Five Nations were far too radical even for the most advanced of the framers of the American Constitution. Nearly a century and a half was to elapse before the white men could reconcile themselves to woman suffrage, which was fundamental in the Indian government. They have not yet arrived at the point of abolishing capital punishment, which the Iroquois had accomplished by a very simple legal device. And child welfare legislation, prominent in the Iroquois scheme of things, had to wait for a century or more before the white men were ready to adopt it.[350]

Ultimately, the mythology of new beginnings in a new world became a reality in the words of Thomas Jefferson. In the Declaration of Independence he wrote: "[a]ll men are created equal, that they are endowed by their Creator with certain inalienable rights that among these are life, liberty, and the pursuit of happiness." This is a poetic restatement of Locke's belief in the basic elements of justice. In turn, Locke's vision was based upon his analysis of reports about native culture in the New World.[351] The savage image of the Indian was waning and all eyes in Europe were thus on the new continent.

The preceding discussion has, hopefully, made it sufficiently clear and understandable that the author has only to briefly highlight the major points canvassed. International law was used by Marshall as a double-edged sword. It was used to declare the Indians sovereign, protecting them from the States. Once they were protected, only the federal government was able to deal with them – a tradition drawn from the Royal Proclamation.[352] Marshall's judgments in *Johnson* v. *McIntosh*[353] and *Cherokee* v. *Georgia*[354] were pre-Constitution[355] stories. The stories were pre-Constitution in the sense that they dealt more with events related to the colonial moment and were principally based on the colonial mindset. *Johnson*, for instance, practically disregarded

the sovereignty of the Indigenous peoples. *Cherokee* dealt with Indigenous sovereignty but based on the rights of an infant. The rights were not inserted as a separate entity into the division of power and definitely not based on international law.

In *Worcester*, the court told the constitution story as it pertains to international relationships. The early cases were about power, conquest, occupation and subordination,[356] but the court in *Worcester* was not free to rewrite all the theories, so instead, it reverted to the maxim of "this is how we arrived at where we are now," and used the "rule of law" as justification for providing stability and understanding, even if the arrival at this positive outcome was by ugly means and abhorrent historical events. That erroneous analysis appears to support the view of Professor W. Wesley Pue:

> The "rule of law," once widely considered a resilient notion which offered the hope of a rational governance capable of transcending differences is, in current fashion, more frequently considered as an empty rhetorical device cynically employed to obscure sectional interest (e.g. Horwitz, 1977; Mandell, 1985).[357]

Even the magic wand of "rule of law" could not set Marshall free: he was forced to admit the falsehood of considering the *Trade and Intercourse Act* as the source of the plenary power of Congress. He conceded in *Worcester*[358] that the Act is only for trade and is not a plenary power. With respect to article 9, he stated that "[t]o construe the expression 'managing all their affairs,' into a surrender of self government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them."[359] This observation likewise applies to s. 91(24) in Canada. Unfortunately, as will be discussed under "The Supreme Courts' Version of Sovereignty, United States and Canada" (Part V), Marshall's "guardian-ward" theory managed to keep the Indians under the thumb of Congress.[360]

2. Sovereignty Toting the Gun

The use of force may be conscious or subconscious, psychological or physical, subtle or brutal. Of course, in a given situation, it could be a combination of any or all of the above.

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.[361]

Words of sympathy are like foam on the sea – a substance that floats atop a surface but is unable to do more than decorate the depths of destruction and pain beneath. As we shall discover, the suggestion of protection is similar to putting sweet frosting on a cake laced with strychnine. When the Cherokee Nation went to the courts to prevent Georgia from annihilating the Cherokees as a political society and planting the Cherokee Nation in its grave, Marshall commented: "If the courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." The action of the State of Georgia was clearly in contravention of the 9th article of the Constitution and in breach of numerous treaties between the Cherokee Nation and the United States. Yet, Andrew Jackson, the president that the Cherokee addressed as their "great father"[362] told the Cherokee that "the President of the United States has no power to protect them against the laws of Georgia."[363] When the Cherokee approached the military for protection, the commanding officer informed John Ross, the principal chief of the Cherokee Nation, that "these troops, so far from protecting the Cherokees, would co-operate with the civil officers of Georgia, in enforcing their laws upon them."[364] After

Marshall finally ruled in *Worcester* v. *Georgia*[365] that the laws of Georgia were repugnant to the Constitution of the United States and to the treaties and laws made under it, President Andrew Jackson – the "great father" of the Cherokee – quipped that "John Marshall has made his decision. Now let him enforce it."[366] Georgia disregarded the ruling and enforced its laws on the Cherokee tribe. The Trail of Tears[367] is another example, and many more references might be made to the hypocrisy of the guardianship doctrine but the above are believed to be sufficient.

Sovereignty and Race

The eradication and subordination of the weak was not restricted to Indigenous peoples of Africa, America, Asia and Australia. The English also employed this weapon in Ireland and Scotland. In Scotland, the English used the division among the clans to its own advantage. Their scandalous method involved getting the clan heads onto an English ship, transporting them to the dungeons in Edinburgh and forcing them to sign treaties. The first male children of the clan heads and nobles were forced to study in England at their parents' expense. The English made every possible attempt to eliminate the Scottish culture. In an attempt to eradicate the surplus native population, the English sent Irish women and children into the cold wilderness to die. The Irish were of no economic interest to the English, so extermination and cultural genocide were not ruled out. Singers and orally transmitted Irish culture were forbidden. The strong were forced into slave labour.[368]

Cromwell was an anti-royalist who claimed that the Irish could not be civilized. Of these non-civilizable Irish men and women, 80,000 were shipped as slaves to the West Indies, where they worked under the same conditions as the African slaves.[369] Likewise

in 1651, in the battles of the Highlanders, thousands of natives were killed. Even those who were tied to the monarch were treated the same way. So the use of power to enslave was ideologically rather than racially based. England used the Spanish model in Mexico to deal with their own white populations in Scotland and Ireland.

This treatment carried on to the New World. Sir Walter Raleigh did his time in Ireland. John Winthrop Jr., the governor of Connecticut, learned his cruel trade from the treatment of the clans in Scotland. James S. Calhoun, the first Indian agent appointed by the Crown and posted in Massachusetts, had served under Cromwell in Ireland. The first president of Virginia, the first government in the United States, was Master Ralph Lane and the President of the first legislative council had done service in Ireland. The transmission to the New World is quite clear – ideology based on cultural or ethnocentric difference and not only race. The idea to assimilate or exterminate was always an open option for the powerful.

Summary

Nothing whatsoever is regarded as possessing any inherent power capable of resisting humanly defined intentions. The practical consequence is that the disenchantment of the "civilized" world involved the total eradication[370] of "the other" in the quest for power and wealth. After all, it was the same society that nourished Thomas Hobbes[371] who posited that "[h]ereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man."[372] And since the life of man is "solitary, poor, nasty, brutish and short,"[373] it is not surprising that the society of European Christian nations left very little room for negotiations or compromise in the

colonization process. Thomas Hobbes's world under one sovereign is not far-fetched, for we are figuratively living in one. The outcry of the world did not prevent the invasion of Iraq, and we have been given a taste of life to come.

B. Politics and Sovereignty

Throughout history, the state has acted as the "self" in relation to others. As observed by Robert Young:

> [A]lready I know all about the "reality" that supports History's progress: everything throughout the centuries depends on the distinction between the selfsame, the own self... and that which limits it: so now what menaces my-own-good...is the "other."[374]

Close examination of history clearly reveals that Robert Young's vision is not limited to statehood. It equally applies to ideology. As a matter of fact, the whole concept of nationalism and statehood hinges on ideology – Jews (Israel) versus Samaritans (Palestine), Christians (Spain) versus pagans (Aztec nation), Christians (European States) versus Muslims (Turkey), Muslims (Mossi and Gonja states) versus infidels (northern Gold Coast) and so on. Ideology is not based on race (the treatment of the Irish,[375] the prosecution of St. Abelard by the Catholic Church), nor is it based on location (the Holy See, Jerusalem). It is purely political and, furthermore, international law is the offspring of ideology. It is a protective legal theory devised by the *Republica Christiana*, the "Christian Commonwealth"[376] of Western and Central Europe.

Until positivism replaced naturalism, sovereignty, like colonialism, was viewed by international lawyers as being political rather than theoretical in nature:

> [T]he doctrine of self-determination, [employed in the 1960s] to effect the transformation of colonial territories into sovereign states, ...were perceived, mainly in political terms, as a threat to a stable and established system of

> international law, which was ineluctably European and was now faced with the quandary of accommodating these outsiders.[377]

The positivists failed because they applied what has to be proven to prove their theory. Namely, they employed a notion of international law in the fifteenth and the sixteenth centuries that distinguished between "civilized" and "non-civilized" nations and used the term "civilized nations" to apply only to the sovereign states that comprised the civilized "Family of Nations" in Europe,[378] even though more sophisticated nations existed elsewhere.[379] The positivists were practically pursuing a chimera, which exists only in their own imagination, against the evidence of indisputable facts.

It was in the twentieth century that modern international law blossomed. Perhaps it was the two world wars that "pricked" the conscience of the world. How could one civilized nation attack another civilized nation? How could a civilized nation treat the Jews as it did? The reallocation of the colonies of the nations that lost in the wars must have had some effect on how the Europeans viewed colonization. A third factor could be the collapse of Dutch rule in Indonesia. Scholars focusing on the colonial world exposed the pitfalls in both positivism and naturalism. They outlined how "positivist international law subordinated non-European peoples,"[380] and emphasized that "the naturalist international law that had applied in the sixteenth and seventeenth centuries asserted that a universal international law deriving from human reason applied to all peoples, European or non-European."[381] The positivists ignored this very important fact. In essence, the "colonial lawyers"[382] dissected the tangled web between positivism and colonialism.[383]

Colonialism – The Link between Land and Sovereignty

Colonialism is not incidental to the scheme of international law,[384] but rather integral.[385] It was colonialism that drafted the world map, not only via exploration, but also by dividing the colonized areas into the nations that have come to constitute the United Nations. That is, the marriage between colonialism and international law ultimately came to define a sovereign state. For this reason, it would be illuminating to explore the relationship between land and sovereignty.

> Land is a place to live for man and beast, a source of food and of all other commodities… It outlives its inhabitants, is immune from destruction by man, and therefore provides a suitably firm base for institutions of government and wealth. Control of land could not, indeed, be readily divorced from power and jurisdiction, from "lordship."[386]

Environmentalists may argue that humans can destroy the world. They may be correct in their own right but, philosophically, the world is indestructible. One may turn the forest into a desert, but the trees cut down eventually go back to the soil. "For dust thou art, and unto dust shalt thou return."[387] What humans can do is alter the functional value of the land so that the above still stands.

Expansion of the relationship between land and sovereignty is essential because it will be the position of this thesis that the incompatibility of "Aboriginal sovereignty" in Canada is not a legal problem but rather a political one. As pointed out by Macklem, it is the territory itself that has been set aside for special treatment before the law, not its actual use or character. An attack on the land is an attack on its people. Macklem contends that "[t]erritory signifies a space to which individuals experience an attachment that partly constitutes their identification with a broader social and political collectivity."[388] Ancestral lands are not limited merely to a geographically delineated

space. Within these territories there is a cultural life space.[389] The land not only provides a means of economic subsistence, but also embodies the symbolic content of the collective imagination of those who call it home.[390] Once this intimate bond is broken, cultural life withers and dies.

One spectacular example of Macklem's vision can be drawn from the effect of the Termination Acts in the United States. After the Termination Acts, tribal sovereignty and governments effectively ended in most Indigenous nations affected by the legislation. Indian tribes have inherent sovereignty and nothing in the Termination Acts expressly extinguished that governmental authority. Nevertheless, the loss of the land base meant that in most cases the tribe had no geographic area over which to exert jurisdiction. Regardless of the fact that terminated tribes probably retain their status as sovereign governments, the practical reality is that, with one exception, no terminated tribe has continued to make laws or to maintain tribal courts to enforce any laws after termination. Thus the terminated tribes were effectively stripped of their broad powers to act as governments.[391] This loss of national identity is what Macklem means by cultural life withering and dying.

Closing Statement

The political ramifications of accepting this notion with the view of reversing past injustices would be monumental. Consequently, the courts will probably continue to beg the question in the hope that a political solution will finally resolve the legal contradictions surrounding land title and that, eventually, the true meaning of the sovereignty of the Indigenous peoples of Canada can emerge from that solution.

C. Economics and Sovereignty

Economics and sovereignty are so interrelated that it is practically impossible to talk about imperialism without referring to economics. Around the south-east corner of Ghana, the essential interaction between "economic and political imperialism is illustrated by a process that might be called the extension of the 'smugglers' frontier."[392] Although the Colonial Office was at the time firmly opposed to any extension of political authority on the Gold Coast, no objections were raised to this pushing of the "traders' frontier" northwards.[393] As a matter of fact, British traders were the moving force of colonial expansion all over the world. The same process led to the Royal Proclamation of 1763[394] in the New World – the regions that were to become Canada, the United States and the Caribbean. The expansion of British sovereignty in West Africa was propelled by economic forces that can be demonstrated in every colonizing process. The reverse is needed if true decolonization is to be achieved. As noted by Stephen Cornell: "The first key to economic development is sovereignty. 'De facto' sovereignty, meaning genuine decision-making control over affairs, is a necessary prerequisite for economic development."[395]

The acid test is simple. Who controls the use of the land as well as other economic resources and activities? In an Indigenous community, if the answer to this question is the Indigenous population, then there is de facto sovereignty.[396] The logic of this is evident. As long as management is effected through an outside agency or a body that carries primary responsibility for economic conditions in Indigenous communities, we have colonialism or neo-colonialism. To crystallize this multi-faceted subject, the direct relationship between economics and sovereignty can be seen through the formation

of the Jewish state. The state of Israel could not have been created but for the wealth and media[397] power not only of the Jewish people but also of the Christians who believe that the prophesies of the Bible cannot not be fulfilled without the state of Israel. On the other side of the coin, their task would likely have been more difficult if Arab oil and money had been as prominent in 1948 as they are now. Expansion on the topic, apart from temporal and spatial limitations, is beyond the scope of this thesis, which will now turn to the structure of sovereignty.

Schematic Structure of Sovereignty

This diagram will position Ghana, Canada and the United States in the world order of sovereignty.

- European Christian states v. Civilized but different states
- Sovereignty by assimilation of civilized states (Turkey)
- Sovereignty of powerful but uncivilized[398] states (Ethiopia)
- Colonization: Sovereignty of assimilation of weak states civilized or not (India, China, etc.)
- Post-colonial expansion of sovereignty
- Adoption of European systems (mainly Japan)
- Recognition and creation of No "Supreme Sovereign" (India, but mainly Ghana and other African countries)
- Maintenance of the positivists' concept of sovereignty (North American Indians of Canada and the U.S., as well New Zealand and Australian Aborigines)

It can be seen that the difference between Ghana and Canada/U.S. is the retention of the positivists' concept of sovereignty in the Americas. This deduction is based on the positivists' insistence that territoriality forms the basis of the state in international law. "So entirely is its conception of a state bound up with the notion of territorial possession" that the nomadic peoples of the Americas could not possibly "come under its provisions."[399] Since the Indigenous nations were not states, they could not fully own the

land, so the first European to discover the land would gain title to it and "[n]o one of the powers of Europe gave its full assent to the doctrine of discovery more unequivocally than England." As described in the table above, "Cabot was empowered to take possession in the name of the King of England, notwithstanding the occupancy of the natives, who were heathens."[400] Although Marshall admits the extravagance of "the pretension of converting the discovery of an inhabited country into conquest," he concludes that "if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."[401] Despite the fact that not all Indian lands were obtained by conquest, Marshall goes further to assert that, since the Indigenous peoples of America would not yield to assimilation,[402] the "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances."[403] And this is the throwback from the positivists; since the Indigenous peoples were not foreign nations,[404] Marshall suggests that they be denominated "domestic dependent nations."[405] Dependent nations are not sovereign by any stretch of the imagination.[406] They are "Neocolonies."

From the Ghanaian standpoint, apart from the doctrinal fallacies, Marshall may not be accurate when he suggests that usually the conquered people are "incorporated with the victorious nation and become subjects or citizens of the government with which they are connected."[407] The Ashanti were conquered by the British in 1901 but the Ashanti people did not become British subjects nor did they become blended in with the English people. They were left to retain their traditions and land systems. This topic will

be fully explored later in Part VI since the reader needs the understanding of the dynamics of the colonizing processes to fully appreciate the doctrinal fallacies.

Colonizing Processes: Appropriation, Assimilation and Economic Expansion

A word of caution is in order. No particular nation ever had a single goal. In addition, goals change over time to suit the conditions. The goals stated are the dominant ones within the specified time frame.

The Spanish clearly concentrated on appropriation in Mexico. They received government money to carry on their expeditions. The French were interested in fur trading, and so they needed the assistance of the native people. This required close contact and cooperation, resulting in intermarriages and the subsequent rise of the Métis populations. Inevitably, the natives sided with the French in most of the wars among the colonizers. The British were interested in profit-making, corporate-based plantations and large-scale settlement of surplus population, convicts and religious extremists.

These goals came to define sovereignty depending on the location and the combination of factors that came to the fore in any given situation. For instance, while the actions of the Spanish and the British could be associated with the intention of liquidating the natives in Mexico and with cultural genocide in Ireland, the need for the Indigenous population in the process of economic expansion prevented the colonists from carrying out the extermination. Instead, the Spanish resorted to slavery in Mexico and the British resorted to reservations in Ireland (surplus labour in Ireland were sent as slaves to the Caribbean). The kaleidoscopic nature of the flexible dynamics can be perceived from the foregoing comments.

Writing from Peru, the Dominican priest Santo Tomas stated that the "ongoing slaughter of the Incas and other Andean peoples was so intense…that unless orders were given to reduce the genocide 'the natives will come to an end; and once they are finished, your Majesty's rule over [this land] will cease.'"[408] A few years later, Diego de Robles Cornejo asserted that "[i]f the natives cease, the land is finished."[409] He further explained that what he is referring to is the land's "wealth: for all the gold and silver that comes to Spain is extracted by means of these Indians."[410]

The American colonizers in California did not learn from the mistakes of the Spaniards in Mexico and allowed their hearts to overrule their heads. One commentator notes that "[l]ike the sixteenth-century Spanish in Peru…to some critics the genocidal Californians were simply bad businessmen, liquidating their own best draft animals in an unceasing pique of racist passion."[411]

Examination of Colonial Goals in Detail

1. Appropriation – Transplantation of Spain through Violence

The theoretical basis of the relationship with the Indigenous population under Spanish law was citizenship. Spain did not recognize Indian tribes as separate or even as dependent governments. The lucky Indians who survived the Spanish genocidal venture would be treated as individuals, and the concepts of aboriginal title, property and individual rights fell within the pigeonholes of Spanish jurisprudence (Ragsdale, 1985).

The Spanish entered North America with the Spanish flag. The trip was bankrolled by the nobles of Spain. As stated above, the goals of the Europeans changed over time. The original aim of the Spanish was to find the Indies. But once they landed in the area now known as the West Indies and Mexico, the aim shifted to acquiring the

territory for gold as object for the Spanish monarch, and the easiest way to do so was through genocide. The shift of emphasis from the expropriation to the acquisition of wealth saved the Mexican Indians from extinction.[412] There is another major difference between the Spanish conquistadors and the European traders in Equatorial Africa, in the sense that the Spanish actually did not trade with the inhabitants but instead used slavery and forced labour to acquire silver and gold. In other words, the Native Americans themselves, at the outset, became the property of the Spanish settlers. The Europeans in Africa bought the gold and the slaves but the Spanish generally took the Mexican slaves by force or as war captives. While the Spanish action in the Indies and Mexico typifies the process of appropriation, it is by no means the only technique.

There are other methods of appropriating the land from Indigenous peoples. One of them is justification through folklore. The notion that North America and South Africa[413] were vacant lands when the Europeans arrived is a "political myth."[414] On the contrary, both South Africa and the American continent[415] were teaming with inhabitants whom the Europeans called Khoi-Khoi and Indians respectively. Even as far back as the early twentieth century, anthropology could look beyond the blinders of liberal philosophy and recognize that, far from living in a state of nature, Aboriginal cultures had sophisticated legal traditions. Hernando Cortés, one of the first Europeans to see the city of Tenochtitlán, described it as "by far and away the most beautiful city on earth."[416] That metropolis was also one of the largest cities in the world. By the end of the fifteenth century, it had a population of about 350,000 residents.[417] This made the population of this bursting Aztec city five times the size of London[418] or Seville,[419] and was vastly larger than any European city of the time.[420]

While Europeans obtained their drinking water from their "fetid and polluted rivers,"[421] Tenochtitlán inhabitants had their drinking water piped into the city from springs deep within the mainland through a huge aqueduct system that amazed Cortés and his men. The city was segmented into zones for different trades and goods. There were streets for herbalists, streets lined with apothecary shops, barber shops, restaurants and streets reserved for shops specializing in game and birds. Cortés' famous companion and chronicler Bernal Díaz[422] said that "we were astounded at the number of people and the quantity of merchandise that it contained, and at the good order and control that it contained, for we had never seen such a thing before."[423] Hernando Cortés also admitted that some of the soldiers in his company, who had been in many parts of the world including Constantinople and Rome, recalled that they had never beheld "so large a marketplace and so full of people, and so well regulated and arranged."[424]

The city was surrounded by densely populated lands that stretched to the horizon. Hernando Cortés, in attempting to recount for his king the sights of the country surrounding Tenochtitlán and the "many provinces and lands containing very many and very great cities, towns and fortresses,"[425] could say only "that they seem almost unbelievable."[426] The Aztec civilization is but only one of several civilizations in America. The Adena, the Hopewell and the Mississippi cultures are others in North America that will be considered later. The point of introducing them now is that none of these civilizations exist today and their historical record is scanty. Genocide and the destruction of artefacts should shoulder some of the blame for the vanishing act.

The Spanish Onslaught: Genocide as the Ultimate Definition of Sovereignty

Just 21 years after Columbus's first landing in the Caribbean, the vastly populous island that Columbus renamed Hispaniola and that, prior to European contact, boasted a population of up to 8,000,000[427] was utterly devastated in the 21 years following the explorer's first landing in the Caribbean. Indeed, all but a small number of the people that Columbus "chose to call Indians, had been killed by violence, disease, and despair."[428] Similarly, "when John Cabot, an Italian in the service of England, arrived in 1497 to claim Newfoundland for King Henry VII,"[429] he encountered Indigenous peoples with fascinating cultural and linguistic landscape. A century and half later, the people who had welcomed Cabot had been annihilated.[430]

With the diminished or non-existing population, who is left to claim dominion over the land? Without dominion over the land, there is no government and without government[431] there is no state. Ergo, only the powerful are sovereign and genocide is the ultimate definition of sovereignty. The section below will test the hypothesis.

It is the aim of this thesis to avoid replaying the cruelty that was perpetrated on the Indigenous peoples of South America. The goal is to demonstrate that genocide is the ultimate characterization of sovereignty, that it is the easiest method of appropriation and that the Indigenous peoples had their own unique histories, some of which was destroyed by the colonizers. This sad episode also backs up the theory that there is no history of civilization that is not a history of barbarism.[432] Hispaniola, which before the arrival of Columbus in 1492 was so fertile, so great and powerful, had its population reduced from 8,000,000 to around 4,000,000[433] by 1496 and was depopulated by 1535.[434] What

Indigenous person is left to contest sovereignty over Hispaniola? This was just the beginning.

The Fall of the Aztec Empire

The beauty of Tenochtitlán can be matched only by the ethics of its political leaders. Political traditions in Mesoamerica commanded that war be announced and that the reasons for the altercation be laid out before war ensued. So when Cortés advanced on the great city of Tenochtitlán, he was cordially welcomed by Montezuma.[435] Moreover, Cortés had plainly announced in advance that he came as an ambassador of peace. But once inside the city, it became clear that Cortés's intention was anything but peace. The Spanish under Cortés's[436] ruthless lieutenant Pedro de Alvarado turned the great public celebration of the feast of the god Huitzilopochtli into a blood bath.[437] Words of the massacre soon spread to the garrison and Tenochtitlán warriors began their offense. The war waged on for two weeks and Cortés and his soldiers were forced to flee under the cover of night.[438] The Spanish left, but the microscopic smallpox *bacilli* that they left behind continued the war for the Spaniards.

The people of Tenochtitlán, devoid of immunity to smallpox, succumbed to the epidemic. The effect was catastrophic. It laid waste to the whole city. In the words of Francisco Lopez de Gomara, Cortés's secretary, "it spread from one Indian to another, and they, being so numerous and eating and sleeping together, quickly infected the whole country. In most houses all the occupants died, for, since it was their custom to bathe as a cure for all diseases, they bathed for the smallpox and were struck down."[439] The epidemic lasted for two months, enough time for Cortés to reorganize his defeated army

and mobilize them into destroying smaller towns in the vicinity in readiness for another attempt on Tenochtitlán. Even in their weakened state, the Tenochtitlán warriors proved formidable. They fought courageously and put up fierce resistance. They were so powerful that the Spanish had to resort to other techniques to win the war. They cut off the food and water supply to the city and destroyed or set fire to sections of the city under their control. Even then, the ensuing combat was furious and lasted for months. But when it was over, Tenochtitlán had become a "monotonous pile of rubble, a place of dust and flame and death".[440] The fall of Tenochtitlán did not quench Cortés's thirst for blood. He was bent on the total annihilation of the entire population. He writes:

> We now learnt from two wretched creatures who had escaped from the city and come to our camp by night that they were dying of hunger and used to come out at night to fish in the canals between the houses, and wandered through the places we had won in search of firewood, and herbs and roots to eat... I resolved to enter the next morning shortly before dawn and do all the harm we could... and we fell upon a huge number of people. As these were some of the most wretched people and had come in search of food, they were nearly all unarmed, and women and children in the main. We did them so much harm through all the streets in the city that we could reach, that the dead and the prisoners numbered more than eight hundred.[441]

Cortés and his men returned to their camps because only "we could no longer endure the stench of the dead bodies that had lain in those streets for many days, which was the most loathsome thing in all the world."[442] It will be recalled that it was the same Cortés who earlier had commented that Tenochtitlán was "by far and away the most beautiful city on earth."[443]

The deadly scene did not satisfy the appetite of Cortés and his men. They were in the streets again the next morning to cause more damage and suffering to the starving, dehydrated and disease-wracked Indians who remained. Cortés boasted, "I intended to attack and slay them all." Cortés did indeed return and painted this picture:

> The people of the city had to walk upon their dead while others swam or drowned in the waters of that wide lake where they had their canoes; indeed, so great was their suffering that it was beyond our understanding how they could endure it. Countless numbers of men, women and children came out toward us, and in their eagerness to escape many were pushed into the water where they drowned amid that multitude of corpses; and it seemed that more than fifty thousand had perished from the salt water they had drunk, their hunger and the vile stench... And so in those streets where they were we came across such piles of the dead that we were forced to walk upon them.[444]

It is the same Hernando Cortés who was mesmerised to confess to his king on arrival at the same location that the sites around Tenochtitlán "seem almost unbelievable."[445] Men with such taste for blood have little problem with less sensitive substances such as the destruction of historic documents. Cortés and his men melted away artifacts, destroyed books and tablets containing millennia of accumulated knowledge, wisdom and religious belief.[446] For dessert, "they burned the precious books salvaged by surviving Aztec priests, and then fed the priests to Spanish dogs of war."[447]

Tenochtitlán has vanished from the surface of the earth. About a third of a million people were sent to their graves. This is in a single city in a single lake in the centre of Mexico.[448] The genesis of genocidal enterprise that would engulf the whole countryside, "seem[ed] almost unbelievable,"[449] spreading like fire through a whole continent. The central issue is that most of the inhabitants were no longer alive to contest sovereignty in the region that had been laid waste. Their history and culture had been destroyed and the pockets of tribes that had managed to survive were now politically barking dogs[450] without teeth.

2. Assimilation

It is impossible to grasp the concept of sovereignty without understanding the process of assimilation. Assimilation is a solvent that can dissolve sovereignty the way

water dissolves sugar. This is important in that it is part of the Ghanaian lens. Surrounded by French colonies, both the British and the Ghanaians were aware of the French presence and the opportunities that it offered to the Ghanaians in their bargaining for power.[451] It is not surprising that many concessions were made to Ghanaians. Notably, the number of nine elected members of the thirty-member Legislative Council was proportionally high compared to the other British African territories.[452] The French form of colonization – its successes and its failures – were thus constantly under the watchful eyes of the Ghanaians.

The blueprint of pure assimilation can be taken from the French colonization of West Africa. The French initially directed their attention to the area watered by the Senegal River and its tributaries. The experiment sprang up around St. Louis where the French set in motion what was to become the project of French colonial assimilation in West Africa.[453] At the base of the plan was the notion that West Africa would become part of France. "The French colonialists came to think of their sphere of influence as mere provinces overseas."[454]

The French "farm land"[455] aspiration had evaporated by the early nineteenth century. Numerous factors contributed to the demise of the assimilation project. These include:

A) Competition among the European countries for control of territories in West Africa emerged, in this respect, as the leading factor. The early French-backed political settlers had difficulty nursing West Africans into French citizens in the face of the more aggressive traders from other European countries. The only means of success was therefore to hand over control of the territories to the eager French merchants

who could compete on equal grounds with their European counterparts. That meant abandoning the original assimilation goals and succumbing to the influence of their fellow Europeans in West Africa.

B) Unlike the Indigenous peoples of North America, who openly embraced the European traders,[456] the Indigenous peoples of West Africa resisted the Europeans every step of the way. No exception was made for the French colonizers, Faidherbe and his successors, in their pursuit of territories in West Africa. They encountered strong and sustained resistance from numerous factions, not to mention from the Toucouleur Empire of Segou under Al Hajj Umar and the powerful Almamy Samori of Wasulu.

C) The tribes of West Africa were far from weak. The tenacity of the Indigenous populations and the diversification of their ideological, political, social and economic organization did not allow easy transformation.[457]

D) The French clearly understood very early that the cost of implementing multi-tier assimilative governments in West Africa would be high and that full-scale assimilation would not be possible.[458]

By the early twentieth century, the French had been able to only minimally assimilate the people from St. Louis, where the project began. So, out of Senegal, Mali, Burkina Faso, Benin, Guinea, Ivory Coast and Niger, only in Senegal did a small percentage of the Indigenous peoples come to participate in French national affairs under the original plan.[459] In Senegal, four communes or municipalities that had a *conseil-général* were established. From these communities, assimilated Africans could represent the four municipalities in France. For the rest of the French territories, a governor-general of French West Africa, based in Senegal, administered the French West-African

federation. In these colonies, the Indigenous peoples had become subjects (*sujets*)[460] rather than citizens of France.

Another hallmark of French assimilation was the presence in these territories of a system of direct rule. The administrators received orders and reported directly to France. These colonial governments lacked traditional power holders. The administrators were mainly French bureaucrats. By contrast, the British extensively used local authorities in their colonial administrations. The exclusion of local leaders in the French administration did not sit well with the West Africans. Their protests were heard loudly at the Brazzaville Conference (1944).[461] As a result, the new Constitution of the Fourth Republic in France paid heed to growing calls for reform in French Africa. The changes included African representation in the French National Assembly as well as the augmentation of African representation in the local government and councils. The rise of political parties and nationalist programs in French West Africa grew progressively and in 1956 the French passed the *loi cadre*, or enabling law, which allowed local government for individual territories in French West Africa.[462]

Unfortunately, this governmental power was not given to each territory as a whole but rather to segmented sections within the territory. This fragmentation was by design, not accident. It is believed to be a divide-and-rule strategy and this lack of unity had a destabilizing effect.[463] After independence in the 1960s, the new nations had no unified or coherent governments and had nothing to fall back on. Concomitantly, they had to hang on to the apron strings of France whose interest in their former territory in West Africa continues to this day. To underscore the point, France is actively involved in the war in Chad. As late as February 14, 2008, France admitted sending troops and

ammunition through Libya and other French-speaking countries to assist the government of Chad in its struggle against the rebels.[464] The interesting thing to note is that, although assimilation was the original goal, the assimilation strategy succumbed to economic pressure and, just like the British, economic expansion is what kept France in these areas.

3. Economic Expansion

In contrast to the Spanish settlements in North America, it was economics and not the flag that led the British into North America and Africa. In the United States, the British entered from the northeast: the first colony was Virginia.[465] The British government was financially strapped due to the wars in Scotland, Wales and Ireland. As a result, by 1607 under James I, explorers were given charters under contract to raise the capital necessary to undertake the venture. Shares were sold to underwrite the expedition. That enticed people who were experiencing hardship to migrate to the New World. The myth[466] that people escaped England to avoid religious persecution is not entirely accurate. Oliver Cromwell and some others may have, but not all immigrants were escaping religious persecution. "Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves."[467]

This indicates that some of the settlers came to America for pecuniary reasons. The first charter was to Sir Walter Raleigh in 1585.[468] There is no indication that any of the members of Roanoke were persecuted Christians and there is no record of any of the 105 original settlers of Jamestown being religious separatists,[469] even though Pennsylvania, Massachusetts and Connecticut were all established by Christian groups,

and Georgia was a prison colony. So, the importance of economics in colonization should not be underestimated.

The Link Between Economics, Colonialism and Sovereignty

The role of economics in colonization (sovereignty) is so broad that it is best handled throughout the thesis. Since the commercial activities triggered competition or conflict among the European traders, the issue will be discussed with each colonial power or nation as it explored or entered each colony. Economic activities almost always combined with other factors in the drive for colonization of one type or another. It must be remembered that the Spaniards attempted to liquidate the native Mexicans because they were pagans, but they also had the competing desire fuelled by the mad enthusiasm to convert the aboriginal population. To Christians, pagans were a lesser class of peoples.

The British did not have that excuse at their disposal during the invasion of Ireland because the Irish were Catholics. So how do the British explain their attempt to suppress and colonize the Irish? The underlying factor could be economic but their answer is that one has to be civilized before one can become a Christian. The Irish were accused of everything from practising incest, to being primitive and racially inferior. The Ulster plantation was set up just as similar ones in the New World. Are plantations the method to civilize a people? Ireland was also the first place where reservations were established to contain the natives. It would be illuminating to explore the issue further and ask about the treatment of the Jews. After all, Christianity is an offshoot of the Jewish religion. No one had labelled the Jews "uncivilized," yet the Jews were subjected to very harsh treatment. The answer is that the Jews were considered enemies of

Christianity. "It would be harsh to deny to those, who have never done any wrong, what we grant to Saracens and Jews, who are the persistent enemies of Christianity."[470]

As a matter of fact, colonization is more than just simple competition for the same land and natural resources by peoples of different racial groups, ethnic groups, social organization or economic institutions. The images and ideas as to what the world ought to be is another driving force behind colonization. In almost all situations, the images of the colonizers and those of the colonized were antithetical. That is, the image of the "African," "Chinese," "Indian" and "Irish" provided an affront to the cherished values of their colonizers. These values could be idealistic, a way of life, land use or even class, and according to the standards set by the colonizers. Once that mind-set is engaged, the colonizers then devise methods of transforming the colonized into an approved model and/or of appropriating their lands depending on expediency – all in the name of morality and the "good" of the colonized. One example will suffice: "The first Indian reserves in Canada were not established as part of a treaty process but by French religious orders who sought to Christianize the Indians and desired that they adopt a sedentary way of life."[471] Sedentary life is not synonymous with civilization. The Priests and Ministers were roaming the country so the sedentary life must be more tied to economics than Christianity or civilization.

Summary

In brief, exploration of the relationship between ideology, culture and sovereignty is needed to fully understand how sovereignty became identified with a specific set of cultural practices to the exclusion of others, without losing sight of additional underlying factors, such as economics. With respect to the term "uncivilized," the only common

denominator is its application to inhabitants whose property the powerful European states decided to confiscate. Westlake justifies this action by stating "the occupation by uncivilised tribes of a tract, of which according to our habits a small part ought to have sufficed for them, was not felt to interpose a serious obstacle to the right of the first civilised occupant."[472] This policy was adopted regardless of the actual needs of the Indigenous peoples or their social structure (or, for that matter, concerns regarding environmental sustainability), which will be explored in the next chapter.

PART II: COMPARISON OF PRE-EUROPEAN CONTACT NATIONS IN GHANA (WEST AFRICA),[473] CANADA AND THE UNITED STATES

Introduction

This thesis started by asserting that the Indigenous peoples of the world have a common origin and, thus, was justified in grouping the Indigenous peoples of Africa with the Indigenous peoples of North America. The thesis then invited the reader to look back far enough to see a point in time when the Indigenous majority status was overwhelmingly present in both Ghana and the Americas. If one goes back far enough, Europeans were practically absent in both places. This segment will reveal the Ghanaian paintings of the scenes in times gone by, showing that the Indigenous peoples were organized, self-sufficient and contented.

The Pre-Contact Era in Ghana[474]

Lift High the Flag of Ghana

Ghana was the name of the king of one of the three most organized ancient sub-Saharan states or empires.[475] The fame of that king mesmerized the Arabs, who left records of his kingdom and assigned his name to the capital as well as to the state itself. According to the ninth-century Arab writer Al Yaqubi,[476] the other states were Guinea and Mali in the central Sudan.

King Ghana was renowned for his wealth, hunting skills, organization and military superiority as well as for the opulence of his courts. His commercial acumen led him to a mastery of the gold trade. This commercial enterprise, coupled with his military achievements, cumulated in the formation of a nexus of commercial relations with merchants and rulers of North Africa and the Mediterranean.

As kingdoms rise and fall, the Soninke Kingdom of Ancient Ghana succumbed to attacks by its neighbours in the eleventh century, but its name and reputation endured. In 1957, when Dr. Kwame Nkrumah, the first Prime Minister of the former British colony of the Gold Coast, sought an appropriate name for the newly liberated state, the choice was clear. Like its namesake, modern Ghana was a leader, being the first African colony to liberate itself and emerge from colonial rule, which caused a chain reaction that saw most African states achieve independence within five years. Furthermore, the newborn Ghana was also famous for its wealth and trade in gold. Apart from the symbolism, it is most likely that ancient Ghana has an ancestral role in the present-day Ghana.

Archaeological remains discovered in the coastal zone of modern Ghana indicate that the area has been inhabited since the early Bronze Age (ca. 4000 BC), but these inhabitants, whose organization was based on fishing in the extensive lagoons and rivers, left few traces. Archaeological work further suggests that central Ghana north of the forest zone was inhabited as early as 1,000 to 2,000 years before Christ. Oral history and other sources suggest that the ancestors of some of Ghana's occupants entered this area at least as early as the tenth century AD and that migration, caused in part by the synthesis and disintegration of a series of large states in the Western Sudan, continued thereafter.[477]

The Ghana Empire flourished during this period and within the prescribed migration path (the region north of modern Ghana). The Ghana Empire had no direct rule over any part of Ghana, but it is thought that several small kingdoms which later evolved in the northern region were ruled by nobles believed to have emigrated from the Ghana Empire. The trans-Saharan goods train that made possible the expansion of kingdoms in the Western Sudan also serviced regions in northern Ghana, as well as the forest to the

south. By the thirteenth century, for instance, the town of Jenné in the empire of Mali had established commercial connections with the Indigenous groups occupying 66 percent of the northern drainage of the Volta Basin in modern Ghana. Initially, settlements were mainly organized in the northern savannah regions, where it was easier to cultivate and build abodes.

The discovery of gold served as the magnet that attracted Muslim traders into the forest region. These Muslims (mainly the Dyula) and their commercial activities stimulated the growth and development of early Akan states located on the trade route to the goldfields in the forest zone of what is now the Ashanti region of Ghana. The impenetrable forest was sparsely populated, but slowly, the Akan-speaking peoples nibbled their way into it toward the end of the fiftennth century. This movement into the forest was enhanced by the introduction of sorghum, bananas and cassava crops that could readily adapt to the Ghanaian forest from Southeast Asia and elsewhere. Here again, Jenné served as the nucleus of the trading activities between the Muslim traders and the ancestors of the Akan-speaking peoples who occupy most of the southern half of present-day Ghana.

It was not until the birth of the sixteenth century that European sources noted the existence of the gold-rich states of Akan and Twifu in the Ofin River Valley. The migration from the north and east continued unabated, and around the sixteenth century the Mande, composed of the Housa from Northern Nigeria and the Lake Chad area, made their presence felt in the northern part of Ghana. They are credited with establishing the states of Dagomba, Mamprusi and the Gonja, which are three of the five states comprising the Mole-Dagbane states. The other two states to the south are the Mossi

states of Yatenga and Wagadugu. Archaeological evidence supported by oral tradition leaves no doubt that the Mole-Dagbane states were among the earliest kingdoms to emerge in modern Ghana, being well established before the sixteenth century faded away.[478]

Muslim Influence in Ghana

While the Dyula were Muslims, the same cannot be said about the Mande. However, the Mande welcomed the Muslims and usually had in their company Muslims who acted as scribes and medicine men. Most importantly, Muslims featured prominently in the trade that linked the southern half of Ghana with the north. Consequently, Muslim influence, spread by the activities of merchants and clerics, was felt as far as the Asante (Ashanti)[479] region. There is even a religion, "Asante-Kramo", which is a mixture of the Ashanti traditional religion and Islam. Although most Ghanaians retained their traditional beliefs, the Muslims introduced certain skills, such as writing, and practices that were incorporated into the Akan culture.

The situation in the north is slightly different. In the north, the Mossi and Gonja rulers imposed their traditions on the people they conquered but generally came to adopt the languages of the people they dominated. As a result, most of the people in northern Ghana became Muslim.

Between the northern Muslim states of Dagomba, Mamprusi and the Gonja, and the Mossi states of Yatenga and Wagadugu lay a broad terrain of less-organized groups of Indigenous peoples. These include the agricultural segmented societies of the Sisala, Kasena, Kusase and Talensi. Ruled by heads of their clans, they were cemented together by strong kinship ties. They lived along the trading bridge between the Muslim states to

the north and the Ashanti tribes of the forest. As a result, they were buffeted by both the Islamic and the Ashanti cultures. Their weak organization made them a target of depredations by the more powerful neighbours between whom they were sandwiched.

The Asante State

The Asante state was made up of the Twi-speaking members of the Akan tribe. The other Akan speaking people are the Fanti, the Asene, Nzema, Guans Kwahu and the Akim. The Twi-speaking people first settled on the banks of Lake Bosomtwe, about 15 miles from present-day Owen, and 30 miles from Kumasi. Kumasi became the capital of the Asante state.

Toward the end of the sixteenth century, the Asante, under a series of militant Asantehenes,[480] notably Oti Akenten, embarked on an expansion that resulted in the formation of the Asante confederation. The Asante confederation came to dominate the surrounding peoples and became the most powerful state of the central forest area of Ghana. The resistance of the Asante people to colonization and European domination enabled the Asante state to maintain the most cohesive history and would exercise the greatest influence on British policy in Ghana.

Osei Tutu became Asantehene at the end of the seventeenth century. He was greatly influenced by the spiritual leader, Komfo Anokye.[481] Komfo Anokye was credited with performing many miracles, including conjuring the Golden Stool of Asante from Heaven. The Golden Stool of Asante represented the united spirit of all. Komfo Anokye's spiritual leadership had an electrical unification effect that galvanized and propelled the Asantes under Osei Tutu. The Asante confederacy was transformed into a very powerful empire with its capital at Kumasi.

The greatest achievements of Osei Tutu lie with his political achievements. Osei Tutu allowed the conquered and allied states limited autonomy and a role in the centralized Asante government. He established a dual allegiance that superimposed the confederacy over the individual component states. The result was a strong, united empire as the individual minor state continued to exercise internal self-rule whereby each chief jealously guarded his state's prerogatives against encroachment by the central authority but subordinated his state's individual interests to the central authority located in Kumasi in matters of national concern.

The Asante states had become a very highly sophisticated and organized empire by the rein of Opoku Ware. Their influence had expanded to the north and had engulfed the Mamprusi, Dagomba and Gonja states by the middle of the eighteenth century. Expansion of the Asante state to the south, which brought the Asantes in contact with the coastal Fante, Ga-Adangbe and the Ewe, proved to be more antagonistic.

The Fante Confederacy

The "kingdom of Fantyn"[482] of the sixteenth century recorded in Dutch and English records refers to the Fante states. They are part of the Akan tribe which occupied the region to the south and east of the River Pra. History has it that they migrated from Mankessim to where they are living now.[483] If that is correct then they must have separated from the Asantes and moved to Mankessim long before displacing or absorbing the Etsi people who had been occupying the regions to the north, east and west of Mankessim. This conclusion is based on Dutch and British historical records that indicated that such migration took place only in the seventeenth century. The Fantes were the first Akan group to move to the coast. There emerged, especially during the second

half of the seventeenth century, the numerous modern Fante states including Nkusukum, Ekumfi, Esikuma, Abeadzi, Abora, Ayan Maim and Gomoa.[484] These Fante states had formed a loose confederacy by the beginning of the nineteenth century and were enjoying autonomous existence.

The Ga-Adangbe-Ewe Nations

The Ga-Adangbe-Ewe peoples occupied the eastern parts of what came to be known as the Gold Coast, now Ghana. The Ga established the Ga kingdom prior to or at the same time as the arrival of the Portuguese in Ghana. "The kingdom consisted of such principalities as Tema, Nungua, Teshie, Labadi and Ga Mashi,"[485] and was well established by the 1470s. The "Ladoku kingdom,"[486] seen in European historical accounts of the seventeenth century, belonged to the Adangbe, who settled in the area between Tema and the Volta River. The Ewe straddled the border between present-day Ghana and Togoland. Small kingship groups from the Ga-Adangbe-Ewe migrated northward and founded the towns of Manya and Yilo in the Krobo mountains. The Ga-Adangbe-Ewe were led by traditional priests and elders as opposed to the Akan tradition of chieftaincy. The institution of chieftaincy or "war stools,"[487] found later in the Ga-Adangbe-Ewe tradition, seems to have been adopted from the Akans. The system differs from the Akans in that kings or chiefs are elected patrilineally.

Obviously, the coastal kingdoms and especially the Fantes soon established contact with the European merchants, who offered these groups logistical support in wars with the Asantes to the north. By the seventeenth century, the culture of the coastal tribes had already been eroded over the course of 200 years. Their history, of course, had become the history of the Europeans in Ghana. The Asante, as noted above, had a more

coherent history because they resisted colonization for a longer period. More importantly, the trade with the Muslims of the north also left historic records. The end result is that Asante's written history is dependant on the Muslim and the European sources.

Observations

The emphasis at this point is that statehood, nationhood, government and sovereignty are not European inventions. The Europeans invented many things but they did not invent statehood or sovereignty. The Ashantis had a federal system of government without the help of the Europeans. Wherever the Europeans went, they encountered organized people who were self-supporting and living in organized societies. These people survived without the Europeans – otherwise they would not have been present when the Europeans arrived – and they might still be there, perhaps enjoying a better life.[488] This phenomenon can be seen all over the world but to comment fully on the subject would be impossible in this thesis, and to summarize all of its applications without an adequate commentary would be tedious. The maximum functional value can be appreciated by restricting our research to the countries considered in this paper: Canada, the United States and Ghana.

Pre-European Contact Indigenous Nations of the Americas

To prepare the reader for the section that follows, certain terms and notions have to be dispelled or clarified.

1. Discovery and Terra Nullius

The English are well known for torturing language to raise doubt. When the North American land mass blocked Giovanni Cabotto[489] (John Cabot) from reaching Asia in

1497, more than a century elapsed before Britain set foot on the North American continent. Yet, his voyage was constructed to mark "Englands [*sic*] first foray into the new age of discovery, and served as a foundation for Englands [*sic*] later claims to North America, albeit at some remove."[490] British historians must be lauded for their craftsmanship in selecting phrases that change colour with time and the environment. For while Giovanni Cabotto's maps lay in wait for more than 100 years,[491] the Indigenous people of North America were hunting game, fishing the waters, harvesting the forest and cultivating the land.

Though the land had been discovered by the Indigenous peoples, British historians credit Cabot with discovering parts of America, despite the fact that these same historians have no clue where Giovanni Cabotto landed on the North American continent.[492] This observation in no way minimizes the contribution of Giovanni Cabotto's voyage to British colonization. His voyage opened the Grand Banks to the British fishing fleet and thus inched Britain closer to Canada. The point is that the academic world must free itself from language games that have blessed the nostalgic urge to totalize and legitimate the actions of the European powers.

This thesis has refrained from outlining the cultural and linguistic demography of West Africa because no one has claimed that Africa was a vacant land when the Europeans arrived; indeed, the first European visitors were called explorers. Instead, the imperial powers of Europe – notably, England, France and Germany – through the Berlin conference on Africa of 1884 attempted "to transform Africa into a conceptual *terra nullius*."[493] That is, they believed that African tribes were too primitive to understand the concept of sovereignty and could not possess the land. Hence, the tribes were deemed

unable to cede the land by treaty,[494] and so it could be taken by mere occupation. In positive terms, "only dealings among European states with respect to those territories could have decisive legal effect."[495]

In that vein, the African peoples played absolutely no part in the deliberations of the Berlin conference,[496] even though the conference played a vital role in the future of the continent, continuing to have a profound influence on the life and politics of present-day Africa. Mr. Kasson, the American representative, objected to the non-involvement of the Africans and the arbitrary occupation of African soil by proclaiming that international law dictated that voluntary consent of the natives whose country was occupied should be required where the natives had not provoked the aggression.[497] Some writers, such as James Crawford[498] in excerpts cited by Antony Anghie, claim that, although Kasson's approach was heavily criticized, "subsequent practice suggests that any remotely legal explanation for the partition of Africa was inevitably based on his proposal."[499] The author begs to differ in that the partition of Africa may not have been based on Kasson's proposal but, rather, it was greed that sparked stiff competition and dog-fighting among the traders. This, in turn, led to the signing of treaties by the dominant nations with the local chiefs for mutual benefit and protection. But the end result was the same.

Despite positivist attempts to assume complete control over the identity of the natives, the latter remained "unknowable in a way that threatened the stability and unity of Europe."[500] But the situation was different in North America. Through political mythology,[501] North America was wrongfully considered a vacant land to be discovered by the Europeans. For this reason, it is paramount that this thesis refutes the notion of *terra nullius* as it applies to North America. The reason is simple. If North America was

vacant, then the issue of Aboriginal sovereignty is moot. This section, therefore, will be dedicated in proving that North America was not vacant when the Europeans arrived.

2. The Confused State of Bands as Nations: Nationhood, Tribe and Band

Before colonization, there were approximately 80 to 90 distinct peoples or nations in the territory now known as Canada.[502] The 600-plus bands recognized at one time or another under the *Indian Act* do not necessarily reflect the traditional political organization of First Nations in Canada as nations.[503]

North American aborigines are certainly diverse peoples with hundreds of distinct cultures.[504] Unfortunately, however, the American and Canadian governments often deal with Aboriginal peoples as if they were a homogenous group. As Fergus Bordewich notes, "'The Indian,' as such, really exists only in the leveling lens of federal policy and in the eyes of those who continue to prefer natives of the imagination to real human beings."[505] Past treatment has, however, resulted in similarity of situation and treatment, which allow for reasonable comparisons and contrasts.[506] Certain common threads link the broader experience of modern Indigenous tribes as they pursue their quest for freedom. The common goal is to achieve a greater say in how their people are governed, their lands are managed and their culture is preserved.[507]

Although modern literature has not replaced the oral traditions of the Indigenous Americans, it has become more dominant. The authors of the first reports had their own agendas, so the descriptions of the Indigenous North Americans are based on how the authors chose to group them. Modern writers have further muddied the waters by incorporating modern band names into past literature. This author is thus compelled to use terms and names with which he may not feel comfortable because to unravel all the

confusion is impossible. As an example, one source[508] describing the Blackfoot Indians starts very well by saying that they are an important tribe of the Northern Plains and constitute the westernmost extension of the great Algonquian stock. The source then outlines the three groups that comprise the tribe, namely: *Siksika* or Blackfoot proper; *Kaina* (*Kæna*), or Blood; and *Pikûni*, or Piegan. The source then dissects the tribes into fifty bands without explaining that these bands are European constructs and could well be artificial, since one band could be a mixture of different tribes.

The Northland band of Lac Brochet is a mixture of the Cree from Brochet and the Dene from Tadoule Lake. Most importantly, their location could be far from their ancestral villages. The people of Tadoule Lake are certainly not from their present location. Similarly, the Swampy Cree of the past may not be restricted to the area that the Swampy Cree currently occupy in Manitoba. Or consider the Mohawk tribe, which has been artificially separated by state lines. Finally, the term "Wichita" is assigned to bands speaking the Caddoan language, when the Wichita tribe proper is very distinct and separate from other tribes who speak the Caddoan language. The ancestral Wichita speak the Wichita language, which is but one of the dialects of the Caddoan language – the others being Pawnee and Kichai. As one frustrated Wichitan lamented, "The tribes called the Wacos and the Tawakonis, the Taovayas, the Tawehash, the Yscani and the Kichai are not tribes at all. They are all bands, bands that are part of the Wichita culture and lived the Wichita lifestyle."[509]

It is therefore imperative that the reader, at least, understand the dynamics that went into creating the present situation. In Canada, the band is a creature of statute. Aboriginal bands are European constructs and do not correspond to traditional tribal

units. Rather, they are based on fiscal considerations, the nature of land use, politics and ease of administration. In brief, a comprehensive rather than a restrictive definition of Aboriginal Nation is required to permit consideration of the various threads that have helped make up a complex pattern of various Aboriginal nations in North America. That is, it should be left to the individual Aboriginal band to decide whether or not to adopt any definition or system of government that suits them best. Hence, the closest definition to suit this goal may be the adaptation of Margery Perham's definition of African nationalism. In essence, Aboriginal nationalism could be regarded as the ideal political unit to replace what has been called "the multi-cellular tissue of tribalism."[510]

In this vein, the author, in this pre-European contact section, assigns the Swampy Cree to the area that they traditionally occupied and treat the Mohawk of Canada and the Mohawk of the United States as one nation unless otherwise indicated. In order not to be corrupted by scholars of European descent who dominate in published Indigenous legal and political issues, the author deliberately uses and compares materials from all sources, including the Internet, where the Indigenous people are now beginning to tell their side of the story. These stories have usually been shut out from the academic literature. Unsophisticated as these writings may be, they at least open a dialogue and enrich our knowledge by provoking a new set of questions.

Indigenous Organizations in Pre-European Contact Canada[511]

"[T]he Red Indian"[512] **[sic]**

Neither the English nor the French were the first to attempt to colonize North America. The Norsemen from Iceland and Greenland made an abortive attempt to settle parts of Newfoundland and Labrador in the first millennium. The Norsemen were

instantly repulsed by the Indigenous peoples that the Norsemen referred to as *skraelings*.[513] The *skraelings* were probably Beothuk or some other Algonquin people,[514] but the scale should tip in favour of the Beothuk, who were distinctive for their habit of decorating themselves with ochre, a reddish substance that led newcomers to describe all the Indigenous peoples of the continent as "red Indians." The Norsemen, after being repulsed, kept trading with the inhabitants of Newfoundland, but the control of commerce was taken over during the fourteenth century by the Hanseatic League of German states.[515] These events are significant in two respects. They dispel the notion of *terra nullius* and provide evidence that trading routes had already been established between Europe and North America prior to John Cabot's exploration. As a matter of fact, *terra nullius* is an academic fossil. Closer examination of the people who occupied the North American continent before the arrival of Europeans will put the nails in its coffin.

Table: Native Tribes in Canada prior to European contact[516]

British Columbia:	Haida, Dene, Nisga'a, Makah, the Strait, the Quileute, the Nitinat, the Nooksack, the Chemakum, the Halkomelem, the Squamish, the Quinault, the Pentlatch, the Sechelt, the Twana, and the Luchootseet
Alberta:	Blackfoot, Cree
Saskatchewan:	Dene, Cree, Dakota
Manitoba:	Cree, Dene, Ojibwa, Dakota
Ontario:	Algonquin, Huron, Iroquois, Neutral, Nipissing, Ojibwe, Onondaga, Otdawa
Québec:	Algonquin, Huron, Iroquois, Mi'kmaq, Montagnais, Cree, Abenaki, Maliseet, Inuit
New Brunswick:	Abenaki, Maliseet, Mi'kmaq
Nova Scotia:	Mi'kmaq
Prince Edward Island:	Mi'kmaq
Newfoundland	Beothuk, Mi'kmaq, Inuit, Innu
Northwest Territories:	Athabascan, Gwitch'in
Yukon Territory:	Athabascan
Nunavut:	Inuit

The Tenacious Peoples of the Ice and Tundra

The general cultural groups among the Aboriginal nations of Northern Canada tend to correspond to climatic latitudinal divides. Above the tree line, where the boreal forest meets the tundra, are the Inuit, whose territory stretches far into the Arctic. South of the tree line are the Dene, and below them are the Cree nations of the prairies. Yet, as with all generalizations, this schematic geo-cultural scheme is far from perfect. Different peoples meet, mix, mingle and divide at the lines of contact. It is not uncommon, for instance, for the Dene and the Inuit to claim the same land as their territory. Similarly, the Dene and the Cree have, since antiquity, both shared and fought over the lands that divide them.[517] This fact alone should alert the reader to the fact that Aboriginal peoples had proprietary or territorial concepts, a notion that will be explored further in this paper.

The Inuit lived in ingenious dwellings that included the well-known thirty-foot igloo connected by domed passageways to other igloos and large common rooms for feasting and dancing. The magnificent semi-subterranean barabara of the Aleutian Islands are as large as 50 by 200 feet and can house more than 100 people.[518] As one explorer acknowledged, these hardy and ingenious people of the Arctic and Subarctic possessed all the tools "that gave them an abundant and secure economy [and] they developed a way of life that was probably as rich as any other in the non-agricultural and non-industrial world."[519] To the Europeans, the vast ice and tundra constituted a wilderness in the absolute sense of the word. But, in the eyes of the Koyukon, "[t]he lakes, hills, river bends, sloughs, and creeks are named and imbued with personal or cultural meanings."[520] Richard K. Nelson compares the northern topography to "farmlands to a farmer or streets to a city dweller."[521]

Just as the British and French in Canada,[522] the Russians were initially interested not in the land, but with the fur trade in Alaska.[523] Thus, Europeans came to the North American continent to trade with people who had lived on the continent for thousands of years. It is, therefore, unwise and false to think that the Europeans discovered the land; unless they considered the Indigenous people "little bags of skin"[524] that came with the land.

> According to the *Island of Palmas* case, a claim based on discovery was incomplete until accompanied by "the effective occupation of the region claimed to be discovered." The term "effective occupation" incorporates the notion of "uninterrupted and permanent possession." Based on such a rule and interpretation, it would appear that the only ones capable of successfully advancing a claim based on discovery and occupation may be the Aboriginal peoples.[525]

It is more appropriate to use the concept of "dominion"[526] when discussing the colonization process. Anyone who has lived in the North is aware of the interdependence of animals, human beings and the environment. The animals are provided with protective mechanisms for survival. The bear, for example, stores fat as insulation and as a source of energy for the winter. Consequently, it is able to hibernate and has developed a system for recycling the water in its body. *Homo sapiens*, on the other hand, have invested all of its survival capital in the central nervous system and the division of labour. *Homo sapiens* is, fundamentally, a social animal. The basic unit for humanity is the pair (man and woman). At a practical level, one pair is not viable. Humans also differ from the apes and other lower animals in that, while the apes and the others practise "plug and eat"[527] feeding methods, *Homo sapiens* hunts and gathers for sharing and sometimes carries the yield over varying distances, storing the produce for future use. *Homo sapiens* is also "culture dependent." That is, each of us must be taught how to be human – how to

behave, speak and think like a human."[528] In the Arctic, social dependence is critical. So to assume that Indigenous peoples could survive in such a punishing environment without a social-political structure (government) is absurd.

Beautiful British Columbia

The native peoples of the northwest coast made their homes along more than 2,000 miles of Pacific Ocean coastline. The Makah, the Strait, the Quileute, the Nitinat, the Nooksack, the Chemakum, the Halkomelem, the Squamish, the Quinault, the Pentlatch, the Sechelt, the Twana and the Luchootseet are just 13 of the linguistically and culturally different nations restricted to the small area squeezed between Vancouver and Seattle, that spans less than 150 miles.[529] The population density must have boggled the minds of the explorers. One recent study has estimated the population of British Columbia at over one million prior to Western contact.[530]

While the inhabitants of the southwest coast have always been known for their "political egalitarianism"[531] and personal autonomy, the people of northern British Colombia are best known for their highly hierarchical political systems. Their rich and demonstrative ceremonial lives have been associated with their "intricately carved totem poles and ritual masks, as well as their great status-proclaiming feasts known as pot latches."[532] The "[t]ribes that traditionally practice the potlatch include the Haidas, Kwakiutls, Makahs, Nootkas, Tlingits, and Tsimshians."[533] The ceremony is believed to have originated as exchanges in marriage gifts, inheritance rites and death rituals.[534] It eventually grew into a system of redistribution of land and property that "maintained social harmony within and between tribes."[535] It should be observed that most of these tribes meet both the Austinian definition of sovereignty and Lawrence's requirement of

control over territory. The only handicap is that they do not belong to the society of European nations.

The Cree Nations of the Prairies

The North American Cree nations extend from the Rocky Mountains to Quebec which borders the Atlantic Ocean in both Canada and the United States.[536] They are the largest group of First Nations in Canada. Once numbering in the millions, they now consist of about 200,000 members.[537] The Lubicon Cree, for instance, now have a population of about 300, but it is hard to estimate the size of the population prior to contact.

The Lubicon Cree dwell in northern Alberta, Canada. Further east, there were two major divisions: the Woodland Cree, also called Swampy Cree or Maskegon, and the Plains Cree. The Woodland Cree hunted caribou, moose, bear and beaver. They were reportedly divided into 12 bands,[538] each with its own chief.[539]

The social unit is the family and related families which unite to form a band, though large groups would ally for warfare. They did not cultivate maize, relying wholly on hunting. The Plains Cree who live on the northern Great Plains – the Algonquian, Athapaskan and Siouan[540] – engaged in several activities including fishing and trapping. They hunted several types of game but primarily relied on bison, and were integrated into one military society.[541] The Assiniboine of Southern Manitoba were the traditional allies of both the Plains and Woodland Cree. The Nisichawayasihk Cree Nation were centred around Nelson House, Manitoba. These groups have suffered considerably from the development of hydro projects in Manitoba. Their territory has been greatly reduced. Despite these sufferings, the author found them to be still friendly and in good spirits.

The Quebec Cree nation calls its homeland "Eeyou Istchee" – Cree for Land of the People.[542] Believe it or not, the Montagnais, Ojibway and Blackfoot[543] all once resided in Quebec.

These are but a few Indigenous peoples who have populated the Canadian Shield region of northern and central Canada for 10,000 to 35,000 years.[544] They meet the Austinian definition of sovereignty and, even if they do not satisfy Lawrence's requirement of control over territory because they are "wandering tribes," they are not so different from the Indigenous peoples of northern Ghana and, in accordance with the *Island of Palmas* case,[545] they do in fact possess the land.

The Great Lake Nations

While not Iroquois, the Huron fall into the same linguistic group and shared a similar economy, which was predominately agricultural.[546] This fact implies that the Huron were sedentary and had a *sui generis* concept of possession, land ownership and inheritance. Like most North American Indigenous groups, the Huron had communal land tenure. Gabriel Sagard,[547] a Catholic priest, highlighted the essential elements of this land ownership when he remarked that the Huron had

> ...as much land as they needed... As a result, the Huron could give families their own land and still have a large amount of excess land owned communally. Any Huron was free to clear the land and farm. He maintained possession of the land as long as he continued to actively cultivate and tend the fields. Once he abandoned the land, it reverted to communal ownership and anyone could take it up for themselves.[548]

Hidden in these words is the concept of inheritance. Gabriel Sagard inadvertently made this point when he declared that the land was given to the "family." This means that, even if the head of the household passed away or abandoned the land, it could be

taken over by another member of the family. The reader will note that this arrangement is similar, if not identical, to the Ghanaian "stool land system" described by the Adansehene below. It is after the entire family had deserted the land that the land reverted back to the Nation.

The Mohawk

"The Kanienkehaka, or Mohawk tribe of Native American people live around Lake Ontario and the St. Lawrence River in what is now Canada and the United States."[549] Members of the Iroquois confederation (Hodenosaunee) became the keepers of the Eastern Door (or gate).[550] Traditionally, the chiefs were nominated by the clan matriarchs from designated hereditary families.[551] The Mohawk were mainly agricultural and related families lived together in longhouses, the symbols of Iroquois society. Each Mohawk community also had a local council that guided the village chief or chiefs. It would be fruitless to argue that people living in mainly agricultural communities since antiquity had no concept of property laws or did not possess the land.

The Mi'kmaq of Newfoundland, New Brunswick, Nova Scotia and PEI

Pjila'si – Welcome[552]

To break the monotony, this paper will approach the issue of *terra nullius* from a different angle. "Before the white man came, we were here. The Mi'kmaq Nation had uncontested sovereignty over what is known today as Nova Scotia, most of New Brunswick, the entirety of Prince Edward Island and parts of the Gaspé in the Province of Quebec. Because our Mi'kmaq ancestors were nomadic, some Mi'kmaq migrated to Newfoundland thousands of years prior to European contact."[553]

The Mi'kmaq Elder was not just making noise, as his claim is supported by history. In fact, one settler wrote home that "[w]hen we first came here, the Indians, in a friendly manner, brought us lobsters and other fish in plenty, being satisfied for them by a bit of bread and some meat."[554]

If the English had reciprocated this kindness by offering to make a reasonable land deal with the Mi'kmaq, the two nations could have lived together in peace and tranquility. But it appears that the English never asked for permission to settle nor did they make any move to engage the Mi'kmaq in negotiations.[555] Note that treaties were signed in the 1600s, when the British encountered stiffer resistance. Instead, Governor Cornwallis chose to take the land by force and eradicate the Mi'kmaq as outlined by Professor Jeffrey Plank:

> ...if the Micmac chose to resist his expropriation of land, the governor intended to conduct a war unlike any that had been fought in Nova Scotia before. He outlined his thinking in an unambiguous letter to the Board of Trade. If there was to be a war he did not want the war to end with a peace agreement. "It would be better to 'root' the Micmac out of the peninsula decisively and forever." The war began soon after the governor made this statement.[556]

In brief, there is no doubt the first settlers knew the Mi'kmaq had concepts of property and that they did possess the land. And yet, Governor Cornwallis elected to pursue the brutal attempt to liquidate the Mi'kmaq, just because the British were more powerful. This is the law of property being perpetuated. The native people who inhabited Newfoundland on the arrival of Cabot have been annihilated.[557] That translates into absolute sovereignty for the settlers. Canada can do better. Armed robbery was wrong, is now wrong and will always be wrong. It is impossible to consider all the tribes in Canada so a table of the tribes and their location will suffice.

Territoriality

The Indigenous peoples of Canada, using the people of Tadoule Lake as an example, did possess the land.[558] There are no strict private or personal territorial boundaries.[559] There is, however, mutual respect for the immediate areas around each hunting campground. To the Cree, just as to the Dene, the camp is the centre of the universe. The climate, topography, as well as the whole cosmos and its organisms are connected in some way to the territory in which the tribe lives. That being said, the Cree people are appreciated as a nation in possession of common tribal lands. This sense of sovereignty requires non-tribal members to seek permission before venturing into Cree tribal territories,[560] just as there is an expectation that notice should be given to a trapper if one intends to cross trap lines.[561] Within the Cree or the Dene nation, each tribe had to respect the land of other tribes, but it was very common for tribes to host people from other groups.[562]

Conclusion

The Europeans did not discover Canada. The first European presumed to have landed in Canada did not even know where he was. The French traders – those who came with Cartier and those who followed – came to trade. It stands to reason that the French traded with people and not with the objects they purchased. These were the Aboriginal peoples who had occupied the land for centuries. They had their own governments and handled their own affairs. Canada was not vacant when the Europeans arrived. What about the United States?

Pre-European Contact Civilizations of the United States

Table: Native Tribes in the United States, by State (prior to European Contact)[563]

Alabama:	Cherokee, Chickasaw, Choctaw, Creek (Muskogee)
Alaska:	Athabascan, Haida
Arizona:	Athabascan, Havasupai, Hopi, Mojave, Paiute, Pima, Pueblo, Yavapai
Arkansas:	Caddo, Quapaw, Osage
California:	Athabascan, Chumash, Costanoan, Kawaiisu, Ohlone, Paiute, Yokut
Colorado:	Navajo, Pueblo, Ute
Connecticut:	Mohegan, Nipmuc
Delaware:	Delaware
Georgia:	Cherokee, Choctaw, Creek (Muskogee)
Idaho:	Flathead, Coeur d'Alene, Nez Perce, Shoshone
Illinois:	Iowa
Kansas:	Kiowa
Kentucky:	Cherokee Chickasaw
Louisiana:	Caddo, Choctaw
Maine:	Abenaki
Maryland:	Nanticoke
Massachusetts:	Nipmuc
Michigan:	Dakota, Huron, Kickapoo, Menominee, Sac
Minnesota:	Arapaho, Cheyenne, Huron, Potawatomi, Sioux
Mississippi:	Choctaw
Missouri:	Quapaw, Osage
Montana:	Assiniboine, Blackfoot, Crow, Flathead, Gros Ventre, Lakota, Salish
Nebraska:	Omaha, Ponca
Nevada:	Paiute
New Hampshire:	Abenaki
New Mexico:	Acoma, Apache, Athabascan, Mojave, Navajo, Pueblo, Zuni
New York:	Delaware, Erie, Iroquois, Oneida, Onondaga, Seneca, Shinnecock
North Carolina:	Cherokee, Lumbee, Tuscarora
North Dakota:	Assiniboine, Hidatsa, Lakota, Mandan
Ohio:	Erie, Kickapoo, Shawnee, Wyandot
Oklahoma:	Kiowa, Osage, Wichita
Oregon:	Athabascan, Chinook, Nez Perce, Paiute
Pennsylvania:	Shawnee
Rhode Island:	Narragansett, Nipmuc
South Carolina:	Cheraw, Cherokee
South Dakota:	Lakota, Mandan, Ponca
Tennessee:	Cherokee, Chickasaw

Texas:	Apache, Athabascan, Caddo, Wichita
Utah:	Paiute, Pueblo, Shoshone, Ute
Vermont:	Abenaki
Virginia:	Cheraw, Cherokee, Mattaponi, Monacan, Powhatan, Shawnee
Washington:	Chinook, Coeur d'Alene
Wisconsin:	Huron, Menominee, Ojibwe, Wea, Winnebago
Wyoming:	Comanche, Crow, Shoshone
Straddling states:	Anishinaabe, Cayuga, Chicora, Edisto, Euchee, Haudenosaunee, Ho-Chunk, Kaw, Lenape, Mohawk, Tsalagi

Cabot's Collision

After the successful arrival of the Spaniards in Mexico, or to be exact, as early as 1496, the British monarch

> ...granted a commission to the Cabots to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and "collided"[564] with the continent of North America, along which he is supposed to have sailed as far south as Virginia. To this accident, the English traced their title to North America.[565]

It is difficult to envisage how English title could be tied to Cabot's collision with the North American continent considering the long timespan that elapsed between John Cabot's arrival on the shores of North America and the English occupation of that continent. Yet its significance must not be overlooked. The important issue at this point, however, is that Cabot came to find people living in what is now known as America. Therefore, the issue of *terra nullius*, dealt with above, should still be borne in mind as we explore the nations of America before the arrivals of Columbus and Cabot.

Origin of American Indians

There is considerable diversity both of tradition and opinion with respect to the origin of most Indigenous nations. Many tribes have no tradition of being created *in*

situ.[566] A great number of nations have histories or traditions of migration[567] and a respectable number are silent on the issue. Yet, for the Indigenous Americans who believe that they originated *in situ*,[568] the Beringian proposal[569] will likely provoke criticism. That is understandable since some may assume that the fact that they are themselves immigrants might undermine their claim to their territories.[570] These people must be assured that prior possession is a perfectly adequate basis for their territorial claims and that being autochthonous is not a requirement for possession in the laws governing real property. It has also been reported that "DNA evidence suggests that the Pericú, an extinct tribe of Baja California, are more closely related to the ancient populations of southern Asia, Australia, and the South Pacific Rim than to other Native Americans and peoples of the North Pacific Rim."[571] The "language log" evidence provided is weak indeed. There is no need to consider the findings because, even if the hypothesis is true, it does not disprove the Beringian theory.

It is generally accepted that the American Indians are the descendants of people whose ancestral homelands were in north-eastern Asia. But it is not totally correct to say that these people emigrated over the land bridge that once connected the two continents across what are now the Bering and Chukchi seas. The reader can imagine the size and number of the abutments that must support such an immense bridge.

The true picture is that, prior to the Wisconsin glaciations of 8,000 to 10,000 B.C., the ocean floor of what is now the Bering and Chukchi seas was above sea level and America was fused to north-eastern Asia. That land mass must have been huge. It also must have been a fertile land capable of supporting life. Geographers now call this ghost land the Beringia[572] subcontinent. Therefore, it is best to view the picture as the

Beringians[573] slowly fishing, hunting and gathering their way from Asia across this sub-continental land mass. This nomadic life continued until they reached Alaska on the American continent.

Archaeological evidence puts the date of earliest human habitation in Chile at 32,000 BC and the date for that of North America to be between 40,000 and 70,000 BC.[574] The Indigenous groups have since lived in America and were certainly still present when Christopher Columbus and the European settlers embarked on the American continent. One of their civilizations was the Adena culture.

The Adena People

The area now considered to be the United States was teaming with Indigenous peoples prior to the arrival of the Europeans. One of the prominent civilizations was the Adena culture, which eclipsed the Hellenistic period of Greece. This is roughly the period between the death of Alexander the Great in 323 BC and the annexation of the Greek peninsula and islands by Rome in 146 BC.[575] Some scholars posit that the Adena culture had flourished for over a thousand years, and was still vibrant when ancient Greece was falling to Rome.[576]

It is generally accepted that the Adena culture was a conglomerate of many Indian tribes that inhabited the central and southern regions of Ohio in the first millennium BC.[577] The Ohio River afforded them passageways and the means to radiate out from Kentucky and Eastern Indiana to as far as southern Illinois, Vermont, New York, New Jersey, Pennsylvania, West Virginia and Maryland.

The ancient Adena culture is one of the wonders of civilization. Known for their huge burial mounds and impressive works of art, they remain a mystery in many aspects.

It is estimated that the building of the burial receptacles began around 500 BC.[578] The ancient Adena site located in the Scioto River Valley near Chillicothe, Ohio is presumed to be one of the earliest and most important. Whether or not these mounds were used for religious purposes is debatable. Nevertheless, some of the mounds depict monuments that are mythical rather than merely serving as burial structures. Amidst the debate over the function of the mounds emerges one popular proposition that the shapes of the earthworks "were laid out to record astronomical observations, such as the movement of the sun through the seasons, or of the Moon and Venus."[579]

The most famous of these mounds is the "Great Serpent Mound,"[580] which was made in the shape of a serpent swallowing an oval object that is speculated to be the sun. That icon is derived from an Indian myth.[581] Apart from the mystical mounds, others exist which were used as burial grounds for royalty or the elite. The ordinary people were cremated. The bodies found in the tombs indicate that the people, both men and women, were huge, measuring over six feet tall and powerfully built.

Even the dwelling structures were mystical. Archaeologists have come to refer to them as "sacred circles."[582] They consist of concentric circles of structures ranging from 20 feet for a single-family dwelling, to multiple-family dwellings of 80 feet, to the outer communal structure of 300 feet in diameter. The Adena also left a legacy of Indian objects of utility, of which the siltstone smoking pipes are but a few examples.

The Adena people were sedentary. They lived in villages, surviving not only by fishing, hunting and gathering, but also by cultivating crops such as sunflower, gourds, squash, maize and tubers. Their commercial endeavours involved trade with tribes as far away as Mexico. Their location had many resources and supplied them with copper and

mica, which were a few of the objects and minerals that they traded. They imported tobacco from South America, and smoked it in rituals of celebration and remembrance using the legendary siltstone smoking pipes. During and following the Adena culture emerged the Hopewell people. Although the Hopewell are more renowned, one should remember that the culture of the mounds originated in the Adena culture.

The Hopewell People

Overlapping chronologically with the Adenas was the Hopewell people, whose social dominance in northeastern North America has long been recognized. The term "Hopewell" describes an egalitarian civilization consisting of a broad network of different Native American groups, including the more famous Ohio Hopewell culture and the midland group known as Hopewellian. The latter group is made up of the Swift Creek, the Santa Rosa-Swift Creek, the Marksville and the Copena cultures.[583]

These cultures flourished along the navigation routes in the north-eastern and mid-western United States between 200 BC and 400 AD.[584] At its peak, Hopewell culture stretched from Western New York to Missouri and from Wisconsin to Mississippi, and included both the American and Canadian shores of Lake Ontario.[585] Due to lack of evidence (unexcavated sites) and the poor condition of the mounds, unending debate abounds over the exact location and extent of the Hopewell culture. Thus, another author describes it as covering "an area stretching in one direction from the northern Great Lakes to the Gulf of Mexico, in the other direction from Kansas to New York."[586] The general area is the same but the second area seems to be larger.

Although there is little debate as to the ancestry of the Hopewell culture, which is generally accepted to be the continuous evolution of the Adena culture, there is ample

controversy as to the origin of the nucleus of the Hopewell culture. William Dancey has attempted to sort out the confusion by drawing circles:

> Hopewell populations originated in Western New York and moved south into Ohio where they built upon the local Adena mortuary tradition. Or Hopewell was said to have originated in Western Illinois and spread by diffusion - perhaps carried by a religious elite - to southern Ohio. Similarly, the Havana Hopewell tradition was thought to have spread up the Illinois River and into southWestern Michigan, spawning Goodall Hopewell.[587]

The Hopewell culture was an elaboration of the Adena culture. It was a movement from the "Burial Mound I phase and the Burial Mound II phase."[588] The transition occurred around the birth of Christ and appears to be a peaceful or non-violent evolution. The hallmark of the Hopewell culture is its unique pottery that is an improvement on the Adenean pottery. Hopewell pottery pieces were larger and more sophisticated in design and colouring. Some were fired to make them more durable. However, the most astonishing and the best distinguishing characteristic of Hopewell culture are the mounds that the Hopewell people constructed for, among other things, religious purposes such as funeral rites for royalty and other members of the elite. The Hopewell mounds, such as the Effigy Mound in Iowa, were generally much larger and more complex than the ones erected by the Adena culture. Some of the burial complexes are as large as 100 acres and include earthen embankments that rise as high as five meters. These mounds are regarded as the most significant achievements of Native Americans through the ages. As such, Hopewell may be considered a cultural climax[589] for the Indigenous people of North America. These mounds can still be seen today, especially in the Hopewell Culture National Historical Park in Chillicothe, Ohio.[590] The park contains nationally significant archaeological resources, including large earthwork and mound complexes that provide

an insight into the social, ceremonial, political, and economic life of the Hopewell people.

Hopewell culture is known for its flamboyant burial ceremonialism, diversified material culture and, most importantly, a commercial relationship with other communities.[591] Products were exported and imported.[592] "It was thought that the distinctive Hopewellian artefacts were crafted specifically for mortuary ritual... however, many of the kinds of artefacts associated with human remains under the mounds were found also in settlement debris."[593]

The Hopewell people lived in permanent communities based on intensive horticulture and produced enormous earthen monuments.[594] There was great emphasis on agriculture rather than on fishing, hunting and gathering. The main crops included squash, sunflowers and various grasses. Maize, which later became the diet staple in the area, for some unknown reason was not popular during the Hopewell era.

Artefacts[595] indicate that the people were able to create tools and ornamental objects out of highly refined flint, obsidian, mica, silver, native copper, as well as to slightly modify natural items of iron by using percussion and drilling techniques.[596] The tools include various forms of projectile points indicating throwing instruments, knives and hooks.

Commercially, the Hopewell culture was not isolated. The people had a large trading network connecting Florida, Wyoming and North Dakota.[597] They acquired copper, gold, silver, crystal, quartz, shell, bone, obsidian, pearl and other raw materials from different Indigenous nations.[598] None of the aforementioned minerals are found in their native state in Ohio; all were brought hundreds of miles from elsewhere.[599]

Hopewell artisans worked these metals into "elaborately embossed and decorative metal foil, carved jewelry, earrings, pendants, charms, breastplates, and other objects."[600] There must have been warfare or piracy, for the villages were fortified with stockades and surrounded by dry moats. Such construction required a large population and great skill.

The Hopewell shared some features with the Mississippian culture that emerged around 900 AD and was located more or less in the eastern United States.[601] While it is generally accepted that the Hopewell culture sprang from the Adena culture, the relationship between the Hopewell and the Mississippian culture is not that certain. Judging from the artefacts, there may have been contact and overlap between the two civilizations. The Serpent Mound in Ohio was built in 1075 AD, so if the Mississippian culture emerged in 900 AD, then the two cultures must have existed simultaneously at for a period. However, it is unclear how much continuity existed between the two cultures.

The Mississippi Culture

The term "cultural climax" assigned to the Hopewell culture invites clarification. While the Hopewell culture was followed by a relative decline in social cohesion in the Woodland and the northern Mississippi along with the Ohio valleys, a new tradition, with much stronger and more elaborate mortuaries, emerged between 800 and 1500 AD. This means that the change was limited to the absence of unifying features comparable to those of the Hopewell culture. The Middle-American elements actually advanced during the Mississippian culture, which was richer than the soil of the Mississippi Delta.

The Mississippian civilization was composed of sedentary farmers of the interior rivers, notably the Mississippi River and its tributaries. The culture covered Ohio, Iowa,

Minnesota and Louisiana. Cahokia Mounds is the site of the urban centre of this new world. It is located in the state of Illinois, near the area now known as St. Louis, Missouri. The term "Cahokia culture," synonymous with Mississippi culture, derived from this city. The city once had an estimated population of over 20,000 people.[602]

Cahokia culture followed in the steps of their predecessors and built rectilinear platform mounds. However, the Mississippian culture also built conical mortuaries. Monks Mound, an archaeological treasure, is part of Cahokia Mounds State Historical Site and is the largest prehistoric earthwork north of Mexico. It is a "gigantic man-made structure extending ten stories into the air and containing 22,000,000 cubic feet of earth. At its base this monument, which was larger than the Great Pyramid of Egypt, covered 16 acres of land."[603] This monument is surrounded by another 120 magnificent temples and burial mounds.

All the predecessors of the Cahokian culture had extensive social organization, but it is within the Cahokian culture that evidence of this organization becomes very clear. Apart from burial mounds, there were temples, plazas and community meeting places. The second-largest Mississippian centre is from Moundville, Alabama. It stretched over more than 300 acres, had 20 platform mounds and a huge central town square. The hundred-acre plaza is thought to have functioned as a communal gathering place. It was enclosed by a palisade on all sides except for the side along the river. With time, we may be able to find out what took place in these plazas.

The Cahokia culture was mainly agricultural. They planted crops such as squash, sunflower, gourds and tubers. Maize (corn), which was not popular in the Hopewell culture, became a staple food. Instruments were employed to aid in agriculture. Sun

calendars, also named *woodhenges*, were made out of logs. The sun calendar at Cahokia consisted of 48 posts that ringed a 410-foot diameter circle. The Cahokian farmers used these instruments to read the seasons and to determine when to plant and harvest crops.

It was with the support of this extraordinary agricultural foundation that the Cahokia populations were able to fan out well beyond the Mississippi delta. The sedentary life and plentiful yield enabled the Cahokian people to indulge in extensive trade all over what would become the eastern United States. Their flamboyant material culture and exotic artefacts not native to the Mississippi region bear testimony to exchanges with other communities. Through the trading network, raw materials and finished products were exported and imported, resulting in a life style that, observers claim, parallels the Maya culture of Mesoamerica.[604] The Mississippi culture developed in stages that can be depicted in this chronological table:

Mississippian 1, Martin Farm Phase (AD 900 - 1000)
Mississippian 2, Hiwassee Island Phase (AD 1000 - 1300)
Mississippian 2, Pisgah Phase (AD 1000 - 1400)
Mississippian 3, Dallas Phase (AD 1300 - 1600)
Mississippian 4, Overhill Cherokee Phase (AD 1600 - 1819)
Mississippian 5, Mouse Creek Phase (AD 1400 - 1600)[605]

Conclusion

After the demise of the Adena culture and its mounds, a new culture, the Hopewell, took its place with more elaborate mounds that were shaped in the form of birds, animals and reptiles. In southern Ohio, the Fort Ancient people constructed the Serpent Mound around 1075 AD. These monuments were so magnificent that they came to be identified with the Hopewell culture. Scholars failed to realize that it was not these edifices, but rather the unifying features that made Hopewell so great. When the social

cohesion melted, Hopewell fell apart, but Indian culture and heritage did not evaporate. The Mississippian culture replaced the Hopewell culture, and the American Indian kept marching on. The Indian did not die away. When Columbus arrived on October 12, 1492, as depicted in the table above, the Indians were already living on the American continent. The reader's attention is drawn to the fact that the Mississippian culture was in existence when Christopher Columbus arrived on the American continent. Similarly, Maryland is adjacent to Virginia, so if Cabot did indeed reach Virginia, he could have encountered some members of the Hopewell or Mississippian Nation.[606]

Thick volumes have been written on the wonders of the Adena, Hopewell and Mississippi civilizations, including their economic organization and trade networks, fabulous artworks, religion, mounds, agricultural instruments and astrological systems. Yet it is important to point out how little we actually know about the Indians of the American continent. The Maya culture, for instance, developed a writing system consisting of elements of both phonetic and ideographic script. These scripts are "fully expressive of the most intricate and abstract thinking and [have] been compared favourably to Japanese, Sumerian, and Egyptian"[607] writings, though continuing to defy adequate or full translation. Most pathetic and ironic is that we know even less about the American Indian when the Europeans arrived.

Pre-European Contact Tribes of the United States

The American Indian did not fade away with the Cahokian culture. Rather, they survived and maintained their sovereign statehood right up to the arrival of the Europeans. As stated in the introduction, the Indigenous peoples of Ghana, Canada and the United States are not three groups of Indigenous peoples but rather are heterogeneous

multiple groups of Indigenous peoples in each location. Using an unavoidable approach that may distort the picture further, this thesis has selected one tribe from each geographic unit as a representative group. To eliminate or reduce the distortion resulting from the focus on details, the thesis will now furnish the materials for an in-depth assessment not only of the diversity within the selected units but also of their place among the peoples of the respective geopolitical unit.

All the nations in this section were self-governing when the Europeans arrived and qualify as sovereign states by any definition. All had their own spiritual traditions. While the Cherokee Nation was selected to represent the United States, it is better to start with the Mandans, who have a direct connection to ancient Indigenous cultures of the United States. The Mandans will be dealt with in detail to illustrate that the Cahokian culture, like its predecessors, served as the progenitor of many existing Indian tribes. If the Oklahoma monuments had not been looted and dynamited, it might have been possible to connect some of the present day tribes to the lost Oklahoma civilization. This tribe will also be used to illustrate many of the points canvassed in this thesis.

Not all Indigenous peoples were nomads; some were sedentary and practised agriculture. The arrival of the Europeans, in some instances, contributed to the unflattering characteristics that the Indigenous peoples of the Americas were forced to adopt. It is sometimes suggested that, since trade follows the flag and civilization accompanies trade, the Indigenous peoples of the world must surely have benefited from the presence of Europeans upon their soil. This may not be true. The history of the Mandans is a testimony to the fact that the Indigenous peoples generally suffered and did not benefit from colonization, and it is a history that is well documented.

The friendliness of these Indigenous peoples of America differs considerably from the reception offered by the Ghanaians, and the inability to professionalize the "middleman" position contributed to their demise. Ghanaians right at contact prevented the Europeans from trading directly with the natives. The newcomers had to trade through agents selected by the Chiefs. Their activities were monitored by the Chiefs and this "middleman" arrangement evolved into a profession so that, even during the colonial moment, the British merchants had to trade through these agents. The advantages that the Ghanaians gained by maintaining the 'middleman' arrangement are outlined above. The Mandans, on the other hand, initially acted as middlemen but did not prevent the Europeans from trading directly with the natives. This intercourse exacerbated the spread of diseases introduced by the Europeans. Direct involvement of the Europeans in the fur trade also minimized the economic potential of the Mandan people. It enabled the Europeans to form an alliance with the potential enemies of the Mandans, thus weakening the tribe's military power.

The Mandan Tribe of North and South Dakota

The Mandan lived in villages situated on high bluffs along the drainage system of the Missouri River, whose tributaries are the Heart and the Knife Rivers. These rivers are located in what is currently known as North and South Dakota. Ethnologists and scholars studying the Mandan subscribe to the theory that, like other Sioux peoples, they originated in the area of the upper Mississippi and the Ohio River Valley.[608] Archaeological research also supports the theory that the Mandan people migrated from the Ohio River Valley. Finally, early studies by linguists provide evidence that the

Mandan language may have been closely related to the language of the Ho-Chunk or the Winnebago people of present-day Wisconsin.[609]

That being the case, the Mandan may have settled in the Wisconsin region at one time. It will be recalled that the areas outlined above were the homes of the Adena and Mississippi cultures. The Mandan villages, composed of round earthen lodges surrounding a central plaza, as well as their sedentary lifestyle in an area occupied mainly by nomadic tribes, reaffirms their link to the Adena and Hopewell cultures. Furthermore, unlike many neighbouring tribes in the Great Plains, who were fishing, hunting and gathering societies, the Mandan were mainly an agricultural society. That means that it is possible that the Mandan learned farming somewhere else and that the gathering and hunting opportunities that the Mandan came to find did not stop them from settling in a permanent location. In the rich fields that surrounded the villages the Mandan demonstrated their horticultural skills. They grew and harvested crops, including beans, corn, squash and tobacco.

Women played a major role in the society. The lodges were designed, built and owned by the women of the tribe, and ownership was passed through the female line.[610] They also gathered wild plants and berries while the men hunted buffalo. In contrast to other tribes in the region, who followed the herds of buffalo, the Mandan employed a religious ceremony that presumably attracted the buffalo to their villages. This ceremony, known as the Okipa,[611] was thought not only to attract buffalo but also to energize the world for another year. History has it that the Mandan converted the Hidatsa from a nomadic to a sedentary life and taught them agriculture. The Hidatsa then built villages north of the Mandan, along the Knife River. The two tribes remain friends to this day.

The Mandan People

The Mandan were slightly lighter in colour than their neighbours and there were occasionally blue-eyed people within the tribe. Some speculate that those features, together with their lodging and religion, were remnants of Viking explorers, who allegedly left the Kensington runestone as evidence of Viking contact with the Plains Indians.[612] Similarly, other Mandan features have invited theories of early contact with other European and Mediterranean nations. In 1796, for instance, the Welsh explorer John Evans visited the Mandan, hoping to establish a link between the Mandan and Welsh languages. He lived with the Mandan during the winter of 1796, but was unable to find any Welsh influence within the Mandan language.[613] Moved by the same zeal, Prince Maximilian of Wied, in the 1830s, recorded Mandan over the other Siouan languages and compared them with the Welsh language, but found no connection.

Socially, the Mandan were traditionally divided into 13 clans with a successful hunter and his kin as the nucleus. Each clan cared for its own, especially orphans, the elderly and the sick, until death. Within each clan was a spiritual leader who was in charge of a sacred bundle consisting of a few gathered objects thought to hold sacred powers. Those in possession of the bundles were believed to have sacred powers bestowed on them by the spirits.

The religious traditions of the Mandan were extremely complex. Their mythology revolved around a supreme being known as Lone Man.[614] Lone Man was involved in many of the creation as well as one of the inundation myths. To the Mandan, the world was created by two rival deities, the First Creator and the Lone Man. The First Creator was ascribed the honour of creating the lands to the south. Its creation included hills,

valleys, trees, buffalo, antelope and snakes. To the north, Lone Man brought into being the Great Plains, domesticated animals, birds, fish and humans. The first human beings lived underground near a large lake. The Missouri River separated the two worlds that the supreme beings had created. Some of the humans emerged from under the ground by climbing a grapevine, thus discovering the two worlds created by the deities. The adventurers returned underground to share their experiences with those left behind. The curious decided to accompany the adventurers on their second trip but the grapevine succumbed under the weight of the masses and gave way, leaving half of the Mandan underground.[615]

According to the Mandan's traditions, each person possesses four separate immortal souls. The white soul was seen as a shooting star. The second soul, light brown in colour, was portrayed as meadowlark. The third soul, named the lodge spirit, remained at the site of the lodge forever. The final soul was black and after death would move away from the village. These immortal souls existed side by side with the living in their own kingdom, farming and hunting as the living did.[616]

The most distinguishing aspect of Mandan spirituality was the ceremony of Okipa, first recorded by George Catlin. The ritual opened with a Bison Dance followed by a number of difficult trials through which warriors demonstrated their courage in the hope of gaining the approval of the spirits. This was achieved when the warriors successfully completed the ordeal and carried with them the honour of the spirits. Completing the ceremony once was not an easy achievement and doing so twice gained everlasting fame within the tribe. The only one known to have completed the ceremony

twice was Chief Four Bears (Ma-to-toh-pe).[617] The ritual was discontinued (perhaps due to Christian influence) in 1889 and resurrected with some modifications in 1983.[618]

The pre-European contact Mandan, being sedentary agriculturalists, were able to trade their corn for the meat procured by their neighbours. The population of the Mandan in the nine villages on the Heart River during this period was estimated at 15,000 to 20,000.[619] The reader should keep this figure in mind for comparison with the bottomed-out figure of approximately 125 people[620] after contact, to appreciate the "benefits" of colonization. The Mandan will be left here, to be picked up at the point of European contact when the first European, the French Canadian trader Sieur de la Verendrye, visited them in 1738.[621]

The Blackfoot Tribe

The Blackfoot were selected to reiterate the fact that, despite the nomadic life, the Indigenous people maintained the concept of territoriality. Indigenous peoples had well-structured governments that deserve recognition as sovereign nations. It should be noted that it was the Europeans who reintroduced horses into North America, so that the image of the "warlike" Blackfoot on horseback was, in part, a product of the arrival of the Europeans. The friendliness of the Indigenous peoples of America varies considerably from one Indigenous group to another and, generally, the Indigenous tribes that resisted colonization the most fared relatively better – both politically and physically.

The origin of the name "Blackfoot" still invites debate. According to one theory, it derives from the fact that the footwear of the Blackfoot Indians became blackened by the soot from the burnt forests through which they had to travel to reach their destination.

That explanation is not plausible, judging from the vast area covered by the tribe.[622] A more reasonable etymology could be the black moccasins of their ancestors.

Often described as warlike and aggressive, the Blackfoot cannot be traced directly to the Adena and the Hopewell cultures. However, their linguistic affinity to the great Algonquian nation establishes their origin as the east. They constituted the westernmost extension of the Algonquian nation. They came ahead of the Mandan and established themselves as an important tribe of the Northern Plains.

The Blackfoot consisted of three-member confederacy, namely the "Siksika," or Blackfoot proper; the "Kaina" (Kæna), or Blood; and the "Pikûni," or Peigan.[623] The Blackfoot controlled most of the enormous territory extending from the southern headwaters of the Missouri River in present-day Montana to southern Saskatchewan (Canada) and to the Rocky Mountains from west of what are now known as the Dakotas. Like the other tribes of the plains, the Blackfoot hunted the buffalo, which supplied almost all their needs.

The Blackfoot of the west are now settled on three reservations – two in the province of Alberta and one in the state of Montana. Some still reside in the east.[624] As is generally the case, population estimates are often skewed to suit the interests of the statistician. The estimate made by Mackenzie[625] in 1790 of 8,500 people, including 2,250–2,550 warriors, may not include the Blackfoot in the United States. The author also wonders if Mackenzie realized that the Blackfoot stretched as far east[626] as present-day Quebec.[627]

Socially, the Blackfoot were a typical plains tribe.[628] They lived a somewhat nomadic life. Their dwellings consisted of villages constructed from skin tepees. The

villages were moved from time to time in synchrony with the movement of the buffalo. It must be stressed that the buffalo followed a prescribed pattern in a prescribed area, so the Blackfoot were not roving all over the place.[629] Thus each tribe or sub-tribe claimed possession of a defined territory. Encroachment on these territories resulted in conflict. The Blackfoot were skilled conservationists and used every part of the buffalo to avoid waste. They did not grow much except tobacco.

The advent of the European brought horses, guns and other materials, enabling them to expand their hunting areas in order to support the fur trade. The Blackfoot had a well-structured government, including a military regiment with different ranks and uniforms. Their armaments included bows, knives, clubs, lances and shields. The women played a major role in the society, managing the affairs of the tribe. They made the dresses from deerskins, and were involved in making tents, moccasins and tools.

Spiritually, the principal deity was the sun,[630] and a supernatural being known as Napi, or "Old Man." The central feature of the Blackfoot religion, the Sun Dance,[631] was held annually in the summer season and included dancing, singing, drumming, the experience of visions, fasting and, in some cases, piercings or flesh offerings. A sun dancer is committed to dancing for four years, each of which represented one compass direction. The ritual is a prayer of great self-sacrifice for one's community and the nation as a whole. The Blackfoot will be revisited at European contact.

The Crow Nation

Apart from the other reasons set out above for selecting the tribes in this section, the Crow tribe was chosen to illustrate how the Europeans erred in terms of how they described the people that they encountered. The Europeans cannot be held directly

responsible for the disappearance of the Large-Beaked Bird, but the increase in population and extensive farming may be a contributing factor. The banning of the Sundance is a testimony to European interference with the Indigenous culture. The relationship between the Crow and the other tribes of the plains supports the belief that despite their life styles, the Indigenous peoples had a concept of territoriality.

The real name of the Crow Tribe is Apsaalooke or Absaarokee,[632] which means "Children of the Large-Beaked Bird."[633] The bird, perhaps now extinct, was described as a fork-tailed bird resembling the blue jay or magpie. The word "Crow" was the European interpretation of the sign language used by the Indigenous people to signify a bird flying (representing themselves). The bird was large-beaked, but the Europeans mistook it for the crow.[634] The ancestral tribe of the Crow and the Hidatsa migrated from east of the Mississippi River and the Great Lakes. This places the origin of the tribes in the region of the Adena and the Hopewell cultures. The legend that the Crow left their earth lodges and material culture behind around 1500 AD[635] further strengthens the evidence linking the Crow to the Hopewell culture. The missing link is the motive for their migration across the rugged terrain into life in tepees on the Western plains.

Upon arriving on the plains, the Crow roamed freely over vast stretches of land from west of modern-day Dakotas to the eastern slopes of the Rocky Mountains. The northern range extended to what is now called southern Alberta and Saskatchewan in Canada, and the southern limits covered present-day Montana and Wyoming in the United States. The Crow shared this land with other plains tribes, each respecting one another's territory.[636] The sacred bison was the life of the Crows and the other tribes on the plains. The bison provided almost everything that they needed for survival and more.

From it they got their meat, oil, clothes, shoes, lodging, tools and weapons, as well as Crow spirituality. The bison acted as an intermediary through which the First Maker, the Supreme Being, could address and be addressed.

"The Sweat Lodge" or "Sweat Bath,"[637] a symbol of Crow spirituality and the most important of Crow rituals, was used for purification. It took place before and after every other major ritual or as a stand-alone ritual,[638] usually before and after hunting. The set up is a sauna heated by pouring water over hot stones within a small dome built with tree branches and animal skins. The entrance of the lodge always faces the east, which was believed to be the direction and source of power, life and wisdom. The interior of a Sweat Lodge represents the womb of Mother Earth, its darkness denoting human ignorance, the hot stones portraying the coming of life and the hissing steam standing for the activation of the creative force of the Universe. Most of the Crow rituals, healing and ceremonies are performed by medicine men, healers and visionaries endowed with the secrets of nature.[639] These ceremonies included the Sun Dance[640] and the Sacred Pipe Rites. The Sun Dance, officially banned by the government from 1904 until the Presidency of Jimmy Carter, and tobacco rituals are still practised with enthusiasm.[641] The thesis leaves the Crow tribe here until we meet them again in the section on European contact.

The Omaha Tribe

The word "Omaha" means "those going against the wind or the current." Together with the Kansa, Quapaw, Osage and the Ponca, the Omaha constitute a part of the Dhegiha group of the Siouan family. Their linguistic affinity traces them back to the Ohio and Wabash rivers as early as 1500. The Omaha are another tribe that may be

linked to the Hopewell culture. Their earth lodges, similar to the Mandan lodges, gives them away as descendants of the Hopewell people. The bark lodges were usually elliptical in form and were intended principally for summer use. It appears that the Omaha combined sedentary and nomadic life because they also constructed skin tents or tepees, which were used for travelling or while hunting buffalo. Another giveaway is their pottery craftsmanship: since these skills were not common to the plains tribes, they must have originated in the east. It appears that the sedentary life gave way to the nomadic life, because these skills disappeared after 1850.

The Omaha were very crafty and resourceful. They made mortars by burning holes in pieces of carved wood and converted buffalo horns into spoons. Tradition has it that the Omaha made a brief stop in Iowa on their way to Bow Creek in Nebraska. This could have occurred prior to 1673, since the Omaha could be located at their present spot on the map designed by Marquette.[642] The government of the Omaha was headed by two chiefs selected mainly from the Hangashenu sub-tribe, though they could also be from another sub-tribe; these principal chiefs supervised the activities of other sub-chiefs. The Omaha certainly met both the Austinian definition of sovereignty and Lawrence's requirement of control over territory.

The Wichita Tribe

History[643] places the Wichita Tribe in the Great Bend area of the Arkansas River in what is now south-central Kansas.[644] Judging from the distance and the 1541 date, it can be presumed that, if the Wichita were related to the Hopewell people, then the Wichita must have separated from the Hopewell long before the Mississippian or Cahokian culture. This is interesting because artefacts found in the Mississippi area

suggest some connection between the cultures of the Mississippi delta and the Wichita tribe. Archaeological findings tend to point to trade with, rather than membership in, the Hopewell culture. The items found include buffalo robes.[645] Since buffalo is found on the western plains, it stands to reason that the manufacturers were from the west. Another item that points to trade is the bois d'arc wooden bows.[646] The bois d'arc tree is found mostly in the west.

The conflicting evidence is that early European explorers who visited the Wichita recounted that, even though they sometimes acted like Plains Indians, the Wichita did not look much like the Plains Indians. For one thing, they were agricultural and semi-sedentary but, most importantly, their physique was quite different. The Wichita were darker, shorter and stockier.[647] Another curious thing about the Wichita is that they did not eat fish even though they lived around several big rivers.

In any event, what is significant is that by the time Francisco Vasques Coronado encountered the Wichita, the tribe was well settled. He recounted: "There are not more than 25 towns, with straw houses, in it, nor any more in all the rest of the country that I have seen and learned about...All they have is the tanned skins of the cattle they kill, for the herds are near where they live."[648]

Coronado also indicated that the Wichita practised agriculture with corn as one of their main crops. Other writers add pumpkins, squash and beans to the list of crops that the Wichita harvested. The Wichita even planted plum trees.[649] Legend has it that the Wichita called themselves "Kitikitish,"[650] which means "raccoon eyelids" and stems from a former custom of tattooing lines upon the eyelids, which was practiced among the males. Socially, the Wichita share the Matri-Hawaiian kinship system.[651] They were ruled

by chiefs and sub-chiefs, and had professional warriors. Their spiritual leaders, who handled spiritual matters, were called shamans. The Wichita qualified for inclusion in both the Austinian definition of sovereignty and Lawrence's requirement of control over territory, so why were they not members of the Family of Nations? The only logical reason is that they were not Christian.

The thesis will revisit the Wichita at European contact. There are numerous American tribes that are very popular and have a great deal written about them. Since their fields have been thoroughly ploughed, the readers will be left to their own resources so as not to bore them. These tribes include: the Apache, Pueblo, Navaho and the Six Nations Confederacy. The foregoing part of this work has established the link of different Indigenous tribes to past civilizations. It has also established an interrelation between some tribes and some patterns of migration. There is therefore an adequate foundation to build the structure of the nation that has been selected to represent the United States – the Cherokee.

The Cherokee Nation

The derivation of the name of the Cherokee tribe is somewhat related to the first theory of the origin of the Cherokee people. It stems from

> "Chalaque" probably from the Mobilian trade language (a corrupted Choctaw jargon used by the tribes of the Southeast), probably meaning "cave people." This word in the southern Cherokee dialect was pronounced "Tsa-la-gi" but in the eastern area pronounced "Tsa-ra-gi," from which the name "Cherokee" is derived.[652]

The Cherokee have at least two theories of their origins. Those at the base of the Great Smoky Mountains believe in the Berengian theory. They claim that their ancestors followed large animals over "a land bridge from Asia when the seas had frozen into

glaciers during the last Ice-age."[653] The tribes en route to what is now known as the American continent dwelled in a series of coastal caves and rustic abodes. They hunted large animals, using spears with stone tips. They used the animal hides for "clothing, shoes and blankets,"[654] and supplemented their meat-laden meals with fish, wild fruits, and vegetables. Fire, the centre of life, also became the Cherokee word for "home."[655] The predecessors of the Cherokee carried the fire from place to place and used seashells for "knives, tools and utensils. Colourful feathers, gems and shells were strung with animal hide and worn for identity."[656]

The Cherokee section of the migration party ended up along the Mississippi valleys. Clans united to form villages for protection against other tribes and wild animals. They carried on the practice of fishing, hunting and gathering. Along the fertile Mississippi banks, they developed the skills for making pottery. Some practised agriculture. They cultivated seeds, grew tobacco and built houses from wood and mud. They were inventive and created dugout canoes, which assisted them in developing cultural and commercial networks. With time, these networks evolved into nations of people who shared certain customs; these nations grew along the tributaries of the Mississippi, including the Tennessee, Ohio, Missouri, Arkansas and Red Rivers. A network of roads traced the rivers and streams to unite the Cherokee nations. Commercial activities blossomed along the Great River from "the Rockies to the Appalachians and down to the Gulf of Mexico."[657] Illinois became the centre of commercial activities, with large cities springing out where the big tributaries merged.

The second theory of origin is folklore, but has some merit nonetheless. It is found in "The Legend of the Keetoowah's."[658] "The nucleus of the ancient Cherokee

nation is recorded to be Ani-Kituhwagi, 'the people of Kituhwa.'"[659] Kituhwa is near the modern city of Bryson, New Jersey. The Europeanized version of Kituhwa, Keetoowah is the name used by a federally recognized band.[660] The members are predominantly full-blooded Cherokees some of whom practice the Keetoowah religion. Legend has it that the Keetoowah originated from islands in the Atlantic Ocean to the east of South America. Evidence to support the claim stems from the fact that Cherokee basket and pottery patterns resemble South American and Caribbean crafts more than similar crafts of the people of southeastern U.S., where they are presently located.[661] It may well be that the migration from the north did not stop at the Gulf of Mexico, but continued into the islands. Then, after a while, the Keetoowah may have retreated to the main continent after adopting the pottery skills of the people of South America and the Caribbean.

The cultural achievement of the Cherokee was touched on briefly in Part I, under "The Hopewell Treaty." They were well organized, and had progressive system of inheritance as well as for the election of chiefs and elders. Cherokee women had property rights when English women could only dream of being independent and owning property. Cherokee citizens were able to vote at the age of 18, long before the United States allowed those of the same age to vote at the time of the Vietnam War. The Cherokee appear to have established a confederation or federation for governing their nation. The elected village chiefs led and represented the village at the tribal level. The Cherokee legal system employed the principle of conflict resolution as opposed to the notion of "justice" or "punishment" in the Western sense of the words. This system is based on the culprit admitting responsibility (as opposed to being found guilty) for wrongful actions and making restitution. Restitution is the responsibility of the culprit's whole community

– that is, in most cases the culprit's community ensured that the victim received restitution, compensation or satisfaction. The Cherokee system aimed at keeping balance and "harmony in the spiritual and social world."[662]

The Cherokee flourished before and well after Columbus discovered America. As will be seen in the section on "The Cherokee at Contact," when Hernando de Soto travelled the Cherokee roads into the Cherokee villages in 1540, woe befell the Cherokee and, like the other Indigenous peoples of America, their population dwindled.

The Cherokee nation and the other examples provided are but a tiny portion of a great multitude of extraordinarily sophisticated, talented and well-organized societies with highly developed socio-political systems. Contrary to the popular myths branding American Indians as poor and hungry wandering nomads, most of these Indigenous peoples would have had to have been sedentary and equipped with resource-management skills to be able to build such magnificent monuments and political and economic structures. One Indigenous representative lamented that "[i]t was only after the white man entered and took over much of the fertile lands that the Paiute were forced to live their lives on land that the white man did not want."[663] It is worth repeating and expanding on the words of the eminent geographer Carl O. Sauer, who remarked that "[f]or the most part, the geographic limits of agriculture have not been greatly advanced by the coming of the white man. In many places we have not passed the limits of Indian farming at all."[664]

While it would take a whole book to support his words, we have provided enough examples to demonstrate that Sauer's assessment can be proven. At the same time as the quantity of farm products has increased, the quality and variety of crops have diminished

considerably. Many plants have become extinct, as have many tubers, flowers and seeds. Moreover, the Indigenous tribes that practised agriculture often grew enough to go around. There were no hungry street people. One of the main concerns of this thesis is to prove that North America was not a vacant land when the Europeans arrived. To that end this thesis has done more than it set out to do. The table below will help the reader search further and become an apostle.

Conclusion: Common Origin in Africa

The reader has been briefed on the pre-European contact societies in Ghana, Canada and the United States. Apart from their common ancestry, all three were linked by the colonial moment. From the Ghanaian point of view, the Europeans invented many things but did not invent statehood, nationhood, government or sovereignty. Even before the Europeans set foot in Africa, "sub-Saharan Africa was home to a series of great civilizations [including] Mali, Bornu, Fulani, Dahomey, Ashanti, Songhay, Zimbabwe [and] Axum."[665] These powerful empires made their mark on the world. The Ashantis had a federal system of government without the help of the Europeans.

> No one who has seen the underground churches of Lalibela in northern Ethiopia or the magnificent bronze and brass Ife sculptures of Western Nigeria can doubt the extraordinary potential of African technology and creativity. For much of its history, Europe had little to surpass these achievements.[666]

Similarly, the Aztec civilization and the Adena, Hopewell and Mississippian cultures all predated the entry of the Europeans into the Americas. It cannot be denied that wherever the Europeans went, they encountered self-supported living beings with whom they interacted. These people were not islands, but lived in organized societies. They survived without the Europeans and they might still be there, perhaps enjoying a

better life.[667] Unfortunately, the Indigenous peoples were not allowed the luxury of building on their own skills and resources. From the little that is left of Indigenous artifacts, it is apparent that the world knows little about Indigenous civilizations that served as the progenitors of many existing Indigenous tribes. We know that the Aztec civilization was destroyed – its riches plundered and its records burned. If the Oklahoma monuments had not been looted and dynamited, it might have been possible to connect some of the present-day tribes to the lost Oklahoma civilization. These barbaric acts are part and parcel of political mythology.

Some of the notions about the Indigenous peoples are simply not true. The thesis has just proven that Indigenous peoples are not homogenous, but heterogeneous to say the least. Not all Indigenous peoples were nomads but many were sedentary and practised agriculture. The next three sections will prove that in some instances the arrival of the Europeans contributed to such unflattering characteristics as "warlike," "savage" and "wandering" that were used to brand the Indigenous peoples as "uncivilized." These sections will further confirm the hypothesis that, despite the introduction of European trade and the so-called "civilization" that followed these trade routes, the Indigenous peoples of the world did not benefit – and in fact suffered – from the presence of the Europeans. In pursuing the goals of this thesis, these sections will sketch the conscious and unconscious forces that moulded the types of sovereignty that emerged after colonization. They will deal with the interaction at the point of contact, showing that the motives of the newcomers were similar in all the three nations and that, even though the Indigenous Africans were deemed inferior and subjected to brutal treatment, they stood their ground and eventually retained some semblance of true sovereignty. This leads to

the conclusion that, among other things, it was the type of reception and the response of the Indigenous peoples that determined their fates.

PART III: THE CONTACT PERIOD

Introduction

The fact that the Europeans came to find well-established sovereign states in the territories that would become Ghana, Canada and the United States is clearly shown in the previous sections. This section will link the past to the governing dynamic transformation of events and experiences from the Ghanaian perspective to reveal the unconscious forces that manifested themselves within the colonizing moment. The aim of this section is three-fold. The first is to establish that the colonized nations did not benefit much from colonization; rather, they suffered overall. The second is to stress the point that the reception that the Europeans received in Ghana was very different from the reception that they received in what would become Canada and the United States. The third is to outline the factors that enabled the colonizers to take advantage of the Indigenous peoples and to show how that led to the varied forms of sovereignty that emerged from the colonial moment.

Unlike the Indigenous peoples of the Americas, the Indigenous peoples of Ghana had been baptized by the pain of foreign colonization in one form or another prior to the arrival of the Europeans. They had learned to deal with foreign invasion and learned the tricks of commercial trade. Since economic force played a crucial role in colonization, the significance of this skill cannot be underestimated. European competition, the climate, the topography and insects all assisted the Ghanaians in controlling the advancement of the Europeans. Nonetheless, the Europeans were able to subdue and colonize them just as they colonized the Indigenous peoples of the Americas. The notion

that the colonized nations benefited from colonization is a major distortion of historical reality.

The Indigenous peoples of Ghana, Canada and the United States all suffered as a result of colonization. In this section, the thesis will show how the Indigenous population in the Americas dwindled to the point that their political input and nationhood in contemporary Canada and the United States has become a subject of debate. The sovereignty that evolved out of the colonial moment was undoubtedly different in Ghana than in the Americas. This may in part be due to the pre-contact setting but, most importantly, to the resistance offered by the colonized. All the colonized nations resisted this process, but Ghana's resistance was strong and sustained. This thesis will show that the friendliness of the Indigenous peoples of the Americas affected the resistance to colonization and that the diseases introduced by the Europeans dealt the final blow to their ability to resist.

Ghana – This Is Our Land[668]

The Portuguese in Ghana

The Europeans were neither the first nor the only ones to interact with the Indigenous peoples of West Africa. As far back as 600 BC, the Egyptian King Necho II is believed to have commissioned a group of Phoenician sailors to navigate their way around the African continent. With respect to Europeans, archaeological specimens depict the presence of Greek sailors in the region around 200 BC. But it was the Portuguese who most profoundly interacted with and influenced the cultures and lives of the West Africans. The Portuguese established contact with the Indigenous peoples of Ghana and extensively explored the West African coast mainly for political and

economic reasons. Having been denied power in Europe due to its small size, Portugal expected to compensate for its lack of power in Europe by displacing the Arabs, who had become the middlemen that maintained a monopoly over the trade between Asia and Europe. Of course, West Africa was also rich in grain, slaves and gold – all resources that could be exploited. Regardless of the motivating factors, the Portuguese hoped to use their lucrative position to bolster the prestige of Portugal.

This adventure was not the first interaction between the Portuguese and the West Africans. There were thousands of Moorish slaves in Portugal by the 1500s, so the slave trade was not a new commercial enterprise. Papal grants[669] to Portugal of title and trade monopolies on the African Gold Coast provided the impetus for the explorations of Africa under the auspices of Prince Henry the Navigator, who helped finance colonization and fortification of the West African territories and islands. These explorations began in 1419 and culminated in the arrival of the Portuguese in the Azores in 1439. This was followed by the explorations of the Cape Verde area between 1436 and 1460. During the middle of the fifteenth century, Portugal established numerous fortified colonial trading posts along the West African coast, the most important being the Elmina Castle in the country now known as Ghana.

(Please see over for image of Elmina Castle.)

Apart from the political and mercantile influence, there could have been other motives for the exploration of West Africa. It is difficult to establish whether it was the yearning desire to tap into the rich Muslim slave trade[670] or the crusading enthusiasm

against the Muslims themselves that led to the capture of the strategic harbour of Ceuta by the Portuguese.[671] The Muslims used the port as a bridgehead for invasion across the Straits of Gibraltar onto the Iberian Peninsula, and the port also served as part of the trade route for gold and slaves. Regardless of the motive, it provided an alternative route for the Portuguese into the West African forest, which was not virgin territory for trade and commerce. Pre-European civilization in West Africa saw gold, nuts, cola and slaves being sent in exchange for Venetian beads and Tripolitanian silks across the Sahara to the Mediterranean. That civilization centred around Timbuktu.[672] The Ghana, Mali and Sudanese empires all had access to the West African forest. The trans-Sahara trading network established by these empires lasted into the nineteenth century. During a visit to the northern Gold Coast (now Ghana) in January 1876, a young French trader by the name of M. J. Bonnat was very impressed by the Salaga market, where he saw caravans from Timbuktu, Lake Chad, the Niger and Senegal. He decided to set up a chain of trading stations along the Volta River.[673]

Thus, the coastal entrance provided access to an already existing and lucrative market for the Portuguese. It is important to note that, after nearly 200 years, the Portuguese were not able to penetrate the interior of the Gold Coast,[674] much less settle in that country. The main factor[675] was the resistance of the Indigenous peoples of the Gold Coast, but the dogfight among the Europeans did not help either.

Overthrow of the Portuguese by the Dutch

This section is significant in three ways. It will confirm:

A) The struggle among the Europeans for the control of West Africa;

B) That the Dutch attempted to settle in the Gold Coast (failed cotton plantations); and

C) That the Dutch, like their predecessors, could not penetrate the interior of the Gold Coast.

The Dutch merchants built their first trading post at Moure, under the nose of the Portuguese.[676] It is not surprising that the Portuguese attacked them soon after in 1610. The Dutch stood their ground and in 1612 built Fort Nassau to serve as the headquarters of the Dutch United West India Company, a vivid reminder of the dominance of the Dutch Navy during the earlier decades of the seventeenth century. After several abortive attempts, the Dutch were able to capture the Portuguese stronghold, Elmina Castle, in 1637.[677] The Dutch pursuit did not rest with the fall of Elmina. They raided the remaining Portuguese fortifications and later took the Swedish forts by force. In the later half of the eighteenth century, the Dutch experimented with cotton plantations on the Gold Coast. With the abolition of the slave trade in 1807, the importance of the fortifications decreased considerably. So did the dominance of the Dutch in the Gold Coast. It should be noted that, already in the 1660s, the Dutch forts were falling to the English though most of the forts were returned to the Dutch in the treaties that followed. The successor to the Dutch United West India Company, the GWIC, went bankrupt and the forts came under the Dutch Ministry of Colonial Affairs. In the Sumatra Treaties of 1872, the Netherlands ceded its property and claims on the Gold Coast to Britain in exchange for the Sultanate of Aceh and the sum of 47,000 Guilders.

Summary and Observation

The central issue at this juncture is whether it was the pre-European contact period or the fact that the Portuguese and the Dutch were present in Ghana before the British that created an impact that resulted in the different post-colonial sovereignty

enjoyed by the Indigenous peoples of Ghana as compared to that of the Indigenous peoples of North America. The answer is a guarded no. If anything, the contact with the traders from the Sudanese empires had more impact. These traders sharpened the commercial skills of the Indigenous peoples of Ghana prior to European contact. They showed the Indigenous peoples the tricks of the trade and made them aware of the brutality that accompanies subordination.

In comparison, most of the trading prior to contact was among the Indigenous tribes of America, who have relatively similar beliefs and comportment. As we shall discover, the English and the French were not the first nations to attempt to colonize what would become Canada or the United States. The Norse from Greenland and Iceland also attempted to colonize Canada. The Norwegians and Germans in Canada, like the Portuguese and the Dutch in Ghana, were compelled to limit their presence to trade. These prior encounters by the Norwegians and Germans did not stop the British from settling in Canada. The Portuguese and Dutch presence in Ghana could have set a pattern to be followed by the British, but the British could not have been able to do things any differently. The British would have encountered the same adverse conditions as the Portuguese, who were the first to arrive. As a matter of fact, the Portuguese and Dutch establishments could have been a blessing for the British, since the Portuguese and Dutch laid out the groundwork for survival and left behind fortified abodes for the British. There is no doubt that the European traders would have liked to settle in Ghana, just as their counterparts in Canada or the United States. One anxious colonist wrote in anguish that the "Tribes were the 'rightful owners of the soil in the Protectorate,' and the Chiefs were unlikely to agree that any change of ownership might be for their own good."[678]

Thus it was not the lack of interest in settlement by the British traders,[679] but other adverse factors that prevented settlement. The most important factors against settlement are outlined below.

A) The strongest reason for concluding that the presence of the Portuguese and the Dutch made little difference is the strength of the West African nations[680] and the resistance of the West African tribes to colonization.[681] The Asantes, for instance, engaged the British in seven wars from 1826 to 1894 and resisted the British until 1901.

B) The refusal of the Indigenous people to give up the position of middlemen.

C) Poor navigable rivers into the interior, which restricted the European ships to the coastline.

D) Insect-borne diseases to which Europeans were not immune.

E) The slave trade, which had two dimensions. Most of the slaves were captured in wars among the tribes themselves. If the Europeans had settled in the war zones, they would have been caught in the crossfire. If the Europeans had undertaken to partake in the "slave wars," they would have antagonized the middlemen and the Indigenous tribes could have united against them. That would have been costly and probably would have led to a situation similar to Mexico.

F) Population density. As the Asante told the British, "If you kill a thousand, a thousand more will come." However, this factor had only limited effect since that did not stop the whites from settling in South Africa and Zimbabwe (Rhodesia).

G) Stiff competition among the Europeans due to the fact that West Africa was easier to access from Europe. From the earliest European contact, just as in Canada and the

United States, it was economics, rather than appropriation, religion or politics, that drove the Europeans across the sea to West Africa.

> It was trade that first brought white men to the coast of Guinea.[682]
>
> The Portuguese, the French, the English, the Dutch, the Swedes, the Danes, and the Brandenburgers came one after the other in search of gold and slaves. In return they brought beads, metal ware, and cotton goods; later, firearms, spirits, and other products of a more technologically advanced economy.[683]

Trade is a two-way street and requires buyers and sellers. Therefore, the Europeans needed the Africans in order to advance their economic interests. The situation in Ghana aptly illustrates the importance that the need of the Indigenous people in European economies played in the survival of the natives. With care, so as not to minimize the important role that the missionaries played in the abolition of the slave trade as well as their subsequent benevolent acts to the liberated slaves, this thesis suggests that the slave trade was not halted for religious reasons but as a result of economic factors. After all, the passage of the *Navigation Acts*, which forbade the importation of slaves into English and French colonies, was purely an economic move. It was an attempt to undermine the Dutch success as slave traders.[684] The Dutch occupied the role as middlemen for other European counties and the denial of this role led to heavy losses by the Dutch, ultimately resulting in the collapse of the Dutch dominance in West Africa. In fact, the anti-slavery movement scored its first major victory during the Napoleonic Wars, when the British government outlawed the transport of slaves in ships as part of its economic war against France's "Continental System."

But the main force behind the abolition of the slave trade was that the slave trade had reached the point of diminishing returns. The 1842 Select Committee on West Coast

of Africa, included in its Report and Minutes of Evidence, among other things, this statement:

> Moreover the exertions and improved quality and system of our Cruisers, the depressed condition of the sugar-planters of Cuba and Brazil, the extension of legitimate traffic, and other causes, have succeeded in diminishing altogether the amount of Slave Trade.[685]

This thesis contends that among the "other causes" mentioned above is the fact that in Africa the population was decreasing to the extent that labour for the production of minerals, palm oil and other raw materials was in short supply.[686] The impact of this low production on the Industrial Revolution was becoming obvious. The European nations had the option of continuing with the slave trade and watching their machines idle, or of abolishing the slave trade in exchange for raw materials. The Report on the Economic Agriculture of the Gold Coast during that era confirms this hypothesis:

> Palm oil was the major export, but the supply fluctuated considerably, and even in the best years the export figures never approached those from other parts of the West Coast. The trees were not deliberately cultivated; but the gathering, extraction, and transport of the oil required a considerable amount of labour, and the trade seems to have been more widespread throughout the community than the jealously guarded slave traffic had been.[687]

The comparison of the slave trade to the palm-oil trade is not accidental, as both trades competed for humans. The cost of transportation was also rising as the population dwindled, while "[i]nland trade, thanks to the tsetse fly, had to rely on the only available beast of burden, 'man, the weakest and most costly of all.'"[688]

Industrialization also needed Africans for other kinds of economic growth, since "[g]rowing industrialization, especially in the cotton industry, was providing an alternative outlet for the capital accumulated in the slave trade. West Africa came increasingly to be regarded as an important market for British manufacturers."[689]

Meanwhile, in North America, farm mechanization proved to be cheaper than the use of slaves. A similar process is going on in the automobile industry as we speak: many automobile and automotive-accessory manufacturing towns have turned into ghost towns, while Cleveland and Detroit are slowly becoming ghost cities. Compounding the inefficiency of human labour was the increase in the number of slaves who died en route to America, which made the acquisition of slaves ever more expensive. Adding fuel to the abolition of slavery engine were the increasing revolts by the slaves in America, which made the use of slaves even more expensive and occasionally dangerous. At the same time, slave labour in West Africa itself was getting quite costly.[690] In brief, money is not everything, but financial considerations, by and large, dictated the European interests. If genocide was the easiest method of appropriating the land and getting the wealth, then so be it. If settlement was the answer to riches, let it be done. And if using the Indigenous peoples was the most effective way of getting rich, then keep them under subordination. With that background, let us turn to Canada.

Canada – Bienvenue

The friendliness of the Indigenous peoples of Canada is borne out in the works of Cartier.[691] When Cartier erected a cross on their soil, they only offered passive resistance. Ghanaians would have cut the cross down as they did with the statue of St. Anthony at Elmina. The Europeans who put up the statue were lucky to escape with their lives. The Indigenous peoples of Newfoundland were given a taste of foreign interference around 1000 AD, when the Norse from Greenland and Iceland tried to settle in their territory, but that did not seem to harden them against colonization. Another unconscious force that manifested itself within the colonizing moment is the role of religion in the colonial

process in Canada. The first reservation, for instance, was a religious project[692] and the effect of the residential schools was most severe in Canada. The percentage of Indigenous peoples in Canada, as well as their sparse distribution, resulted in their inconsequential role within the political system, which will be covered in part V.

Arrival of the Europeans in Canada

When Cartier (1534) arrived on the land that would later be known as Canada,[693] he commented that the Indigenous peoples "as freely and familiarly came to our boats without any fear, as if we had ever been brought up together."[694] It appears that the kindness and extraordinary capacity for hospitality of the Indigenous peoples[695] was taken for granted by Cartier and his men. Without permission from the Indigenous peoples, Cartier's men erected a 30-foot cross in Gaspé near the harbour entrance. This occurred on the July 24, 1534, just a week after the arrival of the visitors.

The chief of the tribe, of course, expressed his displeasure in no uncertain terms. He and his entourage approached Cartier's ship, but not as close as they usually did. Instead of the normal cordiality, one historic account describing the scene states that

> ...pointing to the cross he [the chief] made us a long harangue, making the sign of the cross with two of his fingers; and then he pointed to the land all around about, as if he wished to say that all this region belonged to him, and that we ought not to have set up this cross without his permission.[696]

Under the cross-bar of the 30-foot cross, Cartier's men fixed a "shield with three fleurs-de-lis in relief, and above it a wooden board, engraved in large Gothic characters, where was written, LONG LIVE THE KING OF FRANCE."[697]

It is obvious from Cartier's actions that the French intended to stay, and a mark to help them locate the place did not need this inscription in order to be perfectly clear. It

should be remembered that one of the symbols of possession by the Spaniards was the planting of the cross.[698] By unilaterally leaving their permanent mark on the place, the French announced their intention of potentially seizing[699] the land and setting in train a process that would later bring the Indigenous peoples and the Europeans on a collision course. The wonder of it was that the early contact between two societies with very different outlooks on life should have been so amicable.

Later events would confirm that Cartier and his men intended to claim the territory for the King of France. It is premature to deduce that the French had assimilative intentions at this time, but safe to conclude that the motive and action of the French was different from that of the Spaniards in Mexico in the sense that Cartier, even with the blessing of the King of France, was a private trader and not a threat to the Indigenous people.

This thesis does not want to give the impression that the Indigenous peoples of Canada did not exert their rights to the land or assert their sovereignty. On the contrary, they did put up resistance, but their attempts were feeble and inconsistent. It should be recalled that the French or the English were not the first to visit Canada. The Norse from Greenland and Iceland made an abortive attempt to settle in parts of Newfoundland and Labrador around 1000 AD.[700] But within three years, the Norsemen had been driven from their settlements in what is now known as L'Anse aux Meadows. The expulsion of the Norsemen did not end the trade between the Norsemen and the *skraelings*.[701] Visits by the Norsemen continued after their expulsion, but the Norsemen turned their attention from attempts at settlement to acquiring timber, fish, walrus and, in all probability, the polar bear.[702] The Hanseatic League of German states also made their debut in

Newfoundland and Labrador and methodically took control of commerce in the region with no blatant attempt to colonize the people.[703]

Thus, up to the arrival of Cartier, the main purpose of European visits to Canada was exploration, lumber, fishing and hunting. Similarly, the main purposes of Cartier's voyages were exploration and fishing for food, but Cartier's trips soon entered a new phase of commercial expansion. The "new-fangled or barter phase of commerce"[704] sprang up spontaneously between the Europeans and the Mi'kmaq from the Bay of Chaleur. Cartier and his men were cruising the ocean when they came upon an unusual scene. This is how Cartier described the 1534 encounter: the Algonquin "set up a great clamour and made frequent signs to us to come on shore, holding up to us some furs on sticks."[705] From the report, it was the Algonquin who initiated the contact. Later accounts asserted that the men on the beach hid their women in the bushes[706] before coming to the shore to display their wares.[707] This precautionary move, and the fact that it was the natives who initiated contact, seems to indicate that this was not the first intercourse for the natives. In exchange for the fur, the Algonquin received ironware and other metallic ornaments. They were reported to be very pleased and promised to return with more fur.[708] While the encounter was routine for the Natives, it was the first experience for Cartier and he learned that, out of the fishery could emerge a lucrative commerce in animal pelts. This experience would later result in a flood of trading expeditions from Europe for the money-spinning fur trade.

Of interest to this paper is the manner in which the Algonquin people of North America openly welcomed or even invited the Europeans. Both the Indigenous peoples of West Africa and North America had a system of chieftaincy. But the encounters of the

Indigenous peoples in the two continents were remarkably different. With care so as not to over-generalize, in North America, the chiefs did not seem to have been involved in the initiation of the commercial activities. There is no indication of middlemen, as if every man was free to trade off whatever he liked. "They 'bartered all they had to such an extent that all went back naked without anything on them; and they made signs to us that they would return on the morrow with more furs."[709]

It will be recalled that the Mi'kmaq hid their women in the bushes before going on to the beach to sell their wares. They must have had good reason for such defence mechanism. During that trip Cartier kidnapped Domagaya and Taigoagny, sons of the Iroquoian chief Donnacona, and shipped them to France. He returned them on his second voyage. Other victims were not so lucky. European navigators and explorers either kidnapped or persuaded the Indigenous peoples to accompany them to Europe as living specimens of their "findings" and some of these victims did not survive the voyage.[710] It is obvious that the relationship between the Indigenous peoples and the Europeans was not all amicable and harmonious. There were differences, mistrust and misunderstanding. One area that is most significant to this thesis is in the field of expansion of European influence into the interior. The Indigenous peoples tried to contain the newcomers but without success.

Indigenous Protests Ignored

The exploration of European navigators into the interior of present-day Canada began with Cartier's second voyage[711] in 1535. Using the River of Canada, Cartier navigated his way to Stadacona, now Quebec City. Further probing into the interior did not go without protest from the Indigenous peoples of Stadacona. The Europeans ignored

the protests and marched onward to the village they called Hochelaga, or the city now known as Montreal. The motive for the protest is recorded to be selfish – that is the people of Stadacona were accused of preventing the people of Hochelaga from acquiring European wares. But a more plausible explanation could be that the people of Stadacona wanted to maximize their profits by becoming middlemen as the fur trade expanded. The reader should note that the concept of "middlemen"[712] being expressed is inter-tribal and not intra-tribal.

Cartier's adventure to the west incongruously landed him in "China,"[713] the name that was later given to the river whose rapids finally stopped Cartier from proceeding. This river is in the area that the Indigenous peoples called the Kingdom of the Saguenay. The arrogance of the French would later sour the relationship between the people of Stadacona. This mistrust would lead to the fortification of the French posts designed for the winter. The fortification proved to be worthless and could have been the grave of the visitors. For Cartier's men, wintering proved dreadful. The newcomers were attacked by "scurvy that killed almost one-quarter of them and left most of the remainder gravely debilitated."[714] But for the Indigenous peoples, Cartier's men would have perished. The Indigenous peoples, despite the animosity, nursed the French to health by providing them with "tonic containing ascorbic acid from bark, cedar needles, and water."[715]

With this generous act, the Indigenous peoples sealed their fate in the hands of the Europeans. For Cartier returned on his third voyage in 1541 with pre-formed attitudes, and the French settled on the motives that would propel Canada into the nineteenth century. The Indigenous peoples had reluctantly co-operated in the European exploration, had tolerated the fishing expeditions, had enthusiastically embraced the commercial

activities and had slowly "imbibed the evangelization, but had indubitably objected to the presumptuous behaviour of the French erecting a cross on their land"[716] – and in doing so, they had articulated sovereignty over their territory. Strangely, the Indigenous peoples did not cut the cross down or ask Cartier to pay for the use of the land.[717] When the settlers erected the statue of St. Anthony at Elmina, West Africa, the inhabitants destroyed it in protest.[718] It appears that the Indigenous peoples of Stadacona did not heed the warning signs of Cartier and still remained woefully ignorant of the European intention of proclaiming ownership of the Indigenous land by right of discovery of these lands. Cartier erected the cross without permission. This may be hindsight, but it would be interesting to examine the significance of that act and what the first Europeans thought about the Indigenous peoples.

Did Cartier Refer to Indians as Savages?

Language is beautiful but can also be dangerous. Cartier thought that "[t]his people may well be called savage, for they are the sorriest folk there can be in the world, and the whole lot of them had not anything above the value of five sous, their canoes and fishing-nets, excepted."[719] "Savage" in that quotation refers more to poverty than to being primitive or backward. The people that Cartier encountered were in an impoverished state by European standards. The French word *sauvage* has several meanings, including "someone who resided in natural surroundings," "something that was not domesticated" or "something occurring naturally."[720] On the other hand, the English translation of *sauvage*, which is *savage*, has only one derogatory meaning, and the Indigenous people of Canada have paid dearly for this deficiency in English language. But for Cartier, does the fact that the Indigenous peoples were poor mean that their land was for the taking or

that they should be ignored? Or was it the kindness of the Indigenous people that did them in? These are a few of the questions that this thesis will attempt to answer.

Colonization on Hold

Unlike the Spanish explorers who brought back gold, diamonds, vessels, spices and other precious ornaments for their king,[721] Cartier returned with fool's gold, worthless quartz, used animal pellets and people who were more of a liability than assets. This poor showing, together with more important religious and political events in western Europe, drew the French monarch away from active exploration of Canada. To be fair to Cartier, there was general lessening in European explorations due to the religious wars in Europe in the later part of the sixteenth century.[722] When exploration resumed in the seventeenth century, both the topography of Canada and the composition of the Europeans and their purpose for the visit had changed. Champlain, who followed Cartier, directed his attention to the Maritime (Acadia) and the St. Lawrence regions.[723] When he probed into the interior, he discovered that the St. Lawrence Iroquoians had disappeared, most probably dispersed by the Algonquin (Mi'kmaq of the Maritimes) or the Naskapi and Montagnais from the north of the river. Diseases introduced by the explorers could also have decimated them.[724]

While Cartier's men were mostly fortune minded, the French that accompanied the navigators in the seventeenth century had a substantial number of evangelists, who arrived with religious zeal. The evangelists had the blessing of the French monarch, who insisted on the navigators transporting the missionaries.[725]

The Europeans, regardless of their mission, all soon learned that they needed the help or co-operation of the local inhabitants if they were to be successful. Even fishing in

international waters required the co-operation of the Indigenous peoples. Because of the number of the Indigenous peoples and the fact that they had canoes, the local inhabitants had the "power of depredation over the isolated vessels."[726] The English, who had to learn to salt and dry their fish, were even more vulnerable. The threat of Indigenous hostility was very serious. The explorers seeking adventure in the strange land required Indigenous knowledge and equipment to progress. The birch bark canoe, which could carry heavy loads but was still light enough to be carried, proved indispensable. Other Indigenous inventions of interest were snowshoes and the toboggan.[727] The most dependent of all were the fur traders, who relied on the local trappers. These trappers initially brought their pelts to the European outposts but as trade progressed, middlemen evolved. "The Indians collected the furs in large quantities and brought them to the Europeans."[728] It does not need the knowledge of a commerce professor to know that the collectors got their pelts from afar and most probably from tribes outside the trading posts area.[729]

Even Jesus Needed Apostles

Obviously, the Frenchmen who came to cultivate religion rather than barter for skins were also dependent on the people whose souls they sought to harvest. The missionaries depended on the natives for transportation, shelter, food and access to larger Indigenous populations. As the priests quickly discovered, the best way to spread their religion was by using the Indigenous peoples as lay missionaries or catechists. Most importantly, they learned that the shortcut to martyrdom was to antagonize the Indigenous population.

The forerunners of the French missionaries were the Franciscans, known as the *Recollets*.[730] Their targets were the Algonquin of Acadia and the Iroquoians, as well as the Algonquin who resided along the St. Lawrence River and its tributaries. Of particular interest is the fact that the *Recollets* insisted that "Indians had to be remade into French persons before they could be turned into Christians."[731] This is the first sign of assimilation on the part of the French. The *Recollets* took a short interlude[732] during the 1620s, but returned to share the mission field in 1670 with the Society of Jesus or the Jesuits.[733]

The Jesuits became "one of the most formidable teaching and missionary orders of the Roman Catholic Church"[734] in Canada. Those of a less assimilationist mentality actually adopted some Indigenous practices to facilitate the conversion of the proselytes. In the words of one Jesuit historian, "there was no longer any doubt that the best mode of Christianizing them, was to avoid Frenchifying them."[735] The dissent and the feud between the Protestant Huguenots and the Roman Catholic League, which came close to menacing the very base of the French nation in Europe,[736] followed the settlers into New France.

Protestantism had no place in New France, just as Catholicism had no place in the English Colonies of North America. This feud was transmitted to the Indigenous tribes who were torn between their culture and the new religions, as well as between the two "isms." It will be shown later that the Europeans needed the Indigenous peoples in other ways. Since these Europeans needed the resident First Nations for protection and assistance in their raids against rival European nations, the Europeans could not antagonize the Indigenous people by rigorously enforcing their laws on them.[737]

In summary, the Europeans could not have settled in Canada without the co-operation and support of the Indigenous peoples. The Indigenous peoples, by their sharing nature, apparently did not ask much for their land and assistance. Up to the point that the Europeans used force in any given situation, it is safe to assume that the kindness of the Indigenous peoples is to blame for their demise. The Europeans, prior to using force, only took advantage of their superior material wealth. The Indigenous peoples did sometimes benefit from the encounter in the short-run, but history has taught us that the consequences far outweighed the benefits. Unfortunately, the Indigenous peoples of North America, unlike their counterparts in West Africa, were somewhat at a disadvantage. The Indigenous peoples of North America, like the Ghanaians, did play one European nation against the other, but, due to lack of competitiveness among the Europeans in North America, who were not as numerous as in West Africa, the effect was feeble.

Muffled European Competition

While the French explored the mainland, the English, forbidden from settlement by their government,[738] continued until 1670[739] to oscillate annually between Britain and the Grand Banks off Newfoundland and Acadia.[740] That is, contacts between the English and the Indigenous people were sparse and intermittent. The Spaniards and the Basques, more interested in whaling, restricted their voyages to the Strait of Belle Isle on the Gulf of St. Lawrence and to portions of the river estuary such as the "Saguenay near Tadoussac where the whales gathered."[741] Thus, it was only the French who had persistent and constant interaction with the Indigenous peoples in the seventeenth

century. This was enough to allow the French to muster their energy in settling in Canada. By the time European competition surfaced in 1670, the Indigenous peoples had lost considerable ground and power both physically and economically.

Middlemen on Wounded Knees

The use of the economic strategies such as middlemen was inconsistent and inadequate. The fact that the Europeans could contact the fur trappers directly left the middlemen on wounded knees. The tribes like the Huron, the Montagnais and the Iroquois, who took advantage of their position, did not develop the power of being middlemen to the level of their counterparts in West Africa. Indeed, they exploited their monopoly by exacting higher prices for European goods from their distant foes, but did not transform the middleman position into a professional activity.[742] Neither was the middleman strategy applied within their own tribe or community. It will be verified that "middleman power" had a great influence on the sovereignty that the Indigenous peoples recovered after colonization. In fact, the "middleman strategy" is still hampering the control of multi-national organizations in certain countries of the global south. Foreign merchants are struggling to keep up with the Makola women[743] of Ghana, who are asserting their sovereignty. In the meantime, most of the stores in Togo and Ivory Coast are foreign owned and the Indigenous peoples there are mere servants or employees. This thesis will return to the power of the middlemen but, so as not to lose sight of our pursuit, the reception of the newcomers what would become the United States should be the next item on the agenda.

United States at Contact

The nations considered in the section dealing with pre-European contact tribes in the U.S. were selected in order to support various hypotheses that are presented in this thesis. In addition to outlining the factors that affected post-colonial sovereignty, this section will continue to expand on these themes. Some Indigenous peoples were sedentary and practised agriculture prior to the arrival of the Europeans. It is possible that some were forced off their lands, which compelled them to adopt a nomadic life.[744] The introduction of horses, guns and the fur trade increased competition among the Indigenous tribes, earning the label of "warlike" for some. Most of the Indigenous tribes suffered and did not benefit from colonization. Almost all lost large numbers of their population through diseases introduced by the Europeans.

The friendliness of the Indigenous peoples of America differs from tribe to tribe, but generally was favourable towards the newcomers. The inability to capitalize on the "middleman" position contributed to the spread of diseases introduced by the Europeans, reducing the economic, political and military potential of the Indigenous tribes. These factors had a dramatic effect on post-colonial sovereignty.

The American Vacuum – Expansionists versus Explorers

Conspicuously scanty in American history is the role of expatriate explorers[745] and private traders in the United States. There are virtually no sources that will discuss early American explorers. The links to the explorers of North America from "EnchantedLearning.com," a children's learning site, is very revealing, listing Africa, Antarctica, the Arctic, Australia, Canada, Mexico and North America.

Missing from the list is the United States – and be assured that North America does not stand for the United States. Apart from the charismatic visit of John Cabot to Virginia, little is said about earlier explorers and freelance traders in the United States. The names of the few explorers on scouting missions to what is now the U.S. seem to have eluded historians, though they did exist and were instrumental in rousing the interest of Sir Walter Raleigh with fabulous stories. They even brought back Native Americans, yet the historic accounts do not mention their names.[746]

Early American traders, such as the French Canadian trader Sieur de la Verendrye[747] and René-Robert Cavelier de La Salle,[748] appear to have descended from what is now Canada, while the Spanish, represented by Francisco Vasques Coronado,[749] rolled in from the south to colonize parts of what we now know as the United States (New Mexico and Florida). The explorations reported in the literature on American explorers are actually "internal" expeditions, and these pioneers should, more accurately, be called "expansionists" since they were usually guided by Indigenous peoples[750] who had already discovered and explored the various regions. They include Lewis and Clark, the Astorians, Pike and Long, Mountain Men, fur-trading companies and Fremont.

These expansionists did not come from abroad to explore and return home to Europe as did Christopher Columbus, Cartier, Henry Hudson and the rest. Instead, the expansionists had already taken abode in North America and were fishing for more territories to occupy or with which to trade. Most of the expatriates (newcomers) to the United States came as colonizers, so they will be considered during the colonization era. Their experience on arrival, however, will be recalled to demonstrate that the Europeans

were in the minority at one point in the history in North America – that they were vulnerable and could not have survived without the help of the Indigenous peoples.

On the other hand, the fact that the early Americans came as colonizers should not deter the reader from recognizing that the friendliness of the Indigenous peoples of North America led to their demise. It is essential that the colonizers be separated from the explorers and traders. The colonizers came with a preformed attitude and arrived in groups. It is possible that their colonizing attitude and their confidence (because they arrived in groups of family and friends) could have alerted the Indigenous peoples regarding their intentions to settle. This, in turn, could have aroused suspicion and affected the attitude of the Indigenous peoples. It is not surprising that these colonizers did not record much about the friendliness of the Indigenous peoples, yet sang their praises for their benevolence and saving grace.[751] Even more paramount was the fact that, wherever the Europeans settled, the history of the Indigenous peoples in that location vanished as their history became intertwined with the history of the 13 original states. For this reason, this paper will start with the explorers and traders for proof of hospitality before dealing with the colonizers.

Arrival of the Traders in Selected Indigenous Nations of America

The Mandans at Contact

The first encounter between the Mandans of what are now the Dakotas with Europeans began in 1738[752] with the visit of the French Canadian trader, Sieur de la Verendrye. The meeting took place along the drainage of the Missouri river. The

estimates put the population of the Mandan in the nine villages on the Heart River during this period at 15,000.[753]

Initially, trade with the Europeans was limited to a few European goods, but later it expanded to include anything from meat products and guns, to horses and musical instruments.[754] In exchange, the Mandan offered fur and corn. The Mandan acquired horses in the mid-eighteenth century[755] in order to enhance the fur trade but, until that time, the sedentary life of the Mandan was a blessing to the Europeans, who did not need to establish trading posts in the wilderness. A trading network between the Europeans and the Indigenous peoples of the plains, with the Mandan serving as middlemen, gradually developed. The friendliness of the Mandan and their willingness to engage in commerce[756] encouraged many traders and fur trappers to congregate in the Mandan villages. Ironically, while friendliness and hospitality blossomed between the Mandans and the Europeans, hostilities ensued among the Mandans and the Indigenous tribes of the plains. Due to conflicts between the Mandan and their Indigenous neighbours and, more importantly, to epidemics of smallpox and whooping cough, the population of the Mandan dwindled. The final blow to the Mandan population was a major outbreak of smallpox in 1837. When it was over, the Mandan population had bottomed out at approximately 125 people.[757] This visit, short as it is, has revealed several vital products of European contact. The first is the hostility among Indigenous tribes after contact.

Hostilities among Indian Tribes Clarified

One picture is emerging very clearly in the historical records of the Indigenous peoples. Some historians[758] cite hostilities among the Indigenous people as one of the

causes of dwindling Indigenous population. While that account may be true on the surface, it distorts the picture and the true nature of the Indigenous people, because the historians fail to assess the cause of these hostilities. Specifically, the historians fail to investigate the rate of hostility before the arrival of the Europeans and compare it with the rate after contact.

Take the case of the Omaha and the Dakota. The two tribes were in an amicable relationship in 1766. They even shared a favourite resort on the Minnesota River, near Omadi, Dakota County in Nebraska. After the arrival of the Europeans, the Omaha found themselves in constant battles with their neighbours by the 1800s.[759] Prior to the arrival of the Europeans, the Mandan population was estimated at 15,000, dwindling to 125 thereafter.[760] The Mandan were sedentary and practised horticulture. They even conjured the buffalo to their villages. Thus, the chance of the Mandan encountering other Indigenous people on a large scale was very slim indeed. Upon the arrival of the Europeans, the Mandan acquired horses and expanded the range of their hunting activities. That expansion definitely encroached on the lands of other Indigenous groups.

It is safe to conclude that the encroachment resulted in conflicts. The point being made is that perhaps the hostilities among the Indigenous tribes were, if not initiated, at least enhanced by the arrival of the Europeans. The advancement of the Europeans into Indian country intensified the competition among the Indigenous tribes for territories. Last but not the least, the arrival of the settlers was seen as encroachment on the territories of the Indigenous people. This intrusion demanded action on the part of the Indigenous people, which inevitably involved armed conflict with the settlers. For that reason, labelling the Blackfoot or any other Indigenous group as "warlike" could be a

misrepresentation – as could labelling Indians as inherently barbarous and savage due to their destructive military techniques. There is no doubt that scalping in Indian country occurred prior to the arrival of the Europeans. The taking of trophies had been a common practice among all armies since records were kept, but even these practices were made more common by the arrival of the Europeans. "There is even some evidence that European bounties encouraged the adoption of scalping where it was previously unknown. The Micmac of the Maritimes, for example, apparently did not scalp captives until their French friends taught them to do it."[761]

The Crow at Contact

The first Europeans to contact the Crow were the French explorer, Sieur de la Verendrye, and his brother[762] in 1743. They were also traders who arrived from Canada.[763] The meeting took place near the present-day town of Hardin, Montana. What happened between contact and the life on the reservation is not important in this chapter, save to highlight a consistent theme throughout the paper: the breaking of treaties by the United States government.

In 1851 "The First Fort Laramie Treaty" established the boundaries of the "Indian Country" for several tribes, including an area of 35 million acres reserved for the Crow Indians in Wyoming and Montana. In 1868 the Crow country was reduced to eight million acres and by in 1870, the U.S. government had forcibly confined the Crow to a "reservation life."[764] As European settlers progressively advanced into Indian lands to the west, the struggle for supremacy and land among the various Indian tribes of the plains intensified. The main attraction of the Crow land was the fertile soil, trees, coal, oil and gold. White prospectors who had discovered gold in the Yellowstone River attacked the

Crow from the southwest of Crow country, the Shosone tribe from the south, the Blackfoot from the north and the Sioux from the east also pressured the Crow. What still boggles the mind is the use of germ warfare by the United States Army.

In 1840 the U.S. Army distributed blankets infected with smallpox amongst the Crow, reducing their population by 90%.[765] On June 25,1876, "near the Little Bighorn River at the heart of Crow Country, 400 years of conflict between European Americans and Native Americans culminated with the famous battle known as Custer's Last Stand."[766] The Crow took advantage of this opportunity to gain the friendship of the United States government with the hope of preserving its territories. The Crow helped the U.S. army by providing five members of the tribe as scouts for General Custer's men. It did not work. The Crow, despite being allies of the United States, lost millions of acres of their land. In 1905 their reservation was hacked to 2.5 million acres. Thirty-four percent of this land ended up in the hands of white settlers.[767] The Crow tribe controlled the rest with a population comprised of 12,000 members.

The Omaha Tribe at Contact

Like other Indigenous tribes, the Omaha succumbed to smallpox epidemics[768] in 1802. Their number dropped to as low as 300[769] but slowly recovered to over 1,200 by 1906.

The Wichita Tribe at Contact

The first European to contact the Wichita was the Spanish explorer, Francisco Vazques de Coronado.[770] Looking for riches, he came across the Wichita in 1541. The meeting took place in the Great Bend area of the Arkansas River, in what is now south-

central Kansas.[771] By the 1700s, the situation had somewhat changed for the Wichita. One writer observes that the

> Wichita, a semi-sedentary people, occupied northern Texas in the early 1700's and were involved in trade with other Southern Plains Indians on both sides of the Red River and as far south as Waco. The Wichita lived in huts made of forked cedar poles cover by dry grasses, but would abandon them in the winter to go hunt American Bison.[772]

Three significant developments occurred between 1541 and 1700. The location of the Wichita changed from the Great Bend area of the Arkansas River to Northern Texas. They had to travel far to get the cattle, which was near where they lived at the time of Coronado. The issue is whether they were forced out of their original location, since the French had penetrated that area by this time.[773] The alternative is that the Wichita left voluntarily in pursuit of the buffalo. This thesis seeks to isolate these social, calendrical and mythical issues about the Wichita to which archaeology, history and anthropology may eventually supply answers. Those answers will further explain why the Wichita were said to be notorious for raiding the settlers and other tribes, even though some authors claim that "[t]hey have never been at war with the whites."[774]

French trader Bénard de la Harpe apparently first used the name Wichita in 1719 when he visited several Indian bands on the Arkansas River.[775] Like the other Indigenous peoples, they did not escape the smallpox epidemic, which reduced their numbers considerably. Coronado recorded their presence in 25 villages. He did not indicate the number of houses in each village, but it is believed each hut housed about 10 people. The population estimate for 1780 was 3,200, but by 1937 those numbers had slipped to 385.[776]

The Devastation of the Cherokee[777]

Hernando de Soto ventured into the Cherokee country in April of 1540[778] in search of gold and other precious metals. The Cherokees in the southern part of what would become the United States were aware of the Spanish atrocities in Mexico and vacated their villages in the wake of de Soto's advancement. With no Indigenous peoples to supply them with food and other necessities, the Spanish party quickly moved northward. Their needs were met when they crossed the Blue Ridge and came across the northern populations, who were not aware of what was going on in the south. "The Cherokee were reportedly very hospitable and provided the travelers with much needed food – corn, wild turkey and other small game."[779] De Soto dispatched two scouts to look for gold and other precious metals. The scouts found a rich source of copper and there were prospects of obtaining gold and silver. A second expedition arrived in the Cherokee territory in the fall of 1566 to establish and settle at Fort San Felipe, currently near Port Royal, South Carolina.[780]

The Spanish secretly engaged in mining and smelting of gold, copper and silver, which they mined until the late 1600s. The Cherokee nation suffered a calamitous ruination during their first encounter with the Spanish. "The Spaniards brought foreign diseases, horses, chains, knives, guns and vicious dogs to America; they took women, food and slaves as they went."[781] The Cherokee withstood the onslaught. After de Soto's expedition in 1540, the Cherokees, isolated by geography, had sporadic contact with the Europeans, even though the Spaniards continued mining and smelting operations within the Cherokee nation.

The first contact with the British was around 1654.[782] The Virginia colony was alarmed to find that a large group of Rickahockans (as the Cherokee were known by the Powhatan tribes) had settled at the falls of the James River – the present site of Richmond, Virginia. The Virginians, having just fought an exterminating war with the Powhatans, resolved "that these new come Indians be in no sort suffered to seat themselves there, or any place near us, it having cost so much blood to expel and extirpate those perfidious and treacherous Indians which were there formerly."[783] In an attempt to uproot the Rickahockans, the Virginians, were instead compelled to sue for peace after the Cherokees soundly defeated them.

As a result, Abraham Wood, a Virginia trader, dispatched two ambassadors to the Rickahockans capital, Chota, to arrange for trade concessions in 1673.[784] The ambassadors were James Needham and Gabriel Arthur. James Needham kept a record of the adventure. He recorded that the town of Chota was well fortified and was defended with at least 150 canoes that were each capable of carrying 20 warriors.

The reader will recall that in Part II, the thesis examined and stressed the contribution of the Europeans to the unflattering characteristics of the Indigenous peoples. This is another example. By the 1670s, all the tribes had acquired firearms. A "weaponry race"[785] began. The South Carolina Colony not only induced the tribes to accelerate trade for the acquisition of firearms and their necessities, but also to exchange prisoners of war for firearms. The South Carolina Colony, established in 1670,[786] directly encouraged the tribes to exchange their Native American prisoners of war just as they exchanged furs for guns. The South Carolina Colony then sold the prisoners of war into slavery. The tribes were so incensed that, in 1705, North Carolina warned the other

colonies about an inevitable Indian war. The war ensued in 1715. The Indian tribes united and threatened to wipe out the South Carolina Colony. The other colonies came to the aid of South Carolina and were able to defeat the Indian tribes. A peace treaty[787] followed in which the colonies gave the Cherokee a large quantity of guns and ammunition in exchange for their alliance with the colony.

There was a bright spot in the encounter of the Cherokee with the British, since it allowed them to learn the art of printing. On February 21, 1828 Elias Boudinot (Buck Oowatie)[788] became the first editor of the Cherokee national newspaper. The Cherokee Phoenix, published at New Echota (near present Calhoun, Georgia), was published in both Cherokee and English. It became popular in the Cherokee country, the United States and even Britain. The reader will discover later on in this section that the American government in May 1834 extinguished this bright light.[789] The road was very rough for the Cherokee throughout colonization.

As the years went by, the Cherokee population steadily and precipitously continued to decline. During the late seventeenth and the early eighteenth centuries, the Cherokee lost three-fourths of their population.[790] These losses were not all due to diseases but also to European action. One contemporary wrote that "their town is all burned...their corn cut down and themselves drove into the Woods to perish and a great many of them killed."[791] James Mooney also noted that the Cherokee were on "the verge of extinction."[792]

As if that were not enough, the election of Andrew Jackson in 1828 resulted in more atrocities and genocidal attempts. Andrew Jackson recommended that "American troops specifically seek out and systematically kill Indian women and children who were

in hiding, in order to complete their extermination: to do otherwise, was equivalent to pursuing 'a wolf in the hamocks without knowing first where her den and whelps were.'"[793] After the atrocities and the genocidal warfare came the forceful erosion of the Cherokee communities. Soon after the ascent of Jackson to the presidency, the state of Georgia expropriated large chunks of Cherokee territories. The Cherokee, the Chickasaw, the Choctaw and the Creek challenged the move all the way to the United States Supreme Court, but court cases took a long time to be settled.

The discovery of gold during the intervening period in the contested area encouraged more immigrants to move into the territory. They "forced the Indians to sign leases, drove them into the woods, and acquired a bonanza in cleared land."[794] The immigrants then "destroyed the game, which had supplemented the Indians' agricultural production, with the result, as intended, that the Indians faced mass starvation."[795] When the decision of the United States Supreme Court, under Chief Justice Marshall, finally came down in favour of the Cherokee, President Andrew Jackson uttered his notorious remark: "John Marshall has made his decision, now let him enforce it."[796] The drive to appropriate Cherokee and other Indian lands continued unabated. To put a legal stamp on the land robbery, the colonists forced the Cherokee to sign a treaty. This was done after the imprisonment of their leaders and the shut down of the Cherokee printing press. The United States military official who registered the tribe's members for removal protested to the Secretary of War in these words: "that paper...called a treaty, is no treaty at all, because it is not sanctioned by the great body of the Cherokee and made without their participation or assent. I solemnly declare to you that upon its reference to the Cherokee people it would be instantly rejected by nine-tenths of them, and I believe by

nineteentwentieths of them."[797] He was right. Stand Watie was the only Cherokee leader who escaped assassination for signing the Treaty of New Echota. All the rest, namely Major Ridge, John Ridge and Elias Boudinot, fell prey to assassins' bullets in 1839. However, the authorities ignored the officer's protest because the establishment was only interested in the signatures on the documents.

The French observer of American history, Alexis de Tocqueville, sarcastically remarked that "in contrast with the sixteenth-century Spanish, in the nineteenth century and, we might add here, the twentieth, the conduct of the United States Americans toward the natives was inspired by the most chaste affection for legal formalities…It is impossible to destroy men with more respect to the laws of humanity."[798]

The darkest moment of American history came after the treaties. It acquired the name the Trail of Tears and was nothing less than a death march for the Cherokees. The policy of forced resettlement was ordered by Andrew Jackson and pursued under General Winfield Scott. One commentary of a Georgia volunteer, who later became a colonel in the Confederate service, proclaimed that although he "fought through the civil war and have seen men shot to pieces and slaughtered by thousands…the Cherokee removal was the cruelest work I ever knew."[799] Even more pathetic, the Cherokee were not at war, and at this moment, most of the evacuees were women and children. Did the Cherokee benefit from colonization? The Ghanaians believe that human life is priceless so no matter the gains, the Cherokees suffered.

Summary and Analysis

The powerful Indigenous empires made their mark on the world. The thesis selected the Cherokee to represent the Indigenous nations of the United States. The comments about them apply to a great number of other Indigenous tribes. The Cherokee had a federal system of government without the help of the Europeans. None of the newcomers to Virginia could doubt the extraordinary potential of the Cherokees' strength, technology and creativity. The Cherokee story highlights a consistent theme throughout this dissertation: the lopsided nature of the American treaties and the breaking of these treaties by the United States government. Some of the notions about the Indigenous peoples are simply misinformation. The works of historians[800] that cite hostilities among the Indigenous people as one of the causes of dwindling Indigenous population, for instance, often fail to outline the causes of these hostilities. Specifically, these works fail to compare the rate of pre-contact decline of the Indigenous peoples to the rate of post-contact decline, and the causes of the variation.

Unlike the Ghanaians, the overall inability of the Indigenous peoples of America to capitalize on the "middleman" position contributed to the spread of diseases introduced by the Europeans and to the reduction of the economic potential and military power of their nations. Finally, the hospitality and the friendliness of the Indigenous peoples of America played a major role in their downfall. Overall, the Indigenous peoples of the world have suffered and have not benefited from the presence of the Europeans. Getting back to the theme of this thesis, the differences in culture and in the levels of civilization or economic strength cannot explain the difference between the level of post-colonial sovereignty enjoyed by the Ghanaians and by the Indigenous peoples of the United

States. It was the colonists' abuse of power fuelled by the colonial powers' application of the "shifting definition" of statehood and sovereignty that made the difference.

Land Use versus Land Occupation

This section would not be complete without discussing land use as compared to land occupation, and the possibility that it could account for the different sovereignties enjoyed by North American Indigenous peoples and the Indigenous people of Ghana. North American aborigines are a diverse people with hundreds of distinct cultures, yet those who pursue land use as the justification for the appropriation of Indigenous lands are, unfortunately, "those who continue to prefer natives of the imagination to real human beings."[801] This bold statement is justified because, in appropriating Indigenous lands in America, the settlers did not distinguish between sedentary nations and non-sedentary nations. Members of the Six Nation Confederacy lost their lands just as did the Blackfoot of the Prairies. The members of the Six Nation Confederacy were farmers just as were the new settlers.

Therefore, the difference is based on assumptions that can easily be classified under what Martha Minow terms the "difference dilemma,"[802] a fascinating and complex psychological dissertation. She postulates that the conventional rights approach of Western law focuses on categorizing people as either in or out of a given category.[803] "The dilemma persists when legal reasoning itself not only typically deploys categorical approaches that reduce a complex situation, and a multifaceted 'nation,'[804] to a place in or out of a category but also treat those categories as natural and inevitable."[805] The forces that maintain these sources of difference include considering difference as intrinsic, without any point of reference. The next angle of force is treating "the other" as having

no perspective and, if the facts make the last assumption absurd, considering the other perspectives is irrelevant. These forces render the difference intractable, and the resulting social and economic arrangements become natural and taken for granted. Minow notes that the fact that these assumptions go unspoken means that they underlie much of our communication without our even being aware of the extent to which they hinder our ability to hear another's legitimate claims.[806]

To test the theory, if nomadic life was wasteful and became the reason for appropriating Indigenous lands, one would think that the highest concentration of white settlers would be in the prairies and Northwest Territories, where Aboriginal populations were, in fact, nomadic. On the contrary, the highest concentration of settlers was exactly where the Indigenous people were already practising a sedentary lifestyle, namely in the areas of what are now Ontario, New York and Quebec. These areas were the land of the farmers, the Six Nation Confederacy. And so, the nomadic claim is baseless and without any point of reference. The Six Nation Confederacy was agricultural, so it cannot be said to have no perspective about land use. The only justification left is that the perspective of the Six Nation Confederacy is irrelevant, making the difference between the settlers and the Indigenous peoples intractable. Westlake expresses this justification succinctly: "the occupation by uncivilized tribes of a tract, of which according to our habits a small part ought to have sufficed for them, was not felt to interpose a serious obstacle to the right of the first civilized occupant."[807] So the reason for appropriation is not *terra nullius*, discovery or hunter-versus-farmer arguments, but the hidden assumptions of the civilized/uncivilized "difference dilemma."

Similarly, the Europeans settled on the coast of Ghana, where the inhabitants were sedentary, but left the northern region inhabited by roaming cattlemen unoccupied. As a matter of fact, the northern region was not even colonized and remained a protectorate until Independence.[808]

All said and done, the fact is that, at contact, the Indigenous peoples of North America, just like their counterparts in Ghana, were living in organized societies that qualified them as sovereign states. They possessed the power and authority that enabled them to protect and assert their distinctive cultures. The North American Indigenous peoples lost that power and authority during colonization but, unlike their counterparts in Ghana, did not regain the sovereignty to the same extent as the Ghanaians. Land use may be a reason or even a justification, but it does not disprove the fact that Indigenous sovereignty comes in different shades. That is the theme in this thesis, with the issue being not why the British settled, but why they settled on top.

The Time-line Factor

When Britain decided to colonize the Americas, it was overpopulated. The prisons and poorhouses were full and the Industrial Revolution had not yet yielded the results of a large middle class. The situation was pitiful, as described in this eighteenth-century poem by William Blake, which analyzed the cost of freedom:

> What are those golden Builders doing
> Near mournful ever-weeping Paddington
> Standing above that mighty Ruin
> Where Satan the first victory won.
> Where Albion slept beneath the Fatal Tree
> And the Druids golden Knife,
> Rioted in human gore,
> In Offerings of Human Life.
> They groan'd aloud on London Stone

> They groan'd aloud on Tyburn's Brook
> Albion gave his deadly groan,
> And all the Atlantic Mountains shook.[809]

Britain needed a place to settle its excess population and prisoners. But by the nineteenth century, the Industrial Revolution was humming along and Britain's population had stabilized. It was argued that there was no need to send people to West Africa in order to establish settlements there. What was needed, however, were the raw materials and slaves for the plantations in America.

While these facts offer one reason for not settling in West Africa, other facts also need to be taken into consideration. The insignificance of the time-line argument can be supported with reference to the British East India Company. The British East India Company (John Company) was one of the first joint-stock companies endowed with an English Royal Charter by Elizabeth I on December 31, 1600. The Royal Charter, in spirit, gave the newly created East India Company (HEIC) a 21-year monopoly on all trade in the East Indies.

Even more than the Hudson's Bay Company, the British East India Company transformed from a commercial trading venture to a ruling enterprise as it acquired supplementary governmental and martial functions. In one military campaign, Robert Clive defeated the forces of the Nawab of Bengal, Siraj-ud-daulah, at the Battle of Plassey in 1757 and considerable English communities developed around the towns of Calcutta, Bombay and Madras. The Company lasted for 250 years until it was dissolved in 1858. If the British did not settle in Ghana because it had no surplus population to establish settlements, the same argument could not be used in the case of India. India was handed over to the East India Company before Rupert's Land was offered to the Hudson

Bay Company in 1670. The fact that India did not become a settled colony to the same extent as North America means that factors apart from the time-line difference or the excess population in Britain accounted for the non-settlement in Ghana and India. These factors, outlined in the section under "The Portuguese in Ghana," are summarized below.

A) The resistance of the Indigenous population.[810] In India, the Rebellion of 1857 or the Sepoy Mutiny brought about the dissolution of the British East India Company a year later.

B) The refusal of the Indigenous people to give up the position of middlemen.

C) Poorly navigable rivers into the interior.

D) Climatic conditions and insect-borne diseases.

E) Stiff competition among the Europeans (Dutch East India Company).

F) Population density. It would have taken forever for the Europeans to be in the majority so, even if they had settled throughout the country in larger numbers, India would have ended up being another South Africa.

The most convincing proof against the time-line argument is that the Europeans were still pushing their way into the New World in the middle of the nineteenth century – so much so that, in the 1850s and 1860s, a group of U.S. citizens established a "Know-Nothing" party.[811] Those who shared the sentiments of its founders worked against the tide of Catholic immigration from Europe – especially that of the Irish, though other groups were also targeted. That means that at the time of the colonization of Ghana, emigration from Europe, including the United Kingdom, had diminished but had not come to a halt. One would think that, with the channel to the United States blocked, the

emigrants would be directed to the new colony, Ghana (West Africa), which is closer to Europe than Australia, unless other factors dictated otherwise.

If these arguments are not convincing enough, then last argument should turn the table. The British Crown Colony of New South Wales commenced with the establishment of a settlement and penal colony at Port Jackson[812] by Captain Arthur Phillip on January 26, 1788.[813] The Dutch forts in the Gold Coast fell to the English in 1660s. Instead of using these fortifications as prisons, the English handed most of these fortifications back to the Dutch in subsequent peace treaties. A number of Dutch forts fell under the administration of the Dutch Ministry of Colonial Affairs, which took over the forts after the Dutch United West India Company (WIC) went bankrupt. Some were abandoned in 1792 – four years after the first shipment of prisoners to Australia. The Gold Coast was much closer to England than Australia, yet the English bypassed the Gold Coast, along with the ready-made fortifications (potential prisons), and settled in Australia, which at that time could not boast of any significant natural resources. As a matter of fact, the time-line argument is *terra incognita* because it does not negate the fact that the sovereignty enjoyed by Ghana is different from the sovereignty imposed on the North American Indigenous peoples. It only serves to prove that sovereignty could be manipulated to enhance colonial interests. The time-line argument and the issue of land use verses land occupation, like history, explains everything but does not solve anything.

Conclusion

It stands to reason that, if a nation travels across the sea to trade, liquidation of the inhabitants would not be the primary agenda. That is what saved the Africans from the genocide that took place in Mexico and America (smallpox blankets). While Christopher

Columbus was seeking an alternate route to the East Indies, his aim shifted once he came upon the American continent and its wealth and he sought to acquire the land for the Spanish Crown. The aim was not to trade; thus, the Spanish did not buy the Mexicans but simply appropriated them as slaves. Most of the slaves were obtained in the process of appropriating the land and riches of the land for the King of Spain.

In the United States, the pilgrims and the commercial companies came to settle and farm (tobacco and cotton plantations). Trade and other commercial activities were secondary to the process of colonization in the U.S., though in Canada the motive was primarily trade for quite some time. It will be proven that, once the European population increased to the point that the Canadian traders no longer needed the Indians to foster trade or to aid the Europeans militarily, genocide did ensue in some locales (Newfoundland).[814] As a member of the Alberta Attorney General's office put it, "Albertans with whom I have spoken are not, I would gather, very much in sympathy with the Indian, nor with the efforts to better his condition. They look upon him as a sort of a pest which should be exterminated."[815]

Missionary organizations who have been employed to carry out cultural euthanasia, or the assimilation of the Indians, along with the Ottawa bureaucrats who had come to recognize that directed change and economic development were not occurring as they wanted, created changes in Canadian Indian policy. Sir Francis Bond Head, the lieutenant-governor of Upper Canada in 1836, "considered himself a thoroughly qualified expert on natives in the New World and on social engineering. He was convinced...that the Indians were dwindling in numbers and were destined to die out completely."[816] To assist them to that end, he proposed "that they be left alone to live out their days in

isolation and peace."[817] He forged this policy by appropriating as much Indian lands from Indian groups as he could and "relocate[ed] them on the Manitoulin islands where they would live out their remaining days."[818] The economic goal remained the same, but the emphasis of the European traders shifted to appropriation, which could be quickly and easily achieved through genocide.

Aside from the European motive, other conditions dictated the outcome of colonization. Of these, the most important is the resistance offered by the people who were to be colonized. The resistance could be physical, economic or spiritual. While the Indigenous peoples of the Americas welcomed the Europeans, the Ghanaians placed roadblocks wherever possible. The role of middlemen is just one of them. For instance, every initial contact with the outside world was through the chief. There could be no contact between any Indigenous person and any foreigner on the soil without the knowledge or the permission of the chief. There could also be no contact with the chief except through his *Okyiame* (linguist). This means that only the chief's representatives could deal with foreigners and every transaction had to be approved by the chief. Furthermore, the proceeds from the sale of the produce were usually distributed under the auspices of the chief. The owner, of course, got a bigger share, but the chief, who had the welfare of the tribe at stake, saw to it that the entire tribe benefited from the transactions. In summary, the role of middlemen is inherent in the West African (Ghanaian) culture. It is not only inter-tribal as in North America but also intra-tribal. It is not restricted to trade but spread to all dealings with the visitors. As opposed to the Chief of Manhattan who went out on the beach to meet the first Dutch visitors to the island,[819] Ghanaian chiefs would have sent their headsmen or servants to escort the newcomers to them. The Chief

of Manhattan took the glass of liquor from the visitor and drank it. A visitor to a Ghanaian chief could not even speak directly to the Chief, since all communications went through a linguist, much less hand him a drink.

Again, the Mandans, in contrast to the Ghanaians, encouraged the newcomers to settle among them, accompanied them on expeditions and allowed them to trade liberally with the Indigenous people. This does not mean that the Ghanaians did not accompany the foreigners on expeditions. They did, but those events were well orchestrated under the Chiefs, who made the guides report to them on arrival. In order words, the newcomers were under the control of the Chiefs at all times. Furthermore, the Chiefs sanctioned all the activities of the newcomers in the interest of the community, especially as they related to trade and commerce. Control of trade by the Chiefs ensured that weapons such as guns did not fall into the hands of the enemy tribes. Interestingly, such forms of government existed before Hobbes came up with idea that

> [t]he only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort as that by their own industry and by the fruits of the earth they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.[820]

The pre-colonial civilizations in North America were as sophisticated, if not more so, than the societies in the region now named Ghana. Yet Ghanaians enjoy a form of sovereignty that approaches the definition set out in the introduction much more closely than the Indigenous peoples of North America. This means that the quality of sovereignty is not necessarily a function of the pre-colonial culture of the inhabitants but, rather, of other factors. The theme that has recurred throughout this thesis is that the nature of sovereignty enjoyed by the Indigenous people in the post-colonial era depends on

economics, politics and, most importantly, land distribution and use. The relationship between land use, economics and self-determination is universal.

In pressing the British government for more land for the Khoi-Khoi in South Africa, the missionaries argued that the Indigenous people "would never become civilized until they stood on a legal equality with Europeans and the economic base of that equality was land."[821] The British ended up being the colonial masters in Canada, Ghana and the United States. Trade was the initial motive for setting up these colonies. The British initially respected the political systems of the Indigenous peoples in the three areas, so we can presume, at least initially, that the effect of economics and politics was not the essential factor moulding the genesis of post-colonial sovereignty in the three nations. The only factor that was substantially different in the three regions is the way in which the colonists viewed the land, the method of acquiring the land and the final distribution of the land between the Europeans and the Indigenous peoples.

It is therefore safe to assume that the different sovereignty enjoyed by Ghana and the Indigenous peoples of North America could be related to land occupation and land use. The table below tests this hypothesis by comparing the notion of possession of land, land acquisition and land use by the British settlers in the three nations. West Africa is used instead of Ghana in certain instances, because the boundaries of Ghana had not been established by the twentieth century.

West Africa	Canada	United States
• Explorers	• Discoverers	• Discoverers
• Berlin Conference (conceptual *terra nullius*)	• Practically *terra nullius*	• *Terra nullius*
• Communal ownership (adansehene)	• Communal ownership (Gabriel Sagard)	• Communal ownership (Gabriel Sagard)
• Chiefs leased land for settlements	• British took the land (Hudson's Bay Charter)	• British took the land (charters)
• Native lawyers supervised land deals	• No native lawyers	• No native lawyers
• Contracts & treaties from the start	• Charters issued in Britain, treaties later	• Charters issued in Britain, treaties later
• Direct land deals with traders	• No legal deals with traders	• No legal deals with traders
• Quality of treaties fair	-Treaties lopsided[822]	• Treaties lopsided[824]
• Treaties respected	-Treaties somewhat ignored[823] (Peguis Band of Manitoba)	• Treaties generally ignored (Fort Laramie treaty and the Mandan)
• Europeans did not settle permanently	• Europeans settled	• Europeans settled

Table: Possession of land, land acquisition and land use by the British settlers

As the above table illustrates, Ghana stands out among the three nations with regard to the control of the land by the Indigenous peoples. It is Ghana that enjoys sovereignty approaching the definition set out in the introduction, which, "at the most basic level [is] an assertion of power and authority, [and] a means by which a people may preserve and assert their distinctive culture."[825]

In what follows, I capture the ideas expressed above under the generic expression "shades of sovereignty." My analysis is grounded in the golden triangle defining sovereignty in terms of power, property rights and economics. *Power* is examined in the light that natural law is meaningless in the face of insurmountable power. If natural *rights*

are a prudent means to achieve agreed-upon harmony, what happens when stability is more conveniently established by ignoring the rights? *Land* is considered the source of life and a suitably firm base for institutions of government. Finally, *economics* represents growth, development and maintenance of the power which is essential for self-determination and sovereignty.

Since feudalism in Britain was primarily a system of control over men,[826] it is not surprising that the sovereignty of the Indigenous peoples of North America should suffer, despite later modification to property law. If sovereignty hinges on territoriality,[827] one can see how the colonization process ultimately determined post-colonial sovereignty. While the Ghanaians had control of their lands from the start, the Native Americans lost control of the land and never fully recovered it from the Europeans who settled. Thus, while the natives in Ghana maintained control of the land after independence, the Native Americans had to compete with the settlers for the land. Hence, sovereignty for the Native Americans was to be shared with the settled Europeans, and the most powerful naturally got the bigger piece of the pie.

Most unfortunate for the Indigenous peoples of North America is that the sharing is an infinite process. Both the U.S. Congress and Canada's federal government can make changes to the distribution of powers between the Indigenous peoples and their respective federal governments at will. And if that is not bad enough, the respective supreme courts can further reduce the rights of the Indigenous peoples, as can be seen from the precedent-setting cases of *Mitchell* in the U.S. and *Delgamuukw* in Canada. Hence, American Indians remain, to some extent, at the mercy of the federal government.

In *Lone Wolf* v. *Hitchcock*, the court ruled that "Congress possesses a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests... even though opposed to the strict letter of a treaty with the Indians."[828] This ruling was supported by action, since the use of Indian land became "controlled by the Bureau, as are sales, exchanges and other land transactions."[829] One scholar goes further and claims that

> [a]lthough the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the Government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the Government.[830]

North of the border, the story is just as telling. The Canadian government affords the following reasons for the Robinson treaties (the treaties with the Indians of Manitoba, the North West Territories and Kee-Wa-Tin, in the Dominion of Canada):

> In consequence of the discovery of minerals, on the shores of Lakes Huron and Superior, the Government of the late Province of Canada, deemed it desirable, to extinguish the Indian title, and in order to that end, in the year 1850, entrusted the duty to the late Honourable William B. Robinson.[831]

Ostensibly, the only reason for taking the land from the Indigenous peoples in the Robinson treaties was the discovery of minerals in the region, which provided the excuse for land appropriation, but the intention to dispossess the Indigenous peoples of their lands preceded the treaties.[832] The treaties were not bargaining mechanisms, but tools of dispossession. No foreign government could do that in Ghana. The land can be mined but will always remain the property of the tribe that owns the land. Titles can never be extinguished. People may be re-settled for government projects, but the land still belongs to the tribe. The land on which the Ashanti Gold Fields Corporation operates legally belongs to the Adansehene and will always belong to the Adanse tribe.

Canadians will flag the 1982 Constitution[833] as a safeguard. The 1982 Constitution has many components worth celebrating. But such a celebration for the Aboriginal peoples must be tempered by the knowledge that the disruptions inflicted during colonization are permanent, and that the new Constitution did little to ameliorate the real and violent consequences of that process. The point is that the Indigenous peoples can never get the "Robinson" lands back. The loss of that land will forever leave a mark on the sovereignty[834] of the Indigenous peoples involved. Worse still is the fact that the Aboriginal lands after 1982 are also not secure. Chief Justice Lamer states that

> ...regarding the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrendering forces the conclusion that aboriginal title is limited in the way I have described. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.[835]

Lamer continues by saying that, if the Aboriginal peoples decide to develop their land or to convert the land for commercial use, such as mining or parking,[836] they must surrender that land to the Crown in order to do so. What if using the land as a parking lot or mining development is the only way for that particular Indigenous tribe to maintain their culture and survive? No other Canadian groups are under the same obligation and such a system is different from the zoning restrictions that apply to the general population. The Hutterites, for example, hold their lands communally and yet they do not have to surrender their title to the government in order to convert the lands into parking lots. The real tragedy is that even the Canadian legal community is divided as to whether the right to self-government is an inherent right and whether it is recognized and affirmed by subsection 35(1)[837] of the Canadian Constitution.[838]

One can infer from the above observation that colonization never actually ended for the Natives of North America and that they remain at the mercy of the colonial bureaucracy.[839] The argument that the Indigenous peoples were deprived of true sovereignty because the Europeans settled in North America begs the question. The Europeans could not have settled if they had not confiscated the lands, because the lands were not vacant. Both Cabot and Cartier met human beings on arrival. If the lower population density in North America at contact was the morally acceptable justification, then by the same token, the Chinese can waltz into Canada and occupy it.

The fact that the Indigenous peoples in Ghana were in the majority cannot account for the high quality of Ghanaian sovereignty for two reasons. Firstly, the Indigenous peoples of North America were also in the majority at one point in history, and, secondly, the Indigenous peoples of South Africa and Zimbabwe have always been in the majority and yet the European settlers, even now, have the most of the lands in their possession in South Africa, as they did in Zimbabwe until the most recent wave of land reforms. Again, the Indigenous peoples in these two African countries have fewer opportunities than the American Indians. This is the source of the crisis in Zimbabwe, where the government has taken it upon itself to forcibly redistribute the land. The fact that the Indigenous peoples in South Africa and Zimbabwe (though in the majority) have less freedom and a lower quality of life than the European settlers further supports the hypothesis expounded in this paper – namely that the method of acquiring and using colonial lands moulds the type of sovereignty of the inhabitants. Canada and the United States were hatched from the same egg,[840] so the shades of sovereignty enjoyed by Native Canadians and Native Americans can be explained, among other things,[841] by how the

European settlers decided to exploit the land during colonization and share the sovereignty acquired after independence.

Concluding Remarks

This thesis started the reader on a journey through the pre-contact era. The reader was then led through the period of contact and is now going to be thrust into the colonial process. The next section will examine the various forces that had the greatest impact on the sovereignty that emerged after colonization in Ghana, Canada and the United States. The thesis will bring the reader to this end point: colonization in the Americas, unlike colonization in Ghana, subsumed the Indigenous peoples; the First Nations lost their nationhood as well as their legal personality; and where they existed, it was only on paper.[842]

PART IVA: THE COLONIZING PROCESSES IN ACTION

Preface to Colonization

One theme that runs throughout this thesis is that sovereignty was deliberately defined by colonial jurists according to the requirements of colonial interests. If that statement is true, then it is possible to study the colonial processes in various regions and to roughly predict the type of sovereignty orchestrated for the Indigenous people in that particular area. The table below is meant to help the reader come to this point at a glance.

Table – Comparison of Colonizing Processes

British West Africa

- Trade
- Individual traders
- Local involvement
- No access to producers
- Minimal government involvement
- Native involvement in court system
- Minimum damage by missionaries
- Land held by community
- Lease granted by local chiefs
- Protective Land bill of 1874-7
- Treaties respected
- Mining almost simultaneous with trade
- Native involvement in mining
- Could not replace Indigenous labour
- Deadly insects
- Not dependent on European goods for survival
- Did not welcome Europeans with open arms
- Trade + appropriation

Canada

- Hudson Bay Charter
- Middlemen only
- Access to producers
- Substantial government involvement
- No native involvement in court system
- Severe damage by missionaries
- Land held by community
- British grant and encroachment
- Royal Proclamation (1763)
- Treaties largely ignored
- Mining long after trade
- Negligible native involvement in mining
- Difficult to replace Indigenous labour (European immigrants)
- Insects not potent
- Became dependent on European goods for survival
- Welcomed Europeans

United States

- Mainly appropriation
- Several charters
- Middlemen only
- Access to producers
- Substantial government involvement
- No native involvement in court system
- Severe damage by missionaries
- Land held by community
- Grants but mainly encroachment
- Royal Proclamation (1763)
- Treaties ignored
- Mining after trade
- Negligible native involvement in mining
- Replaced Indigenous labour with slaves
- Insects not potent
- Became dependent on European goods for survival
- Welcomed Europeans (Mandan)

Several conclusions can be drawn from this table. The reader can tell at a glance that the Indigenous peoples of Ghana enjoyed better security and more control over their lives for the following reasons. Firstly, the European traders who had very minimal

government backing[843] had to persistently trade through local middlemen. The middlemen were not only inter-tribal but also intra-tribal, and were under the auspices of the Chief.[844] At the point of contact, the land was leased to the settlers by the Chiefs,[845] who thereby reasserted their ownership and sovereignty. The Indigenous people not only had direct access to both the tribal[846] and the colonial court system, but they also had African lawyers representing them in the British courts within a very short time after British colonization. *Stool of Abinabina* v. *Chief Kojo Enyimadu,* for instance, went from the traditional courts all the way to England.[847] The first lawyer from the Gold Coast, Mr. John Mensah Sarbah, was called to the bar in 1893 only 43 years after Britain formally declared the Gold Coast a colony in 1850. If that is not astonishing, consider that John Mensah Sarbah was called to the bar 64 years before Ghana's independence. He was no token and by no means the only lawyer. Other pre-independence lawyers included the very famous J.B. Danquah, R.A. Awoonor-Williams and Edward Akufo Addo.[848] In fact, there were also Ghanaian judges, the most renowned being Mr. Justice Henley Coussey[849] of the Gold Coast High Court prior to Ghana's independence. This alone guaranteed that the European settlers respected contracts and treaties.

Compare that with the situation in Canada, where the first Indigenous Canadian lawyer did not graduate until 175 years after the Royal Proclamation of 1763 declared Canada a colony, 62 years after Confederation in 1867, when Canada gained independence in all areas except foreign affairs, and seven years after Canada gained full independence in 1931. This legal pioneer is Norman Lickers. His graduation was reported in the Leader Post newspaper dated November 29, 1938. It reads: "First Indian lawyer among 19 called to the Ontario bar at Osgoode hall was Norman Lickers, first full-

blooded Indian in Ontario to become a qualified barrister and solicitor. He is a Seneca Indian from the Six Nations reserve near Brantford and a graduate of Western Ontario."[850]

South of the Canadian border, James L. McDonald became the first American-Indian lawyer. "As a boy, he was raised by Thomas L. McKenney, the nation's first commissioner of the Bureau of Indian Affairs, and learned to read Greek and Latin. Later, he studied law under John McLean, a future Supreme Court justice, and became the country's first Indian lawyer. But he began to drink, and after a white woman spurned his marriage proposal, he fell off a cliff to his death."[851] From that account, James L. McDonald became a lawyer sometime between 1807 and 1829, because Justice John McLean himself became a lawyer in 1807 and a Supreme Court Judge after 1829.[852] The date of graduation for James L. McDonald can only be extrapolated from the life span of his mentors,[853] but it is clear that both Lickers and McDonald could not have helped much in the land transactions or the treaty negotiations.

The Ghanaian lawyers, however, were directly involved in both processes and, if not solely responsible, were nonetheless instrumental in drafting the Ghanaian Constitution of 1954, which became the Constitution at Independence.[854] In contrast, both the American and Canadian Indigenous lawyers were not even born at the time of the BNA Act (Canada) or the articles of Confederation (United States). There is also no indication that any lay Indigenous people took their place. The scene at Ghana's independence celebration will underscore the point being canvassed. At midnight, on March 6, 1957, at Black Star Square in the capital city of Accra, the Union Jack slipped beneath the floodlights.[855] Rising in its place was the tri-colour flag of red, gold and

green, with a black star at its centre, the standard of the new, independent nation of Ghana. On the platform, Nkrumah, his faced streaked with tears, electrified the crowd when he declared: "At long last, the battle has ended. Your beloved country is free forever."[856]

To contemplate: what American or Canadian Indigenous leader can boast of his or her country being free on Independence Day? What free nation can have its children taken from their parents and placed in residential schools designed for cultural genocide? If independence means freedom, what Indigenous nation in the Americas was free? Free from whom and from what? The answers are embedded in the theme of this thesis: for the Indigenous people of North America, life after independence is not defined by independence but by dependence.[857]

That is, the Indigenous peoples of Canada and, even more so, the Indigenous peoples of the United States[858] appear vulnerable. Both cultural anthropologists and historians are fully aware that cultural continuity is maintained by transference or substitution, and that what appears to be a break with the past is usually the displacement of one dogma by a similar belief system. In Canada and the United States, colonial (settler) nationalism displaced British nationalism. On Independence Day, a government of the settlers, or the governmental systems of the chartered companies and Pilgrims, replaced the British parliament.

The chartered companies, though formed in most cases by shareholders for the purpose of earning dividends, became the instruments through which enormous areas in North America were brought under the dominion of the European nations who issued these charters. For the most part, these European states were not prepared to directly

administer these territories. Instead, doctrines were developed to give these trading companies some measure of legal personality by typifying them as extensions of the respective Crowns through royal charters. With that instrument (Charter), trading companies were capable of asserting sovereign rights[859] over Indigenous peoples who were deprived of any sort of sovereignty with reference to international law. Thus, the Hudson's Bay Company, which was, at first, purely a trading corporation,[860] in time came to exercise sovereign rights[861] over Rupert's Land. Eventually, that land came under the direct administration of Canada in 1869. Part of the Hudson's Bay Charter is reproduced to illustrate the power granted to the chartered companies.

> And that the said Governor and Company soe often as they shall make ordeyne or establish any such Lawes Constitucions Orders and Ordinances...All and singuler which Lawes Constitutions Orders and Ordinances soe as aforesaid to bee made WEE will to bee duely observed and kept under the paines and penaltyes therein to bee conteyned soe alwayes as the said Lawes Constitucions Orders and Ordinances Fynes and Amerciamentes bee reasonable and not contrary or repugnant but as neare as may bee agreeable to the Lawes Statutes or Customes of this our Realme.[862]

Gibson argues that, although the governing power of the Hudson Bay Company Charter was restricted to the Hudson Bay employees, the company used it to create an *ad hoc sui generis* legal regime governing the Native inhabitants of Rupert's Land.[863] According to his analysis, as a result of the company's very rudimentary judicial institutions, the Indigenous tribal legal systems were largely left to resolve their own disputes. However, where company property or personnel were involved, action was swift. In such situations, the attitude of the company was more military than judicial.[864]

Perhaps Gibson is referring to Adam Thom,[865] who stated that "[e]very community possesses the acknowledged right of avenging the wrongs, which its members may have sustained at the hands of any other community, either by public war or by

private reprisals."[866] Gibson illustrates this point with an account of a blood feud created by the killing of a company trader and his family. A group of company officers, rather than seeking a legal remedy, acted extra-judicially. They hunted down the native band thought to be responsible for the crime and summarily executed all the male members of the group. There was not even the semblance of a trial.[867]

In this instance as in others, company charters granted the trading companies not only the right to trade, but also the right to make peace and war with natives and, in some cases, the power to coin money.[868] Since the charted companies were explicitly created to make money, the territories under their control were administered for profit. Unsurprisingly, the fact that companies were driven by such imperatives resulted in excesses that embroiled their chartering sovereigns in wars[869] between the companies and the Indigenous peoples all over the world. On the surface, most wars are reported to be over land issues. But land acquisition is a form of wealth acquisition.

The wars inevitably led to expansion of the territories. The Indigenous people in North America had no practical access to the court system (although the Mohicans sued Connecticut in 1701) and no control over the lands appropriated by the British government for the settlers due to the prevalence of the idea of *terra nullius*. Most importantly, the settlers came to stay, which they did with the government's backing. As Table 2 shows, the Indigenous people of North America came to depend on the Europeans for survival and the governments that replaced the British government were devoid of Indigenous representation. So in theory, Independence Day to the Indigenous peoples of North America is without substance since, for the Indigenous people of North America, life after independence is not defined by independence but by dependence.[870]

The Colonial Era

This section may look disjointed, but this is by design. The first part is topical. It begins by bringing forth the most essential factors that contributed to the nature of sovereignty that the Indigenous people acquired in the "post-colonial" era. The aim is to compare the three nations under the various topics outlined below. It is then followed by other factors that are unique to each individual nation under consideration.

Hostility versus Friendliness

Advancement of Europeans into Ghana: Running Against the Wind

The colonization process in Equatorial Africa, as represented by Ghana, was initially very similar to the processes in Canada and the United States. The weak traders,[871] on their arrival, were compelled to be polite, friendly and helpful. The Portuguese, the first to arrive on the West Coast, encountered strong opposition and were prevented from penetrating the interior. Initially, it was the chiefs and their subjects who offered the opposition. As trade progressed, African traders jealously resisted any attempt to usurp their functions as middlemen between the coast and the interior.[872]

That does not mean that the settlement on the coast went unopposed. The struggle between the Indigenous people and the foreigners went on unabated throughout the colonizing period. The new settlers were always on the defensive and had to live in fortified buildings. As a result, West Africa had the highest concentration of fortified castles and forts in the whole world. Ghana alone had thirty-two forts and castles.[873]

> Permanent coastal forts and trading stations were soon built to give continuity to the operations of the merchant fleets, and to protect their stores. Often perched on rocky promontories, they served as a vivid visual reminder of the precarious foothold won by Europeans, who never became a settler community and for

> centuries remained on the defensive against both the climate and the inhabitants.[874]

(Please see over for images of Fort Orange and Cape Coast Castle.)

The commercial exchange in the form of barter seems to antedate all written records. The Carthaginians are said to have founded the system of "silent trade" in West Africa,[875] under which each party would leave the goods that were to be bartered in a pre-established location and would then pick up what they traded for without an actual verbal exchange. As one account illustrates, the early Europeans found the Indigenous peoples of West Africa to be skillful traders: "They are very wary people in their bargaining, and will not lose one sparke of gold of any value. They use weights and measures, and are very circumspect in occupying the same."[876] The West Africans had even converted gold dust into a form of currency.[877]

To make matters worse for the newcomers, the traders later came under attack from other European nations. This is significant because it led to the signing of treaties by the dominant nations with the local Chiefs for mutual benefit and protection, ignoring the resolutions of the Berlin conference. One very interesting observation should be pointed out at this juncture. Unlike Canada and the United States, the traders themselves entered into treaties with the inhabitants. Gouldsbury, in an attempt to be the first white man to enter Salaga, engaged in treaties with the Chiefs and fetish priests of Yeji, Yendi and Krachi on March 8, 1876. That treaty guaranteed him "freedom of trade and transit between there and the coast."[878]

These private treaties lead to the question of their validity under English law. Although these treaties did not bind the British government, the treaties nevertheless had functional value. All the foreign merchants respected them. Moreover, since the traditional courts were left intact, breaches of the treaties could be sent to these courts. The appeals from the traditional courts could go as far as to the Privy Council. Consequently, the treaties could be upheld under contract law in Britain.

The competition between the European nations for control of West Africa compelled the European governments to get involved in the management of trade in the region. The passage of the Gold Coast from the Portuguese to the Dutch and eventually to the British is not as stratified or cut and dry as presented above. The competition among other Europeans and the resistance offered by the Indigenous people forced whoever was in charge to be constantly on guard. Since exercising control was expensive, at times requiring military interventions, the European powers in charge proceeded cautiously. Initially, the involvement took the form of grants but, as competition intensified, military support became prominent. As noted by one commentator, however, British support was fairly feeble and somewhat constrained:

> The merchant adventurers could generally count on the support of their governments, especially where international rivalries were reflected in the competition for African trade; and if they were granted subsidies or monopoly privileges, these were normally subject to Crown or parliamentary control.[879]

The reluctance[880] of the British government to get involved in the West African colonies resulted in a very interesting wedding ceremony that would have a dramatic effect on sovereignty. This involved the marriage between the British traders and the inhabitants who acted as middlemen. Without the local middlemen, the British traders could not have fended off other European competitors and, in particular, the determined

local dissidents who were bent on preventing the newcomers from penetrating into the interior. Despite the resistance, the British government did not take direct responsibility for the forts or their administration. Even the lure of gold did not entice the British government to expand its territorial rights beyond the castles and forts.[881] This is because the Indigenous peoples jealously protected the gold. But the greatest deterrent was the fact that most of the gold fields were in the Ashanti region, where the Ashantis were reputed to be fierce fighters. Incidentally, the reluctance of the British to settle was not limited to West Africa. While the French explored the mainland of what is now Canada, the English, forbidden by their government from settlement until the grant to the Hudson Bay Company in 1670, merely continued to oscillate annually to the Grand Banks off Newfoundland and Acadia.[882]

But where there is will, there is a way, and the persistent traders and colonial governors used the prospect of gold mining as an important tool for convincing the Colonial Office of the importance of British involvement in Ghanaian territory. They argued that, if Britain were to successfully engage in mining, the government would have to take over the land, since the tribes would never give it up willingly. They proclaimed that the "Tribes were the 'rightful owners of the soil in the Protectorate,' and the Chiefs were unlikely to agree that any change of ownership might be for their own good."[883]

To bolster their ability to survive and to win over the British government, the merchant traders had little choice but to accept the local inhabitants as partners or, at the very least, as traders in their association.[884] In return, the African traders aided their European counterparts in presenting their case before the British government.[885] As it became costlier[886] for the government to simply issue grants, the Crown decided to take

over the management of the settlements for a brief period of time between 1821 and 1828.

The involvement of the British government was, more often than not, triggered by unrest in the trading areas. For instance, the first major British military involvement in the Gold Coast was during the interruption in palm-oil exports, which occurred during a rebellion in the Krobo area in 1858.[887] British government troops had to intervene in support of the merchants. These inconsistent redemption attempts did not satisfy the frustrated British administrators, who were under constant pressure from the traders, the inhabitants and other European competitors. On the other hand, territorial expansion was costly and the British politicians had their hands full justifying it to the taxpayers in Britain. Lord Salisbury's outburst at the Foreign Office was not an exception. He complained that "Governor R has had no better occupation for his spare time than to annex some place with a forgettable name, near Dahomey on the lagoon. Really, these proconsuls are insupportable… I have implored the Colonial Office to recall Governor R."[888]

The above correspondence illustrates too clearly the tension between the restraints of the Colonial Office and the ambition of local officials to enter into the international scramble for trade and territory. "Governor R" was not alone in pushing for an expansion. Governor Sir William Brandford Griffith was particularly conscious of the danger to British commercial interests from French and German expansion.[889] The relentless complaints and interventions inevitably led to the British government finally taking over the settlements in 1843. It should be emphasized that this was not full control or colonization, but administration of the settlements in order to assist in the military control

of a restricted engagement in the Krobo area, where there was a major interruption in the palm-oil trade. The emphasis was still on trade, but trade involves economics as well as social relationships. That these two elements were the gametes of politics and fertilization under the conditions in West Africa is obvious. The gestation period was long but, eventually, the full impact of Western political forces and their stimulus to governmental activities was felt in 1875.[890]

The unending disturbances and trade interruptions mandated decisive action. In response to the rising European competition and, in particular, the recurring invasions by the Ashanti, an all-out military campaign was launched in 1874. This was in conjunction with the British decision to remain on the West African coast and to assume greater responsibilities for the region to be known as Gold Coast. It was the turning point in the colonization of West Africa, since it became clear "that imperial rule was not a mere cipher at headquarters, but was going to affect intimate personal and domestic relationships throughout the area under British authority."[891]

To canvass the main points, the European traders were constantly running against the wind. The Indigenous peoples of Ghana stood their ground and protected their land from encroachment. Lands that were offered exacted tolls. The Chiefs and later the middlemen prevented the foreigners from trading directly with the producers. This applied to both local producers and producers from far away. Those who opposed European penetration were aided by the adverse climatic conditions, and the lack of good navigable rivers confined the newcomers to the open seas. Notwithstanding the agreement reached at the Berlin conference, the Europeans engaged in stiff competition and the Indigenous peoples took advantage of that, playing one European nation against

the other. Treaties were signed and respected. Initially this was due to the competition between the Europeans, while later the treaties were protected by the Indigenous peoples within the legal system. The Portuguese set foot in Ghana in 1492. It was not until 1850 that the British declared Ghana a colony. And it was not until 1874 that the British actually took physical and political control of the coastal regions. Thus a total of at least 358 years of commercial and political interactions preceded alien political control. Even that control was limited to the southern third of the nation. It was not until 1901 that the entire country came under British rule. That is enough time for the Indigenous peoples to study and learn from the foreigners, as well as to sharpen their skills for the political struggle that ensued. It is not surprising that what is now Ghana was colonized for only 56 years. The thesis will now project the Canadian scene against this background.

The Soft Landing in Canada and the United States

One distinguishing feature of America's Indigenous peoples that transcends the enormous diversity of other cultural characteristics is an immeasurable capacity for hospitality with regard to the early settlers.[892] Indigenous peoples' affectionate and intrepid cordiality in welcoming aliens was noted by nearly all European explorers. They were praised in 1502 by Vespucci[893] in South America and by Cartier (Canada) in 1535.[894] There were no survivors from Roanoke in the 1580s to sing their praises, but Edmund S. Morgan did relay their sentiments when he recalled that the local chief Wingina welcomed the visitors and that the Indians gave freely of their supplies to the English, who had lost most of their own when their ship was grounded.[895] The friendly reception offered to Cartier in Canada was extended to Henry Hudson[896] in 1610 to 1650. Indeed, Morgan later notes that "the Indians… could have done the English in simply by

deserting them."[897] That was not the case. Indeed, the Indigenous peoples of North America assisted the newcomers every way possible.

The Substance of the Trade – Dancing on Bay Street

Unlike the Ghanaians, who were skilful traders, Cartier's records indicate that the Indigenous peoples of America, though not unfamiliar with trade, did not appear to have any systematic commercial organization or medium of exchange. He recalled that they "bartered all they had to such an extent that all went back naked without anything on them; and they made signs to us that they would return on the morrow with more furs."[898] Considering the culture of sharing practised by the Indigenous peoples of America, it is not impossible that these Indigenous traders thought that they were exchanging gifts rather than engaging in commercial transactions. Although that can also be considered a form of barter, unlike the Europeans the Indigenous people did not engage in the activity in order to accumulate wealth. How else would one interpret exchanges mixed with dancing as described by Cartier, who noted that they "showed a marvelously great pleasure in possessing and obtaining these iron wares and other commodities, dancing and going through many ceremonies."[899]

As can be imagined, frauds and abuses were often committed by the foreign traders, who were much better versed in the intrigues of business. The experience with foreign traders in the past may explain why the Indigenous peoples of Ghana approached trade and commerce differently than the Indigenous peoples of the Americas. The same could be said about the dealings with the missionaries. Earlier contact with Muslims could have sharpened the Ghanaian's skills not just in social but also in religious dealings.

The Role of the Missionaries[900]

Even the missionaries were under the watchful eyes of the Ghanaian Chiefs. The caution that they took eventually ended up bringing more favourable results in Ghana, even though the tactics of the missionaries were the same in Ghana as in Canada and the United States. Just as in Ghana, the early European traders in the Americas were mainly interested in acquiring primary materials.[901] This kept cultural influence to a minimum and interaction occurred on the basis of equality. Each had an interest in what the other had to offer. The arrival of missionaries, on the other hand, was altogether different.

The ministers arrived loaded with the assumption that the natives were morally inferior and sought to redeem the Indigenous people from the tribulations of their own traditions. Thereafter the Indigenous culture was under attack. Roman Catholics, Anglicans, Methodists and the Basel Mission[902] competed for converts in Ghana, while Catholics, Anglicans and later the Methodists batted it out in Canada.[903] In the United States, it was the Puritans and the Catholics who pursued similar goals.

The inhabitants were thus subject to multi-dimensional forces, torn between their own traditions and the European culture. They were further subjected to the schisms of Christian theology.[904] The missionaries zigzagged across these foreign lands denigrating the Indigenous cultures that they were committed to destroying. Ironically, since they were the first people who consistently kept records, their accounts have become the primary historical source for understanding traditional cultures.

To gain acceptance among the inhabitants in the beginning of the colonization process, the missionaries often took on the mantle of the local religious leaders. For example, they would bless a marriage or the naming of a child performed by local

religious leaders, thus associating their powers with their own religious authority. The message from the priest to the couple was the same as those given by the Indigenous elders and the two ceremonies were complementary.

Both the priests and the leaders of the Indigenous people claimed spiritual powers, but the power of Christianity proved to be irresistible. The struggle between traditional beliefs and Christianity was largely decided not on the basis of religious persuasion but by the bullet and on the basis of economics, as well as the devastations of new diseases. These diseases were not limited to the Americas, though the effect in Ghana was somewhat muted due to the limited contact between the Europeans and the people in the interior. It is also possible that the Indigenous peoples of Ghana had developed immunity from earlier contact with the traders from the Mediterranean. Nevertheless, contact with the Europeans introduced smallpox, tuberculosis,[905] chicken pox, scarlet fever, cholera, influenza and whooping cough. The mortality in the influenza epidemic of 1918-19 was estimated at over 25,000 in the Northern region of Ghana alone, which accounted for six percent of the region's population. The victims of the disease were mainly women and young children.[906]

The Indigenous peoples of Ghana, and even more so those of the Americas who had no immunity to these diseases, began to die in substantial numbers. The Fetish priests, healers and diviners were all powerless to save their people. Traditional leaders were overwhelmed and people often lost faith in their traditions. Only the missionaries offered hope.[907] Faced with the missionaries armed with money and European medicine in one hand and the Bible in the other, the Indigenous peoples saw their salvation in

Christianity as a means of survival and not necessarily in the faith of the Bible. Most Indigenous peoples still adhered to their traditional religion.

Paradigm Shift: From Fetish Priests and Medicine Men to Missionaries

The Indigenous holistic view of the world as a balance between the natural, human, spiritual and animal worlds was transformed into one in which humans were at the mercy of one God, as taught by the missionary priests. The missionaries tried to impress the idea that the individual is responsible for his or her own salvation and a paradigm shift began to occur from communal to individual responsibility. The spiritual traditions of the Indigenous peoples of the Americas were further undermined by the corrosive effect of the fur trade. Commerce created new incentives to kill more animals in search of furs to trade and the introduction of guns ensured that the depredations on the animals were more effective. It is impossible to imagine that this mass slaughter of animals did not have an effect on the Indians' relationship with the natural world. These commercial activities certainly did obliterate or at least dull the Indians' sense of the animals being fellow sojourners on the soil, not to mention of the animals' role in the Cosmos which was very often at the heart of Indian spiritual traditions. With the essence of these spiritual traditions being undermined, much of the rest becomes inconsequential.

In contrast to the situation in the Americas, the Indigenous peoples of Ghana tended to appropriate the Christian god and incorporate it in their pantheon of spirits and ghosts; hence African spirituality survived the onslaught and features prominently in Ghana to this day. Although religious syncretism also became a prominent feature in many North American Indigenous societies, the fact that the missionaries in Ghana were confined to the coast allowed the Indigenous population a greater degree of control over

the development of their traditions. The African missionaries did not have the fur trade and the same level of devastation resulting from communicable diseases to aid them in crippling African spirituality. In consequence, they needed economic might to undermine the local traditions, becoming a part of the economic forces in West Africa. As an example, shortly after the Gold Coast became a colony in 1850, "the Basel Mission arranged a shipment to Liverpool of 440 cwt. of cotton grown in the trans-Volta area."[908]

Missionary involvement in commerce was not limited to trade. From 1837 to 1840 a trader by the name of James Swanzy was managing a coffee plantation "on the basis of 'pawned' labour, and was not a little aggrieved by the interference of the visiting British Commissioner, who considered the system too near slavery."[909] The estate was eventually sold under pressure to the Rev. T. B. Freeman, the Wesleyan General Superintendent. Christening the estate Beulah, he developed it into a somewhat successful self-supporting Christian community and agricultural training centre.[910]

The missionaries also placed a great deal of emphasis on education. In most British colonies – and the Gold Coast was no exception – children were placed in European education systems, within which both Indigenous languages and cultural traditions were forbidden. It is not surprising that Hegel would later declare that "Africa has no history,"[911] while Marx, despite being critical of British imperialism, would conclude that "the British colonization of India was ultimately for the best because it brought India into the evolutionary narrative of Western history, thus creating the conditions for future class struggle there."[912]

The residential schools as we know them in North America did not exist in Ghana, partially due to the lessons that the Ghanaians had learned from the slave trade, as

well as the fact that the colonizers were not able to exercise their power over the local population to the same extent as in North America. The schools were situated in the villages and the children came home every day. Boarding schools developed much later and were limited to children in their mid-teens and over. Without residential schools, the impact of cultural deprivation was indeed limited.

The lives of Indigenous women were also negatively affected by the changes in Indigenous societies. They were often employed as live-in maidservants, thus separating them from the family and depriving them of their influence on the family unit. Another factor was the different levels of inter-racial marriages. Perhaps the most potent force to change gender roles was the Catholic religion. Many gods and deities of the traditional religions had little in common with Mary and other saints, who were void of sexual symbolism. Yet Indigenous women were forced to accept images of chastity, depriving them of their role as the bearers of children, except within the confines of an exclusive marriage. With time, the role of women in previously egalitarian societies became more marginalized as the importance of the male-dominated commercial trade increased. Domestic responsibilities were further devalued due to the advent of the cash economy. And Hobbes's theory that "men are moving systems of matter and all relationships are market relationship"[913] took hold in the region.

Summary

Religion was proven to be a colonizing tool. It became another implement of conquest, chipping away at the traditional culture of the Indigenous people. But unlike Canada and the United States, in Ghana the Christians provided the schools from which the generation of nationalists emerged, the roads along which they travelled and the

harbour from which prospective leaders sailed into a national-minded world to snatch victory from the jaws of defeat.

The Power of the African Traders

One striking difference between British trade in West Africa on the one hand and in Canada as well as the United States on the other hand is the power of the local traders. These different functions came to affect the colonization and decolonization processes, and ultimately the expression of sovereignty – or lack thereof – in West Africa and North America. While the Indigenous peoples of Canada and the United States remained as suppliers and middlemen, African traders got involved in the commercial dealings at a very early stage of trade and the change over from trading partners to colonization did not affect the outcome.

> The final supplanting of merchant government by colonial rule had had little effect on the organization of the trade. The independent merchants – who might still be called upon to act as temporary officials and were frequently agitating for a greater voice in the Government – now included a few mulattoes and well-to-do-Africans[914]

As explained earlier, the European merchants welcomed the African traders as an inescapable adjunct to their business. The champion who led the crusade for the admission of African traders into the economic system in England proper was F. Fitzgerald, the London editor of The African Times.[915] He wrote: "We want a race of native capitalists in West Africa… and we will do our best to help in the creation."[916] He stood up to his words and set up non-profit organizations for the African traders in London and Liverpool.[917]

The independent African traders were astute and continued in business for decades. They learned very quickly from the British traders how to deal with the British

government. They adapted their skills toward political emancipation and featured prominently in the nationalist movements that set the Gold Coast on the road to independence.

The development of gold mines in 1874 enhanced the power of the African traders. The acquisition of land for the gold fields encouraged the rise of African gold dealers who acted as middlemen between the European miners and the local chiefs. This new breed of middlemen became very sophisticated. They bought up concessions from the chiefs and then renegotiated them with European companies. Some, such as "Dr. Africanus Horton, in association with Fitzgerald of The African Times, attempted to float the Wassaw and Ahanta Gold Mines Syndicate in 1880."[918] The Ghanaians seemed to take advantage of every opportunity to exert their sovereignty and the traditional use of gold was also used for the same ends.

Tradition: A Galvanizing Force against European Expansion

Gold was traditionally regarded by the Akans as sacred.[919] It was, therefore, extracted only for the well-being of the "Stool" – the area governed by the chiefs. In Western terms, the "Stool" refers to the state. For that reason, no attempt was made to improve on the traditional methods of surface mining and panning, which, quite literally, only scratched the surface of the wealth beneath. The pioneer of the modern mining industry is said to be Thomas Hughes of Cape Coast. He imported heavy machinery and commenced working in Western Wassaw.[920] When he struck a rich vein in 1861, he was sanctimoniously forbidden by the Chief from exploiting it and his machinery was ceremoniously destroyed.[921]

You can imagine the number of petitions that poured into Britain on behalf of Thomas Hughes. Despite those pleas, there was very little action taken by the British government and the individual entrepreneurs were compelled to fend for themselves. The government stepped in only when British interests were at stake. For that reason, full-scale mining did not materialize until after the nineteenth century.[922] One very important observation must be noted at this time, which is that the system of Indigenous land ownership in the Gold Coast was similar to what existed in North America. It should be stressed that the Stool land of Ghana, just as the tribal lands in America, does not belong to the chief but to the people under the Stool. Before we get to the description of "stool land," it is appropriate to establish the Acquisition of Allodial Title, which is the highest form of land ownership in Ghana. Most of the inhabitants of Ghana or their significant governing elements migrated into the country between the fourteenth and seventeenth centuries.[923] Some gained their lands by conquest. It follows that lands acquired by conquest or through the organized effort of an already existing state tended to be regarded as stool land. Acquisition of other properties, especially in the forest region, was settled by inhabitants who wandered into vacant territories. Judging from historic accounts of rampant overthrow of suceessions of hegemonies, the formation of states must have been the necessary prerequisite for self-defense, protection and stability. Hunters and farmers who settled in virgin lands soon organized themselves into communities. For states that resulted from the aggregation of communities with territorial interests, land ownership remained with the individual segments, which was applied in *Ngmati* v. *Adetsia & Ors.*[924] There are four principal means of acquiring Allodial Title by the stool. These are:

> Conquest and subsequent settlement thereon and cultivation by subjects of the stool; discovery, by hunters or pioneers of the stool, of unoccupied land and

> subsequent settlement thereon and use thereof by the stool and its subjects; … gift to the stool; purchase by the stool.[925]

The arrival of the British did not alter the state of affairs. In the words of the Omanhene of Adansi (1912):

> All land in Adansi is the property of the Adansi people, with the exception of one piece of land which has been given to the Government.[926] The fact of the British having come to the country has made no difference; things are exactly as they were before. There is land attached to my stool and also to the stools of my sub-chiefs, the latter including family land. There is no land in individual ownership. The paramount Chief and sub-chiefs hold the land so long as they are on the stool, as trustees for the people. Land belonging to my stool may be disposed of by me with the consent of my elders. If a sub-chief wishes to dispose of land he must inform me, but this is merely formal, I am not in a position to exercise the power of prohibition.[927]Any of his own people might apply for a grant of un-allotted land,[928] and would then become entitled to occupy and use it in perpetuity, subject only to the observance of customary obligations. No regular payment or tribute would be required, although the chief would probably expect some customary "drinks" or sheep for his assent to the transaction. But even this process did not involve individual ownership in the English sense, since it would soon enter the category of family land: "What the head of a family acquires to-day in his own individual right will, in the next generation, be quite indistinguishable from the general ancestral property of which he was a trustee.[929]

Furthermore, "[a]ny surplus might be temporarily abandoned, but would remain part of the family holding; only after a long period had elapsed would it revert to the stool-i.e. it would be once more the direct responsibility of the Chief, who could then make any fresh grants required."[930]

It is paramount that one aspect of land ownership in Ghana be clarified. Cartier, referring to the Indigenous chief's reaction to the erection of a cross on the shores of the St. Lawrence, described the chief as "making a long harangue and showing gestures as if to say that all the land around belonged to the chief."[931] That land did not belong to the chief himself, but to the tribe. By the same token, a chief in Ghana may claim that the land belongs to him/her. It is crucial to stress that "him/her" refers to the "stool" or to the

people under the stool. The land is communally held and does not belong to the chief personally.

When it comes to land issues, the chief always acts in concert with his/her sub chiefs and elders or headmen.[932] For the reader to grasp the preceding section, certain terms must be defined and understood through the Ghanaian mindset. To illustrate the point, the word "freehold" has a different meaning or connotation in Ghana. It is the type of ownership that a stool or a family member acquires after settling on vacant land held by the group. It is synonymous with "usufruct" which, again, is different from the same term in British property law. For instance, in Ghanaian culture, usufruct can transform into an "allodial" title after long possession and use.[933]

Types of Ghanaian Land Ownership[934]

1. *Allodial Title* is the highest form of ownership. It is the title to stool lands but may be owned by a corporate body such as a sub-tribe or even a family.

2. *Customary Freehold* (usufruct) is the type of ownership that a stool or family member acquires after settling on vacant land held by the group.

3. *Leasehold Interests* and *Lesser Interests* are grey areas in traditional Ghanaian property law, because the law distinguishes between members under the stool and those outside it. The same contract may be viewed differently depending on the parties involved. What is clear is that customary tenancies such as abusa and abunu come under *Lesser Interests.*

Clarification of Land Systems: Golightly v. Ashirifi[935]

This case is of interest because it clarifies Ghanaian land law terminology and interests. It also confirms that British rule did not significantly affect the Ghanaian land systems and that Ghanaian lawyers and judges played an active role in all land disputes.[936] West African cases are very difficult to understand for the reasons given above so the author will have to walk the reader through the case even though it was written by Lord Denning.

The disagreement centred on a property that the court claims is owned by three stools. That can occur only if the three stools are in a concentric circle relationship. That is, the land is owned by a sub-sub-chief (*Gbese* stool), who is under a sub-chief (*Korle* stool), who in turn is under the *Ga Mantse* Chief. This is the reason for stressing earlier that the land does not belong to the chief, but to the people. In this instance, the Ga chief, who is superior to the sub-chiefs, may have less control over the land than the Gbese chief. Recall that in describing his stool land Adansehene stated that "If a sub-chief wishes to dispose of land he must inform me, but this is merely formal, I am not in a position to exercise the power of prohibition."[937]

Unlike most land disputes, which originate in the traditional courts, this case started in the Ghana land court in 1940. The reason for this is obvious. All the chiefs who could settle the issue in the traditional courts were involved in the case. His Lordship begins by noting that a family named Okaikor Churu had been given the right by the Gbese stool to farm a piece of land at Kokomlemle since 1875. The loud silence on the conditions for the right to farm is a clue that the interest was Customary Freehold

(usufruct) and that the Okaikor Churu family were subjects of the Gbese stool. Lord Denning, without introduction of the defendants, writes "in 1942, however, the Atukpai family claimed to be the owners of the land."[938] Reports from the lower courts indicate that the Korle priest, who is a member of the Atukpai family, was the caretaker of the land for the stools. The Korle priest and his family believed that their higher standing in the tribe gave them the title to the land. They sold parts of the land for development despite numerous protests by the Okaikor Churu family. Consequently, in 1943 the Okaikor Churu family brought an action suite against the Atukpai family, claiming a declaration of title, £G100 damages for trespass and an injunction. At the trial in 1951, the judge at the court of first instance decided in favour of the members of the Okaikor Churu family. He declared them to be the possessory owners of that portion of land which they could use for the purposes of farming and residence by the members of their family, subject to the rights of the "Ga and Gbese and Korle Stools who are recognized by customary law as being the allodial owners of that land."[939]

As caretaker of the lands, the Korle priest may grant land to members of the stool for specific purposes such as farming, buildings for residences or trade,[940] "but this right can only be exercised over land which is deemed to be unappropriated." The court also noted that an outright alienation or sale of the lands can be effected only with the prior consent of the three stools – the Ga, Gbese and Korle – and that publicity is necessary in such transactions, since by native customary usage it provides a safeguard against the clandestine disposal of land without the knowledge of the necessary parties. The court further pronounced that the three stools could not alienate stool land without obtaining the consent and concurrence of the individuals or families who are lawfully in occupation

of the land. The West Africa Court of Appeal affirmed his judgment and announced that the plaintiff is granted a perpetual injunction restraining the Atukpai people from entering upon the land or dealing with it in any manner whatsoever.

The Atukpai family appealed to the Judicial Committee of the Privy Council. Delivering the judgment, Lord Denning concluded by saying that "Their Lordships are clearly of opinion that this declaration and injunction does decide the rights of these families in a manner which is binding on them."[941] Of interest to this thesis are the facts that this case started during the colonial period and that Lord Denning stated very clearly that the Chiefs and not the British government were the owners of the land.

Granting land for castles and forts was the prerogative of the chiefs and dates back to the time of contact. The system was equivalent to leasehold in British property law. Such grants of land did not conflict with native custom and traditional laws. Annual payments were fixed in gold according to written contracts that were safely guarded by the local Chiefs. The scramble for these fortifications and their conquest by other European countries led to complications.[942] As we shall observe, later refusal to respect the contracts led to serious consequences.

With the passage of time, trading firms and even individual traders were granted land for stores and accommodation in exchange for a percentage of their income. In 1872, the merchants refused to pay the levy. This led to riots and the first boycott of European goods at Cape Coast, as well as the seizure of some of the goods.[943] Once again, the British governor refused to intervene, blaming the merchants for the riot. Traditional laws, strict as they are, did not in any way prevent the European traders and miners from using wealth to illegally acquire lands from unscrupulous traditional heads. The *Lands*

Bills of 1894–1897[944] were designed in response to that abuse, partly to protect Africans from such alienation. These bills could be considered equivalent to the Royal Proclamation of 1763 in North America. These bills were not as elaborate and encompassing as the Royal Proclamation, but were more or less in accordance with customary law. It caught the British by surprise when some Africans attacked the *Lands Bills* as an attempt to alienate the lands of the people. The Africans were protesting because they understood the words in the strict sense of a transfer of land ownership to the British government, which was certainly not provided for under customary law.[945]

The Role of Indigenous Lawyers

The rise in land value in response to commercial gold mining led to an increased need for African lawyers,[946] because the Europeans could not directly negotiate with the chiefs. The African lawyers were trained in England and represented their clients in both the British and local courts. They usually acted on behalf of native Africans and the chiefs, but occasionally they also represented the concessionaires. As we have seen, this arrangement differs significantly from the situation in North America, where Indians had no representation[947] in the court system. The first land claim case brought by Indians in Canada was *Calder* in 1973. Many hail that case as the triumphant entrance of the Aboriginal people into the Canadian courts, but it was not. The seventh judge, Pigeon, J., pointed out that the court had no jurisdiction to make any determination, as the appellants had failed to obtain the fiat of the Lieutenant-Governor of British Columbia to sue the Crown, a requirement in that province. So in effect, it was not an entry but a knock on the gate.

The effect of exclusion of Indians from the court system in North America will be explored later in this thesis. It will be shown that land ownership by the Indians of North America is very similar, if not identical, to the land ownership in Ghana and most of Africa, where the tribe or nation collectively owns the land. That being the case, the type of land ownership should not account for the different ways in which the American Indians were treated with respect to land title and, for that matter, sovereignty.

Summary

Unlike their counterparts in North America, British traders in West Africa were not given charters. Instead, they went on their own, but received support from the British government when the need arose. The need for support from the local population was so great that the British welcomed them as commercial trading partners. The British traders also sought the support of the African traders in warding off other European competitors and in dealing with their home government, which was very reluctant to expand its territory. These local traders became the leaders in the independence movement half a century later. Although the partnership between the African traders and their counterparts from Britain was not equal, the alliance proved to be formidable to Britain when the march for independence began. Together with the lawyers, the African leadership was able to compel Britain to respect the treaties with the Indigenous people. Unlike in North America, the nation-to-nation relationship persisted between Britain and Africa throughout colonization. The African traders, lawyers and the established system provided enough protection that improper loss of native land was due mainly to unscrupulous and greedy local chiefs and elders who could not resist the large sums of money offered by the Europeans.

A Monument for the Mosquito

The author has always advocated the erection of a statue in honour of mosquitoes in Ghana. The role that mosquitoes and other insects, including the tsetse fly, played in saving African lives is beyond imagination. Most importantly, these insects prevented West Africa from becoming another South Africa. These insect-mercenaries fought courageously on the side of the Africans in so many battles.

The champion of these brave soldiers is the Anopheles mosquito with its deadly machine gun, the *Plasmodium vivax* – the parasite responsible for malaria fever. *Plasmodium vivax* could wipe out a whole battalion of British soldiers and had self-regeneration capabilities. The Africans, on the other hand, had an internal bullet-proof vest, the sickle cell, for protection. The sickle cell, the aetiology of sickle-cell anaemia, protects its carriers from malaria. By natural selection, most West Africans had sickle cell recessive genes that saved them from malaria, but which were not potent enough to kill them. Europeans, on the other hand, had no sickle cells, and so fell prey to *Plasmodium vivax.* Even the discovery of quinine did not help much, because the malaria attack was perpetual.

Though Europeans brought their own diseases with them, those paled in comparison to the African ballistic missiles. The fever-carrying mosquitoes and the tsetse fly also ruled out the use of beasts of burden, including horses, further limiting infectious diseases which thrive on close contact between humans and livestock. This also meant that, unlike in the Americas and elsewhere, the Europeans could not use cavalry to enforce their political power. With such force and fortification in favour of the Africans, the Europeans had to exercise restraint. Thus, the reluctance[948] of the British government

to advance into the interior may be due, in large part, to the insect-born diseases. This can be supported by the fact that the British sent soldiers of African descent all the way from Jamaica to fight in Ghana on behalf of the British government. Needless to say, the attempt failed because by that time the Jamaican soldiers had lost most of their natural immunities. The only reason that the British were able to win wars was because, unlike in North America,[949] they could get West Africans to fight on their behalf. In 1637, for example, the Massachusetts colonists, with the co-operation of several local tribes, mounted a devastating attack on a tribe known as the Pequots.[950] While there were many other similar strategic alliances, these co-operative attacks in the Americas were different in that in Ghana, the entire regiment, except for a few very high-ranking officers, was composed of West Africans themselves.

The Colonizing Process in North America: Indigenous Peoples of Canada

From Trading Partners to Rulers and Subjects

Cartier arrived in Canada in 1534 and by 1537 had established two outposts in what are now Quebec City and Montreal. His successor, Champlain, founded Acadia in 1604. New France developed under a succession of commercial monopolies.[951] When Louis XIV started to govern in 1661, he took steps to ensure an absolute monarchy. One of his ambitions was to establish a dynamic French presence in North America. To that end, he transformed New France into a *province de France*[952] and it became a colony directly under his personal rule in 1663. It was not until 1670 that Charles II granted the Hudson's Bay Company exclusive trading rights to "Rupert's Land."[953] That means the French had over 125 years to become established in Canada before they faced any serious

competition from another European nation. Compare that with Ghana, where the European nations were competing virtually from the start. By the time the British made a push for Canada, France had two holdings in this part of North America, as well as Louisiana. The valley of the St. Lawrence was called Canada and the name Acadia was given to the eastern or maritime part of New France. The line of demarcation was not clear, but what is now known as Maine, New Brunswick, Nova Scotia and Prince Edward Island was considered Acadian territory. The two provinces were run separately and Canada received more attention than Acadia.

Jean-Baptiste Colbert became the minister of colonies in 1669.[954] He endeavoured to turn the colonies into viable enterprises, directing much attention to getting the colony populated.[955] As an incentive, he fashioned the land tenure system after the *seigneurial* system in the mother country. The French *seigneurial*[956] system is similar to the English feudal system. Title to all the land rested with the king, who portioned the lots out to *seigneurs*,[957] who in turn leased out the land to the *censitaires*.[958] To accomplish his goals, Colbert made actual occupancy a condition for the tenancy.[959]

In running New France, Colbert again copied the political systems of the provinces of France. Officially, at the top of the pyramid was King Louis XIV, but in New France he had to delegate enormous powers to his colonial ministers. In New France, the king's power resided with Colbert, who was furthermore assisted by his *commis* (secretary) or his deputy minister.[960] The Sovereign Council headed by the Governor General and an Intendant[961] administered the colony. Politically, the Governor General ruled supreme, having undisputed control over military and diplomatic affairs. Almost always an aristocrat and a soldier, the Governor General saw to it that those under

his authority exercised their duties judiciously, effectively, honestly and fairly. Initially, the bishop ranked directly behind the Governor.[962] Thus the first bishop, François de Laval, initially shared with the Governor the responsibility of selecting the other council members from among the leading colonists. That power evaporated after Laval had an altercation with the Governor in 1663.[963] The Sovereign Council, renamed as the Superior Council after 1703, heard civil and criminal cases and was endowed with legislative powers. The "coutume de Paris"[964] became the colony's legal code in 1664 and remains the foundation of the current Civil Code of Quebec.

At the local level, the captain of the militia,[965] established in 1669 by the Intendant, was chosen from among the most respected habitants. It was an honourary position, but the Intendant's agent wielded immense power and respect. The captains became the most influential men in their communities.[966] There were no municipal or local governments and power came from above, though occasionally the Governor General and the intendant consulted the public on issues of general concern.

The Composition of New France

The core cities of New France were Quebec City and Montreal, though the latter soon became more populated. Outside these colonial centres were mission[967] First Nations.[968] They were the Hurons at Lorette near Quebec; the Abenakis from present-day Maine at Saint-Francois east of Montreal; the Iroquois at Sault St. Louis, Kahnawake; and the Iroquois of the Lake of Two Mountains (Kanesatake or Oka) west of Montreal.

Population-wise, New France was a mosaic society with a considerable First Nations population as well as an African community. Between 1670 and 1710, the mission First Nations even outnumbered the French settlers. Wisely and obviously, the

missionaries did not insist on assimilation or Native amalgamation with French civilization.[969] On the other side of the coin, the mission First Nations did not consider themselves subjects of French law, and the colonists obliged.[970]

Apart from the protection provided by the mission First Nations in the form of buffer zones between the French and other hostile tribes, the French relied on the resident First Nations in their raids against the English. The importance of the First Nations to the French was confirmed in the mid-eighteenth century when the mission First Nations alliance network known as the Seven Nations of Canada helped protect the St. Lawrence valley and assisted the French in the Seven Years' War.[971] For these and other practical reasons, the French could not antagonize the resident First Nations by rigorously enforcing French laws. Anxious not to undermine the symbiotic relationship, the French left the mission First Nations with a surprising degree of independence and largely excluded the First Nations from the application of the French legal system.[972]

English Canada

Most of the English American colonies in the sixteenth and seventeenth centuries were restricted to the eastern shores of what is now the United States of America. Henry Hudson, on an expedition sponsored by the English in 1610, located the immense body of water that became known as the Hudson Bay.[973] But it took over half a century for the English to make use of Hudson's finding in Canada,[974] though they used his finding of the Hudson River in New York right away. To be exact, it was not until 1670 that Charles II gave the Hudson's Bay Company exclusive trading rights to "Rupert's Land."[975] This land comprised all the lands within the drainage area of the rivers flowing into the Hudson and James Bays. The company lost no time establishing an extensive trading

network within the area and exposing the French from the west.[976] The French were now exposed to the English on two fronts: from the south when New Netherlands passed into English hands and was renamed New York and from the west through the Hudson's Bay Company.

British and French Struggle for Canada

Fearing that they would be choked by the English, the French under King Louis XIV and the Governorship of Frontenac embarked on further westward and southward expansion into the Mississippi valley in 1672.[977] The expansion into the Mississippi valley was led by a fur trader, René-Robert Cavelier de La Salle,[978] who reached the Mississippi Delta in 1682. His achievement will be considered under the British invasion of America. Of interest now is that the French also moved westward and built trading posts from the Ohio River to Lake Superior. They then turned northward toward the Hudson Bay area.[979] The French traders developed cultural, social and military ties with the Indigenous peoples, resulting in mixed First Nations and French (Métis) population, particularly in Michilimackinac, Green Bay and Detroit.[980] These expansions actually made the French more vulnerable. They had spread themselves too thinly, but their close ties with the Indigenous peoples proved to be an asset and, consequently, they could fend off the English for a while.

Details of the struggle between the British and French for control of Canada are very important, but it is doubtful that these could explain the different forms of sovereignty experienced by the Indigenous peoples of Canada and Ghana, since the Indigenous peoples that were allied with the British did not seem to have fared any better in terms of sovereignty issues. The peace treaties that followed the wars without any

participation of the Indians show how this deduction is entirely accurate. For that reason, only the sequence of events will be listed. The first major confrontation was the 1689-1697 war, when the two empires confronted each other in the interior of what is now Canada. There was a brief interlude of peace which lasted until 1701 when war resumed until 1703. There was unsettled peace until the signing of the Treaty of Utrecht in 1713. By the 12th article of that treaty, France gave up her claim to Hudson Bay and Newfoundland and also ceded Acadia to Britain.[981] An enormous part of these ceded territories was in the possession of the Indians. The commissioners appointed could not agree on the extent of the secession, and the Treaty of Aix la Chapelle was made on the principle of the status *ante bellum*.[982]

The year 1756 saw the start of the Seven Years' War. The beginning of the end of the French in Canada commenced with Wolfe's victory on the Plains of Abraham in 1759. This British victory led to the fall of Quebec; the French forces capitulated at Montreal the following year. The British established a military regime until the signing of the Paris peace treaty in 1763. The "Province of Quebec" that came under British rule stretched from the territory north of the Great Lakes to immediately south of the Canadian Shield.[983] The Western portion was mainly forest and the only European settlement of any size was located on the outskirts of present-day Windsor, which was incorporated into Quebec by the *Quebec Act*[984] of 1774.[985]

The Birth of Ontario

The American Revolution compelled Britain to create its first inland colony,[986] since the Royalists fleeing the United States needed a new place to settle. John Graves Simcoe,[987] who was posted to Boston at the beginning of the American Revolution in

1775 and who organized and became the commander of the Queen's Rangers in 1777, spent four years constructing the framework for a colony intended to be the ideal home for the Loyalists.[988] In 1791 Simcoe became the first Lieutenant Governor of this settlement, which was designated as Upper Canada, remaining in that position for five years. With the help of the Home Secretary, he organized the first civil government comprising of the legislative and executive bodies, which ran the territory for the half century that was to follow.[989]

To accommodate the American Royalists, the British Parliament enacted the Constitutional Act of 1791.[990] The division of the Province of Quebec was effected so that Loyalist American settlers and British immigrants in Upper Canada could have English laws and institutions without disturbing the French-speaking population who maintained French civil law and the Catholic faith. That Act established Upper Canada as a political entity separate from the rest of Quebec (Lower Canada). The designation "Upper" refers to the fact that it was up the St. Lawrence from the other jurisdiction, Lower Canada. Conflict soon arose between the United Kingdom and the Americans, who were searching for more land. The two nations confronted each other in the war of 1812. The Treaty of Ghent,[991] ratified in 1815, merely restored the status quo[992] *ante bellum* between the combatants.[993]

Additionally, Britain had to deal with internal conflicts. Between 1837 and 1838, William Lyon Mackenzie led an unsuccessful rebellion against British rule.[994] In response to these threats, the Parliament of Great Britain introduced the Act of Union (1840), which merged Upper Canada with Lower Canada to form the United Province of

Canada. The *British North America Act* of 1867 re-divided United Canada along the former boundary, but as the provinces of Ontario and Quebec.

The Effect of the European Drumbeat on the Indigenous Peoples of Canada

The establishment of a trading post at Quebec by the French in 1608 demonstrated little regard for Indian culture or traditional lands.[995] Similarly, the first Indian reserves in Canada[996] were not established as part of a treaty, but by the unilateral action of French religious orders that sought to proselytize and transform the nomadic culture of the Indigenous people into a sedentary way of life. This means – in support of this thesis's hypothesis – that, even if the Indigenous peoples in the reservations were self-governing, Indigenous societies were made to comply with European standards as the price of membership into the family of nations.[997] This French action was not restricted to Quebec but was carried over to Nova Scotia as well as to New Brunswick. However, the French ceded much of its maritime territories to the British in the Treaty of Utrecht (1713)[998] and did the same in the case of what remained of New France (including Cape Breton and Prince Edward Island) in the Treaty of Paris[999] in 1763.

The British continued the French attempt to transform the cultures of the Indigenous people, but in a more sophisticated manner. They used orders-in-council to dispossess the Indigenous peoples of their lands in what would eventually become Quebec, Nova Scotia and New Brunswick in the Dominion of Canada.[1000] The only faint hope for the Indigenous peoples was the Royal Proclamation that was, in part, a response to Chief Pontiac's rebellion of 1763. The insurrection threatened the European settlements in the interior of the North American continent. The reaction to Chief Pontiac's resistance confirms the hypothesis expounded in this paper that one of the

reasons for which the Europeans did not settle in West Africa was the opposition offered by the Indigenous tribes. This further supports the notion that sovereignty is all about power and that the control of land is critical to maintaining sovereignty. In the case of the Indigenous peoples of North America, that resistance could not be maintained, which allowed the Europeans to seize the opportunity.

Thus, even the Indigenous lands that were obtained by treaties in the Anishinabeg-loyalist settlement[1001] came under scrutiny.[1002] That all this could happen even though the Europeans could not have settled without the help of the Indigenous peoples[1003] supports the hypothesis presented in this thesis – namely that, compared to their counterparts in West Africa, the Indigenous peoples of North America were friendlier,[1004] more tolerant,[1005] more weakly organized[1006] and, by this time, more dependant on European trade and goods for survival. With respect to land, the Indigenous peoples of Canada clearly did not intend to sell the land outright.[1007] The Indigenous peoples had a different concept of land and, like their counterparts in West Africa, they believed that they were leasing it. The outcome of these unfortunate circumstances is that, with the loss of power and land, Indigenous (Canadian) sovereignty had to suffer, since positivists insisted that sovereignty could be most clearly defined as control over territory.[1008]

The British Invasion of America

The history of British America appears deceptively simple, but when traced from the 13 original colonies[1009] it is very complex and convoluted. The colonists definitely had their goals and aspirations, but they did not know where they were heading, and the future could have been very different for them. The royal charters granted to the British

East India Company and the Hudson's Bay Company created the trade monopolies over India and "Rupert's Land" (Canada) respectively. The Hudson's Bay Charter states the intent "to Incorporate them and grant unto them and theire successors the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee."[1010]

But Queen Elizabeth I's but ill-fated Charter on March 25, 1584 to Sir Walter Raleigh, as well as the three subsequent Royal Charters or letters patent issued by James I of England in 1606, 1609 and 1612, appear to be for the exploration and settlement[1011] of the eastern seaboard of the present-day United States.[1012] Take, for instance, the 1584 Charter to Sir Walter Raleigh:

> Elizabeth by the Grace of God of England, Fraunce and Ireland Queene... we haue given and graunted, and by these presents for us, our heires and successors, we giue and graunt to our trustie and welbeloued seruant Walter Ralegh, Esquire, and to his heires and assignes for euer... to discouer, search, finde out, and view such remote, heathen and barbarous lands... to haue, holde, occupie and enjoy.[1013]

The attitude of the settlers seemed to conform to the type of grants issued. One observer noted that most white newcomers to Canada before 1760 were single men who did not intend to make a home in the New World. Their sojourn overseas as soldiers or contract workers was a temporary exile to escape unemployment and hunger at home and was not meant to be the prelude to permanent settlement abroad.[1014]

In contrast to Canadian immigrants, who came to trade or proselytize, most of the settlers who went to what would become the U.S. intended to stay. Particularly in the area that came to be known as New England, "they arrived in family groups, sometimes along with friends and relatives from neighbouring villages back home. They recreated European society and family life to an extent"[1015] not possible in Canada, where migrant

men often found their sexual partners within the Indigenous populations.[1016] This is significant because the American and Canadian settlers viewed possession and the use of land in markedly different ways, and this difference should have impacted Aboriginal land title in the two countries, especially in "Rupert's Land."[1017]

After a few explorers on a scouting mission had returned from a voyage to the new continent with fabulous stories and two Native Americans, Sir Walter Raleigh was enticed and expressed the desire to establish a colony on the North American continent.[1018] He was to name it Roanoke[1019] in the region of what is now Virginia.[1020] The colony was established under the governorship of Master Ralph Lane after the fleet arrived under the navigational skills of Sir Richard Grenville.[1021] The colony landed on horrific times and was rescued by Sir Francis Drake, who was on a mission to conquer the Spanish in North America. Reinforcement for the colony arrived from Britain in 1587. A dark cloud[1022] appears to have descended over the colony during the three-year wait for fresh provisions. When the long-needed supply ships arrived from Britain in 1590, the colony had vanished without a trace. All that is known is that Virginia Dare, the first English child to be born on American soil, was born in the colony.[1023] Despite several attempts to locate the inhabitants of the now designated "Lost Colony," the inhabitants of Roanoke could not be found. Sir Walter Raleigh's Lost Colony of Roanoke ended all hopes of establishing a permanent English settlement in Virginia during the Tudor era.

The First Permanent English Colony in America

It took another 20 years before English settlers ventured to found another colony in the Virginia region.[1024] The Treasurer and Company of Adventurers and Planters of the

City of London (the London Company), and the Treasurer and Company of Adventurers and Planters of the City of Bristol (the Plymouth Company) sought letters patent to establish settlements in the New World. In 1606, James I of England issued two letters patent to the adventurers. The London Company received a charter for southern Virginia, while northern Virginia went to the Plymouth Company. The London Company was the first of the two companies to settle newcomers on the American soil. These settlers took up encampment at the strategic defensive location at Jamestown in 1607.[1025] This settlement became the first permanent English colony in North America. In *Worcester* v. *Georgia*,[1026] Marshall took account of this phenomenon: "Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves."[1027]

Most of the original 105 Jamestown settlers came to fulfill the wishes of their king and to search for gold and riches. As for their predecessors at Roanoke, the first year proved disastrous. When the first winter was over, a mere 32 of the original 105 settlers remained – and only because the Indigenous Americans living in the area had nourished the survivors to health.[1028] One frightening historical account would be educational. "[O]ur men were destroyed with cruell diseases as swellings, Fluxes, burning Fevers, and by warres, and some departed suddenly, but for the most part they died of mere famine."[1029] A supply ship finally arrived with much-needed supplies and a new batch of colonists. Needless to say, the provisions were not enough for the survivors and the new colonists who arrived with the supply ship. Predictably, in the following year, most of the

colonists again died of starvation and from hostile encounters with their neighbours, who had become suspicious of the newcomers.

Spring brought hope and ships arrived, but the settlers had learned their lessons, and most were set to leave. Just then, Lord Thomas de la Warr[1030] arrived from England with additional provisions and yet more colonists, preventing the old settlers from leaving. Captain John Smith,[1031] one of the settlers who had significant experience from past wars, was blessed with survival instincts and was committed to the success of Jamestown. Slowly, through his efforts, the settlers reached agreements with the local Native American chieftain Powhatan, who literally kept the settlers alive by providing them with much of their food in that first year.

Eventually the settlers learned how to cultivate and farm the land for part of their crops. Incidentally, Smith was the person who tutored the pilgrims in England before they set sail for Massachusetts. In Virginia, John Rolfe was the first of the colonists to cultivate tobacco for commercial use. He married one of Powhatan's children, Pocahontas, who visited the colonists in the early years and even brought food and other provisions to the settlers.[1032] John Rolfe's commercial venture eventually brought the colony to profitability.

It is essential to point out that nowhere in the research process did the author find the Indigenous peoples of America asking the settlers at contact for anything for the use of the land.[1033] Richard H. Bartlett[1034] made the same observation with respect to Canada. This does not mean that the Indigenous peoples of North America did not demand compensation for the use of their lands. It is strange that some of the tribes such as the Algonquin of Allumette Island in the Ottawa River[1035] would have used their position and

power to exact tolls from canoe brigades, including those of traders, who passed through their territory[1036] and yet not demand compensation for the construction of forts and settlements on their lands.

The situation in Ghana (West Africa) was quite different. The Indigenous people of the Gold Coast (Ghana) demanded compensation at the outset in one form or another from the Europeans for land use.[1037] The most common form of payment for the use of land by strangers seems to have been the *abusa* system, whereby the landowner received a one-third share of the produce.[1038] This is similar to the British tenuary and seniory system but evolved without British influence. The system flowed smoothly into later arrangements, whereby individual European merchants and firms were granted leases for their houses and stores in exchange for a percentage levy upon their trade.[1039] The most significant difference relevant to this thesis is that for most tribes, such as the Adangme, there was a definite tendency to avoid selling land to strangers. To enforce this rule, the children of a deceased stranger always had to renew a tenancy.[1040]

On the other hand, Virginia, which started out as a corporate colony granted by Royal Charter to a company of investors who held governing rights apparently obtained for nothing, became a royal colony subject to the governing authority of the English monarch in 1624. Recall that in 1607, King James I of England issued another charter to the Plymouth Company[1041] in addition to the charter to the settlers of Jamestown. However, the Plymouth Company's attempt to settle in northern Virginia ended up in disaster. The employees of the Plymouth Company made an abortive attempt to establish a colony named Popham. The settlement was located at what is now Maine. The

disappointed settlers abandoned the feeble settlement and returned to England after a year.

As a final note, regardless of the Royal Charters, the settlers initially regarded the Indigenous nations as sovereign. As indicated in the introduction, treaties implied nation-to-nation relations between the signatories. Therefore, it can be assumed that Virginia recognized Indigenous sovereignty. "Virginia had entered into treaties with 'Indian Kings & Queens' which acknowledged their 'Dependency on' and 'Subjection to' the English Crown, but which also secured to 'each Indian King & Queen' Power to Govern their own People.'"[1042] Sadly enough, Chief Justice Marshall disregarded this important fact in *Johnson* v. *McIntosh.*[1043]

The Other Colonies

From here on, this thesis will concentrate only on the characteristics of the colonies that are different from those treated above and that are of significance to the themes in this thesis. These themes include but not limited to the following subjects:

A. The Europeans did not arrive on vacant lands but found the lands occupied by Indigenous nations.
B. The newcomers could not have survived without the help of the Indigenous inhabitants.
C. The newcomers initially respected these inhabitants and dealt with them on a nation-to-nation basis. Some colonies signed treaties with the Indigenous nations. Some had statutes, which were premised upon the belief that the extension of these laws over the Indigenous peoples was contingent upon agreement or treaty with the respective nations.

D. The newcomers took undue advantage of the hospitality and friendliness of the Indigenous peoples of America and, when the balance of power had shifted, the newcomers disregarded the nation-to-nation relationship and imposed their will on the Indigenous peoples. The laws that underlay the imposition were twisted to match the intentions of the colonists (e.g. Mohegan v. Connecticut cases) and were not based on any coherent system of law.

Massachusetts

The passengers on the Mayflower, who were collectively known as the Pilgrims, arrived in Massachusetts on September 16, 1620. Among the 102 passengers were 41 Christian Puritan separatists. The group had obtained a patent from the London Virginia Company. One of the conditions of the patent indentured the group into seven-year service in the company. The term of service was to commence after arrival and settlement in the part of the North America now known as New England. Unlike their predecessors, the Pilgrims envisaged the problems they would encounter, seeking the advice of those who had been in the New World and had experience establishing colonies. One of these advisors was the Captain John Smith, who had been instrumental in keeping Jamestown alive. The new settlers, after surveying the area, decided to settle not at the tip of Cape Cod where they landed, but near Plymouth harbour.

The settlement was named Plymouth, in the state that would be known as Massachusetts. As a sign of solidarity, all the men signed an agreement known as the "Mayflower Compact." This declaration, which served as the official constitution of the Plymouth Colony for many years, was signed on November 21, 1620. It contained the principles and rules to guide the newcomers in their efforts to set up the colony. Despite

the precautions, nearly half the settlers died in the winter of the first year. But fate was on the side of the survivors. They were approached by an Indigenous Wampanoag called Samoset, who later introduced the group to Squanto.[1044] Both Samoset and Squanto had been kidnapped by Captain George Weymouth and smuggled to England.[1045] When Squanto returned from England, he found his entire tribe decimated by diseases introduced by the Europeans, with no one remaining at the site to contest.[1046]

Squanto, of course, could speak English and he taught what was left of the Pilgrims the survival skills that they needed. His greatest contribution to the survival of the settlers was the bond of co-operation and friendship he forged between the settlers and Indigenous populations. By his actions, "Squanto carved a prominent place for himself in the history of the early settlement of New England."[1047] Governor Bradford of the Plymouth Colony expressed his appreciation of Squanto in his memoir:

> Squanto continued with them (the Pilgrims) and was their interpreter and was a special instrument sent of God for their good beyond their expectation. He directed them how to set their corn, where to take fish, and to procure other commodities, and was also their pilot to bring them to unknown places for their profit, and never left them until he died.[1048]

Squanto's story is significant in many ways. It depicts the vulnerability of the colonists and the fact that they might have not survived without the help of the Indigenous peoples. The loss of Squanto's tribe is one reason for which some of the lands appeared vacant when the Europeans decided to settle. That is, diseases introduced by the earlier explorers could account for the decimation of some Indigenous tribes and the lack of population in certain areas, notably in the ports of entry into the American continent. Finally, it shows one occasion where the settlers did not have to provide any consideration for the use of the land and were not challenged to do so.

The Puritans soon followed the Pilgrims and settled in Naumkeag. This settlement later came to be known as Salem. John Winthrop, armed with the Massachusetts Bay Charter, founded Boston in 1630. The relationship between the New England colonists and the Indigenous peoples was often strained. In 1637, the colonists, aided by some local tribes, launched a devastating attack on the Pequot tribe.[1049] The long fragile accord between the colonists and the Indigenous peoples fell apart in 1675 with the outbreak of the King Philip's War (1675–1676).[1050] The war got its name from the Wampanoag leader, Metacomet, who was nicknamed "King Philip."

It is not clear if King Philip's War, one of the bloodiest ever fought on American soil,[1051] was related to the invasion of the Pequot tribe. However, it is clear that during that war the Pequot and Mohegans fought alongside the British colonists against the Wampanoag.[1052] What is important is that the war against the Pequot tribe and King Phillip's War are examples where the Indigenous peoples appear not to be the aggressors.[1053] Professor Gill Lepore reconstructed history with an open mind. In telling her version of this story, Lepore constantly reminded the reader about "the nature of storytelling itself, and about the partial and partisan nature of memory and history."[1054] From her analysis, one commentator wrote: "In retrospect, it is nearly irresistible to see King Philip's War as a struggle in which Indian victims rose up in futile rebellion against triumphal English conquerors who only understood the language of blood."[1055] Even King James II's emissary, Edward Randolph, who was sent to investigate the violations of the Crown's colonial laws, was displeased with the attitude of the colonists. This is what he had to say about the causes of the King Phillip's War:

> Various are the reports and conjectures of the causes of the present Indian war. Some impute it to an imprudent zeal in the magistrates of Boston to Christianize

> those heathen before they were civilized and injoyning them the strict observation of their lawes, which, to a people so rude and licentious, hath proved even intolerable, and that the more, for that while the magistrates, for their profit, put the lawes severely in execution against the Indians,... Others impute the cause to some injuries offered to the Sachim Philip; for he being possessed of a tract of land called Mount Hope, a very fertile, pleasant and rich soyle, some English had a mind to dispossesse him thereof, who never wanting one pretence or other to attain their end, complained of injuries done by Philip and his Indians to their stock and cattle, whereupon Philip was often summoned before the magistrate, sometimes imprisoned, and never released but upon parting with a considerable part of his land.[1056]

The English got what they wanted and more. With the triumph of the English, Massachusetts, which like Virginia was conceived as a corporate colony, was transformed into a royal colony in 1691, 15 years after the King Phillip's War.

New Hampshire

Unlike Virginia and Massachusetts, New Hampshire started out as a proprietary colony that was turned into a royal colony in 1679.[1057] In 1623, the English Captain John Mason advanced two groups of adventurers who established a fishing village that later acquired the name of New Hampshire near the mouth of the Piscataqua River.[1058] This is a situation where the settlement apparently preceded the charter or the grant of Hampshire to Captain John Mason on November 7, 1629. This colony, on occasion, fleetingly came under the administration of Massachusetts, but generally remained a separate colony until Independence Day. Notably, there were even settlements in New Hampshire that were established without a charter or grant. One of them was Exeter, started in 1638 by John Wheelwright,[1059] who had been banished from Boston earlier.[1060] There is also a report of Scots-Irish settlers from Londonderry, Ireland who were sent to form a "Scottish"[1061] settlement in New Hampshire. The settlement was named Londonderry and was established in 1719.

New Jersey

New Jersey is blessed with a colourful history. In the British version of events it appeared on the colonial scene with the discovery of Cape May by Sir Henry Hudson in 1609. The irony is that Cape May was named after a Dutch explorer, Captain Cornelius Jacobsen Mey. What matters is that the first permanent town, Bergen (now Jersey City), was established in New Netherland in 1660, even though the Dutch claim to have been in New Netherland since 1623. The Dutch colony straddled parts of both present-day New Jersey and New York (New Amsterdam).[1062] The Dutch, unlike the other colonial powers, had a policy that required formal purchase of all land taken for settlement. The first such transaction was the purchase of Manhattan by Peter Minuit.

Around 1638, some of the south-western parts of New Jersey came under the control of the Kingdom of Sweden and were named New Sweden.[1063] In 1655, the Dutch annexed the Swedish holdings to New Netherland. Around 1664, the Duke of York was in turn able to wrench from the Dutch the Dutch holdings lying between Virginia and New England. With that property in hand, the Duke made a proprietary grant to Sir George Carteret and to Lord Berkeley. The lands granted stretched between the Hudson and Delaware Rivers. Unlike other grant recipients, Sir George Carteret and Lord Berkeley did not intend to settle or trade in the region, but to profit from land sales.[1064] The region granted was named after the Isle of Jersey, which was under the governorship of Sir George Carteret. New Jersey was granted a Royal Charter in 1702.

The significant features of New Jersey are the fact that it started out as a proprietary colony as opposed to royal colony. The grant recipients intended to hold the land and eventually sell it for profit. This colony introduces the first sign of colonial

acquisition of Indian lands by purchase. The Dutch paid the Indians for the use of their land. This acquisition differs from the conditions in Ghana because it appears that it was the voluntary action of the Dutch and not a traditional requirement of the Indigenous peoples; otherwise the other colonial powers would likewise have conformed to this policy.

New York

New York (New Amsterdam) was already mentioned above. It originated with the Charter of the Dutch West India Company of 1621. Peter Minuit with his partners bought Manhattan Island with approximately $24 worth of goods from the Indian owners. After the British overran the Dutch, New Amsterdam was given to the King's brother, the Duke of York, and was renamed New York. Like New Jersey, New York was conceived as a proprietary colony that evolved into a royal colony in 1685.

Maryland

Another colony that began as a proprietary colony is Maryland.[1065] It received its charter from Charles I in 1632. The grant was issued to Lord Baltimore (George Calvert, Baron of Baltimore). Maryland has a long and interesting history. The most important point to this thesis is that Maryland is one of the colonies that had statutes that recognized native nations[1066] as well as tributary arrangements with Native governments; a case in point being the "act for ascertaining the bounds…of the Nanticoke Indians, 1698."[1067]

Rhode Island

Rhode Island originated with the expansion of Europeans already in the North American continent. The first permanent settlement was a private venture. Roger

Williams, who was expelled from Salem, Massachusetts for promoting religious and political freedom, took refuge among the Narragansett Indians and later purchased land from them to set up a camp later known as Providence. The new settlement became a haven for those seeking religious freedom. A second religious dissident banished from Massachusetts, Anne Hutchinson, helped found Portsmouth in 1638. Rhode Island was adopted as a corporate colony. It received a Royal "Charter of Rhode Island and Providence Plantations" in 1663. Among other guarantees, the Charter established complete religious freedom. This unheard of and unique provision later became incorporated into the U.S. Constitution.

Connecticut

Dutch traders were the first to settle in Hartford, Connecticut around 1633. These traders were unceremoniously displaced by the expanding English colonists from Massachusetts, the most prominent being the missionary Thomas Hooker. This clergyman and his congregation arrived in Hartford and declared freedom from all save Divine Authority. In 1639, the "Fundamental Orders" were enacted to govern the colony. In 1662 Connecticut finally obtained a Royal Charter under John Winthrop, Jr.

Mohegan v. Connecticut Cases

One theme runs throughout this thesis. The colonial powers consistently manipulated the meaning of statehood and sovereignty to suit their intentions, and the relationship between the Mohegan Indians and the colony of Connecticut provides a perfect example of such an occurrence. From the records, Thomas Hooker and his congregation were, to put it politely, refugees in the Mohegan territory. The Mohegan

Indians were the first to be on that land and they had their own legitimate government. The fact that Indigenous sovereignty and Crown sovereignty could have existed simultaneously, or, more specifically, the fact that "the Mohegan nation was 'juristically regarded as sovereign,'"[1068] may be deduced from a series of cases between 1705 and 1773. The litigation, involving land disputes, was between the Mohegan Indians and the Governor, as well as the Company of Connecticut. Unfortunately, these cases were not recorded, but J.H. Smith, interested mainly in the historic rather than the legal significance of the cases, furnished a detailed summary in his book *Appeals to the Privy Council from the American Plantations.*[1069] With Smith's emphasis on history, it is difficult to ascertain whether the conclusions were those of the judges or of Smith himself. Fortunately, J.W. De Forest,[1070] G.A. Washburne[1071] and Sir W. Holdsworth[1072] have all provided some insight into what the conclusion ought to be.

The Mohegan case involved a land dispute. The tail end of the dispute became the landmark case of *Johnson & Graham's Lessees* v. *McIntosh.*[1073] The dispute involved the colonial land speculation engineered by Baltimore and Philadelphia merchants, organized as Illinois and Wabash Land Companies. Although the initial attempt to acquire the land began in the early 1700s, it was not until 1773 and 1775 that the Illinois and Wabash Land Companies "purchased four enormous parcels of land along the Illinois and Wabash Rivers from the Piankashaw and Illinois Indians."[1074] For 50 years, the merchants fruitlessly tried to have these titles legislatively recognized. In a final and desperate attempt, the companies sought judicial recognition in the Illinois federal district court. Their action resulted in an "adverse *pro forma* decision."[1075] The companies then took their case before the Supreme Court under John Marshall, on a "writ of error."[1076]

The companies' action ended in a failure for the company. According to Marshall,

> ...the companies had no recognizable title because: 1) the Illinois and Piankashaws had no fee title to convey, since the fee title had been passed to the British Crown upon discovery; and 2) the only real property interest the tribes did possess was an "occupancy" right, which could only be conveyed by the Crown or its republican successor.[1077]

The bone of contention between the colony of Connecticut and the Mohegan Indians comes under the bigger picture described above. The issues are more complicated in the sense that they involved treaties, the creation of reservations and the apparent breach of the treaty by the Colony of Connecticut.[1078] The English newcomers to Connecticut in the 1630s, dealt with the Sovereign(s)[1079] of the Mohegan nation on a somewhat equal basis. In that atmosphere of trust in 1640, the Mohegan Sachem Uncas tribe ceded most of the Mohegan lands to the settlers, reserving for the Mohegans a parcel of land comprised of farms and hunting grounds.[1080]

The Mohegan Indians later turned over the reserve lands to Major John Mason and his heirs "as their Protector and Guardian in Trust for the whole Mohegan Tribe,"[1081] which was done in 1659. Major John Mason later became the deputy governor and, in 1660, transferred this land to the colonial government. In return, the colonial government undertook to leave enough lands for the Mohegan Indians, when and if it opened those lands to white settlement. The Mohegan Indians would have no part in this arrangement and rightly so. They contested that they were not privy to that arrangement and that there were no benefits accruing to the Indians for the settled lands which were for the use of the Mohegan Indians.

In 1662, the Connecticut settlement became a Royal Chattered Company,[1082] "'a Body Politique & Corporate' with legislative, executive, and judicial powers."[1083] The

boundaries of the settlement outlined in the Royal Charter engulfed the Mohegan lands.[1084] Armed with the charter, the company laid claim to the lands of the Mohegan Indians.[1085] However, the company or settlement maintained the nation-to-nation relationship with the Mohegan Indians. This is supported by a treaty signed between the Mohegan Indians and the Government and Company of Connecticut in 1681. The treaty acknowledged the ongoing Mohegan rights in the disputed land. In addition, it implied that the colonial legal regime did not extend over the Mohegan. The colony offered to administer "'Equal Justice' to them 'as our own people' if they 'before hand declared their Subjection to our Laws.'"[1086] Nevertheless, through legislation and orders in council, the colony began distributing the disputed lands for settlement in 1687.[1087]

The Mohegan Indians did not sit still. Through their trustees, John Mason and his successors, they petitioned the Crown in 1704. They contended that the actions of the Connecticut colonial government "violated 'Treaties' and were therefore 'illegal.'"[1088] In his thesis, M.D. Walters[1089] offered a brief account of the interesting events that followed the petition of the Mohegan Indians to the Crown. The Crown appointed Governor Dudley[1090] of Massachusetts and his council to hear and determine the outcome of the case. That is, the case was taken out of the Connecticut courts. The Dudley Commission decided in favour of the Mohegan Indians in 1705. The Colony of Connecticut appealed the decision to the Privy Council, which in 1706 appointed a commission of review.

This commission never sat and a new commission was set up in 1737. The 1737 tribunal's report, which reversed the Dudley decision, came down in 1738. The report was set aside for irregularities and another commission was established. The last

commission rendered its decision in 1743. It also reversed the decision of 1705 and that reversal prompted the Mohegan Indians to appeal that decision to the Privy Council. In 1772 the Privy Council informed the Crown that the decision of 1743 should stand without providing any written reason. The Crown accepted the Privy Council's recommendation in 1773.

The most important aspect of this conflict is not the decision in this specific case or that of Chief Justice Marshall in *Johnson* v. *McIntosh*,[1091] but rather the method employed in dealing with the case. Instead of asking the Connecticut courts to rule on the case, a commission outside the jurisdiction was asked to deal with the conflict. The issue is very simple. Imperial jurisdiction is seldom, if ever, evoked for disputes between British subjects and the colonies in which they reside. This implies that the evocation of the Imperial jurisdiction recognizes the Mohegan nation as having sufficient sovereignty with respect to the Connecticut governmental body. This is what the Dudley commission had to say on the topic: the Mohegan nation had "cultivated a firm friendship by League with Our said Subjects of Connecticut, and have always assisted them when they have Been attacked by their Enemies."[1092] This is a clear indication of a relationship between allies, as opposed to subjects in common.

The issue resurfaced in 1751 when Attorney General Sir Dudley Ryder and Solicitor General William Murray (later Lord Mansfield, Chief Justice of the King's Bench) ruled that "there were no precedents of imperial Commissions issuing to determine matters of Private Property between the Subjects…[matters which were] only proper for the Conusance of the Ordinary Courts of Justice."[1093] This was a case between

a group of speculators who privately purchased lands from some Indians and the colony of New Jersey.

Dudley Ryder and Solicitor General William Murray were asked to reconsider their views in terms of the Mohegan case. They concluded that the two cases were distinguishable: the New Jersey dispute involved "the Rights & possession of Lands disputed between his Majesty's Subjects of that Government, to whom his Majestys Courts there ought to be & are open," whereas the Commissions issued in the Mohegan case "were for determining disputes between the Whole Province of Connecticut & the body of Mohegan Indians between whom there is no common Court of Justice there."[1094]

It is obvious that the case of *Mohegan Indians* v. *Connecticut* should not have gone as far as it did, nor should it have gone in that direction. There had been ample precedents in the sixteenth and seventeeth centuries on the doctrine of continuity,[1095] and the Welsh and Irish cultures, customs and land-tenure systems were not abrogated by the legislative introduction of English law into these nations. In summary, the foregoing points to one of the main themes of this thesis – the shifting definition of sovereignty. That is, the definition of sovereignty is not based on any coherent law or reason, but on greed and power.

Delaware

The radicalism of Delaware, the first entity to ratify the Constitution and become a State in 1787, must have stemmed from its history. That colony seesawed between the Dutch, Swedes and English, and even flirted with independence in 1701, going as far as electing its own assembly in 1704. The Dutch were the first to venture into Delaware under the leadership of Captain David Pietersen de Vries in 1631. The party settled in

Zwaanendael.[1096] By 1632, the party had been wiped out in an encounter with the Indigenous peoples. In 1638, Peter Minuit, under the auspices of a grant from the New Sweden Company, led a group of Swedish settlers to the "the rocks,"[1097] which later became known as Fort Christina. It took 17 years for the Dutch to boot the Swedes out of New Sweden. This attack was triggered by Johan Rising,[1098] the new Swedish Governor, who upon his arrival in 1654 seized the Dutch post of Fort Casmir. In 1655, Peter Stuyvesant[1099] came from New Amsterdam with a Dutch fleet, subjugated the Swedish forts and imposed the authority of the Colony of New Netherland throughout the area controlled by the Swedes. In 1664, the English took their turn and took control of Delaware after defeating the Dutch. The Dutch fleetingly recaptured the territory in 1673, but in 1674 the English finally took control for good.

One of the reasons offered by this thesis for the Europeans not settling in Ghana was competition among European states. The situation at Delaware indicates that, for European rivalry to work on the side of the Indigenous peoples, the Indigenous peoples had to be able to capitalize on the situation. It appears, however, that the Indigenous peoples around Delaware at this point were not strong enough to take advantage of the European rivalry or the rivalry between Christian groups.

Pennsylvania, the Quaker Province

The year 1681 saw the granting of the Province of Pennsylvania to William Penn by King Charles II.[1100] William Penn's agents soon arrived to take charge of the property. They discovered that the property would be landlocked if the colonists on either side of the Delaware River blockaded the property. William Penn reported their fears to the Crown and got a sympathetic ear from the Duke of York, who in March 1682 conveyed

by deeds and leases the land included in the counties of New Castle, St. Jones, and Deale.[1101] William Penn arrived in New Castle on October 27, 1682 to take charge, and wasted no time in implementing his famous "Frame of Government."

The first general assembly was held in the colony in the same year.[1102] Despite these efforts, William Penn's control didn't last. A long dispute ensued between William Penn and Lord Baltimore of the Province of Maryland as to the exact dominion controlled by Penn on the lower Delaware. The 100-year feud continued almost until the time of the American Revolution. Meanwhile, the people of Delaware declared themselves independent and elected their own assembly in 1704. At the time of the Declaration of Independence (1776), Delaware had not only declared itself free from the British Empire, but also maintained a state government entirely separate from Pennsylvania.

The history of Pennsylvania is intertwined with that of Delaware through William Penn, a member of the Society of Friends (Quakers), and through the grants from Charles II to William Penn to offset a debt owed to Penn's father. William Penn's 1682 "Frame of Government" for Pennsylvania established the colonial order and the city plan for Philadelphia was drafted. The 100-year feud that allowed Delaware to liberate itself was settled in 1763, when Charles Mason and Jeremiah Dixon establish a border between Pennsylvania and Maryland. Pennsylvania is also of interest to this thesis because it is the first place where the Germans made their debut in the United States, settling in Germantown near Philadelphia in 1683.

The nation-to-nation relationship between the colonies and the Indigenous peoples at contact can also be seen in Pennsylvania. Pennsylvania enacted statutes based

on the assumption that the extension of English law, or the colony's enacted laws over the Indigenous peoples, required the Native nation's agreement or treaty. One such statute in 1684 stipulated that the governor and council discuss the issue of alcoholism with the Indian chiefs in the hope that they would "Submit to have the Laws of this government executed upon them when they shall any wise transgress them, equally with other inhabitants."[1103]

The phraseology of the 1758 Georgia statute, enacted to prevent private individuals from purchasing lands directly from the Indians, left no room to doubt that the Crown considered the Indian nations as sovereign. It talks about "good correspondence between his majesty's subjects and the several nations of Indians in amity with the said province"[1104] – obviously differentiating the Indigenous nations from His Majesty's subjects, the colonies.

The Carolinas

North Carolina and South Carolina both have long and colourful histories. Some of that history has been dealt with elsewhere in this thesis. The rest do not add any new features that are pertinent to this thesis. The significance of the foundation of the 13 original States to the theme of this paper is set out above but, before we arrive at the conclusion, observations and comments that follow, we have to address the omission of the French colonies from the above presentation.

The French Factor

Conspicuously missing from the accounts of the 13 original colonies are the French. That is not coincidental, since the ex-French colonies were not among the

original states. The formal French settlements had just come under English rule and had not organized themselves to be independent or to form liaisons with the English colonies in the move to independence. During the seventeeth century, the French devoted much of their time and effort to Canada[1105] but, when the English hemmed the French in New France from New York and Rupert's Land, they embarked on further westward expansion into the Mississippi valley.[1106]

Frontenac, who became governor of New France in 1672,[1107] had an ally, the fur trader René-Robert Cavelier de La Salle who was equally keen on westward French expansion. In 1682, de La Salle reached the Mississippi Delta, raised the royal arms of France and claimed all the land drained by the Mississippi River and its tributaries for the king of France.[1108] The huge valley was named Louisiana, after Louis XIV. The French established a successful settlement 20 years after the death of de La Salle.

The French also moved westward and built trading posts from the Ohio River to Lake Superior. They then turned northward towards the Hudson Bay area.[1109] Unlike the Pilgrims and the Puritans, who generally kept to themselves, the French traders intermingled with the Indigenous populations and a mixed First Nations and French population (Métis) arose at these western posts. These interracial marriages occurred particularly at the larger centres such as Michilimackinac, Green Bay and Detroit, where the First Nations, Métis and French lived as neighbours.[1110] They shared cultural traits and developed a new trade language of accommodating words and expressions, usually a combination of Native and French languages.[1111] This accommodating policy became an asset. The close trading and social relationships developed into military ties between the First Nations and the French.[1112] So as not to jeopardize this military asset, the French

sought not to antagonize the First Nations and as such left the First Nations with a large degree of freedom and independence, which facilitated trade and excluded them from the application of the French laws. The French fur traders and fort commanders cultivated the friendship of the First Nations by giving them gifts and presents, which was a common tradition among First Nations. Thus, while the English benefited from the Five Nations' support in the late seventeeth century, the majority of the Native groups in north-eastern North America sided with the French.[1113]

Conclusion: Answering the Indigenous Question

Looking critically at the colonial history of North America, there is nothing or very little that actually disproves the fact that the Indigenous peoples of America were sovereign nations when the Europeans arrived. Nor does the colonial history prove that the Indigenous nations did not qualify as states as defined by international law. The true meaning of a state, as defined in the introduction, is "a community of persons living within certain limits of territory, under a permanent organization which aims to secure the prevalence of justice by self-imposed law. The organ of the state by which its relations with other states are managed is the government."[1114]

If the Indigenous peoples were not on the land, the Europeans could not have traded with them. If the Indigenous peoples had no permanent organizations, there would have been chaos. But as it stands, Europeans could not have survived without the well-organized Indigenous peoples. Furthermore, the Indigenous peoples were organized enough to stand up militarily to the settlers. They had governments – otherwise the Europeans would not have referred to their leaders as chiefs. They also could not have had governments without a system of law.

To underscore these points, Indigenous American society has never been static, neither before nor after contact with Europeans. Complex civilizations developed and evolved with Indigenous nations being characterized by their sophisticated governmental systems and military power. The fact is that the Europeans decided to take the land before they knew who lived on the land, what they did and how they lived.[1115] The Europeans got the land because the Indigenous people of America were friendly enough to allow the Europeans to do so. Perhaps that is a sign of true civilization[1116] – caring and sharing. What happened to the Indigenous peoples after European settlement is well discussed in this paper, so it is time to unearth their fate during and after the American Revolution.

The Path to Independence?

The thesis will now alter its practice of presenting the Ghanaian experience and then anchoring it in North America for a vital reason. By Ghanaian standards, the colonization of the Indigenous peoples is not over and was not over even after American Independence. The American War of Independence was a transition from British rule to colonization by the United States, as will be verified at the beginning of Part IVB.

The American Revolution – A Struggle for Power[1117]

The Scene before the Explosion

There is no shortage of accounts of the coming of the American Revolution, but one that attracts attention is the "neo-Whig thesis."[1118] According to this argument, the war was goaded by the British endeavour to regain control over the Americans, who, practically left to their own devices in the early colonial era, had carved out de facto independence within the non-stringent but informal arrangements between the British and

Americans.[1119] From the beginning of the seventeeth century to the start of the Revolution, the British allowed the Americans to provide such local governmental services as law enforcement and public works. External trade was considered an imperial prerogative, yet the British government provided no resources. Instead, the imperial government imposed taxes and regulations on American international commerce. This is sometimes described as "ruling the colonies on the cheap."[1120] Needless to say, the Americans evaded or ignored many of the most onerous burdens.[1121]

On the other hand, the British never collected taxes for the military protection of America. By informal understanding, the Americans would provide military bases, troops, supplies and service men as needed for wars.[1122] Under these arrangements the American colonies were honing their own independence and by the middle of the eighteenth century had acquired a taste for self-determination. The appetite for freedom was greatly enhanced by the expulsion of France from North America in 1763. It is not by coincidence that the revolutionary era began the same year in which the military threat to the colonies from France ended. But the imposition of taxes and especially the novel, and ominous threat of stringent enforcement by Britain within the same period legitimately dilutes the argument of considering the removal of the French threat as the immediate or sole factor for the revolution.

Shortly after the removal of the French, Britain imposed a series of taxes intended to cover the cost of defeating France.[1123] The colonists thought such taxes without consultation were illegal, coining the phrase "No taxation without representation"[1124] to underline their point. Of special interest was the tax levied on molasses and sugar in

1764. This new tax caused consternation among rum manufacturers and merchants in New England.

There is also a third factor. If the expulsion of the French was the defensive condition and the imposition of taxes was the offensive factor, then the expansion of the American economy, which was growing at a fantastic rate,[1125] became the weapon that the Americans needed. There was recognition by both the Americans and the British that the continued rapid growth of America was bound to upset the existing balance of power. The economic force had absorbing interest and was of incalculable importance to the Americans. Acting in concert with the removal of the French threat in America, the Americans were encouraged to act more independently. Britain's concern that America's growth was making it a dangerously independent power in world affairs could be one factor that led to Britain's rather abrupt and intense change of heart in striving to reassert power over the Americans.[1126]

With these background factors established, the direct aetiology of the American War of Independence is the next obvious step in the examination.

The Package of Dynamite

While a multitude of factors led to the American Revolution, a sequence of specific occurrences, or crises, ultimately set off the war.[1127] The occurrences included, but were not limited to, the Royal Proclamation of 1763 and the Western land dispute – liberalism and republicanism and taxation without representation. Like a tuning fork, each crisis kept on vibrating even when the sound had vanished.

The Royal Proclamation of 1763 restricted American movement across the Appalachian Mountains, but despite the ban groups of settlers continued to move west.

The force of resistance overwhelmed the authorities and the Proclamation was soon modified to accommodate the lawbreakers. However, its promulgation and the fact that it was proclaimed without consulting the colonists left a deep and persistent wound within the colonies. Similarly, the *Quebec Act* of 1774 unilaterally purported to turn over the west up to the Ohio River to the French Catholics in Quebec. The settlers had, at this point, had enough laws from London. Due to this and the other events described below, the colonists had begun to organize at the local and colonial level for confrontation with the British government.[1128]

Liberalism (Republicanism)

The settlers of North America were very diverse, and some of them had religious, political and other views that were antithetical to those of the British. They may not have admitted it, but the ways of the Indigenous peoples had also affected their views. By the middle of the eighteenth century, differences in life, thought and interests had widened between the mother country and the colonists. The evolution of American political institutions and practice had led to significant mutation of the British social customs, religious beliefs and economic expectations. The cumulative effect of the new ecology was the fermentation of a political ideology labelled "republicanism." The Founding Fathers, especially Samuel Adams, instilled republican values in the masses, principal among which was to avoid the luxury and ostentation displayed by the British authorities. They were helped externally by the "country party" in Britain, which was grilling the British institutions over their corrupt practices. The American colonists projected those criticisms onto the colonial administration and condemned lavish lifestyles, luxury and inherited aristocracy. John Locke provided a solution to their frustrations. Embedded in

John Locke's "social contract" is the natural right of the citizens to overthrow leaders who betray the historic rights of Englishmen.

Taxation without Representation

The British government ruled its colonies according to the doctrines of mercantilism, which declared that anything benefiting the Empire to the detriment of other empires was a good policy. This proclamation found expression in the *Navigation Acts*, which were passed under the economic theory of mercantilism and stated that the wealth of the empire was to be increased by restricting trade to colonies rather than by allowing free trade. The purpose of the navigation acts was threefold: to maximize the revenue to the British government; to eliminate or suppress the activities of other foreign empires (in particular, the Dutch); and to raise funds for military operations and the running of the British Empire.

In that vein, the first two *Navigation Acts* of 1650 and 1651 outlawed the transportation of all goods into England by any third-party carrier. Only English ships or ships owned by the producing country could import goods into England. Hence, foreign ships or ships owned by countries outside the British Empire were eliminated from the British colonial trading network. These acts were mainly aimed at the Dutch traders who posed a challenge to British domination of the seas. The colonies reluctantly accepted these restrictions, since the impact on them was minimal and favoured their ships. The next major *Navigation Act*, passed in 1660, tightened restrictions by limiting the nationality of the crew members on ships that could sail into England and introduced specific goods from the colonies that could be carried only by ships belonging to the British Empire. These restrictions essentially eliminated all foreign competition and

ensured that only British ships could trade within the colonies. The navigation acts that followed just tightened the noose. As the Ghanaian proverb goes, if your claws become too tight, they set the animal free.[1129]

The restrictions were impossible to enforce and gave birth to a host of habitual reprobates and smugglers. The ensuing *Navigation Act* of 1696 further confined all colonial trade to English-built ships and tried once more to toughen enforcement. The central aim was to enhance the collection of taxes. The acts that followed in the 1700s added more restrictions and at this time the colonists were becoming agitated because they were suffering indirectly from the smuggling. Moreover, sections of the navigation acts were beginning to directly impact the colonists. The acts stipulated that all raw materials should be exported to England. As the tobacco trade flourished, the colonies realized that they were losing, since they could get more for their products in other markets, such as the Dutch market. Conversely, manufactured goods and some of the produce from the colonies were barred from England in order to stamp out competition with British manufacturers and farmers. The colonists found the double standards irritating because they tended to work for the interest of the mother country at their expense.

The straw that broke the camel's back was the policy of compelling the American colonies to pay for their defence in the form of taxes, which were levied on molasses and sugar in 1764, though the actual amount was miniscule compared to the original *Molasses Act* of 1733 passed by the English Parliament.[1130] But the New England merchants and rum makers took offence to the unilateral imposition of that tax by Britain[1131] and the phrase "no taxation without representation" was born. Many scholars,

including Adam Smith, viewed the *Navigation Acts* as an example of intervention in internal state affairs. James Otis, a barrister from Massachusetts, took the issue to court and argued that the writs of assistance to the revenue officers, enabling them to enforce the act, violated the constitutional rights of the colonists. The Crown countered with the argument that the doctrines of mercantilism were prerogative rights of the Crown.

Otis lost, but his arguments had a cataclysmic effect on the colonies. After the trial, John Adams posited that the "American independence was then and there born. The seeds of Patriots and Heroes to defend… the vigorous Youth, were then and there sown. Every man of an [immensely] crowded Audience appeared to me to go away, as I did, ready to take up Arms against Writs of Assistants [*sic*]."[1132] Towards the end of 1772, Samuel Adams was able to galvanize the patriots in the colonies to form a rebel government. In early 1773, Virginia, the largest colony, set up its Committee of Correspondence, including Patrick Henry and Thomas Jefferson.[1133]

The Fuse – The Crises of 1772–1775

The Intolerable Acts

A number of crises finally triggered the outbreak of war. The most notable was the Gaspée Affair in June 1772. A British warship, commissioned to vigorously enforce the notorious trade laws, was set ablaze by American patriots. Governor Thomas Hutchinson of Massachusetts decided to sidestep the colonial legislature by suggesting that he and the royal judges would get their pay directly from London.[1134] Other Revolutionary catalysts included the four Intolerable Acts of Britain. The first was the alteration of the Massachusetts charter, the foundation of the *Massachusetts Government*

Act. One of the changes restricted town meetings. The second act transferred the jurisdiction of trying British soldiers from the colonies to Britain. This move was embodied in the *Administration of Justice Act*. The third act closed the port of Boston. The *Boston Port Act* was in retaliation for the British tea lost in the Boston Tea Party. The port was to remain closed until Britain received compensation for the lost tea, but the British never got their demands. The final act was the 1774 *Quartering Act*, which forced Boston residents to provide board for the British regulars who were dispatched to protect the area.

The First Continental Congress declared the Intolerable Acts unconstitutional in the Suffolk Resolves and petitioned the population to organize militias. The resolution recommended that Massachusetts form a Patriot government. In response to the *Massachusetts Government Act*, the people of Worcester barricaded the local courthouse, locking out the British magistrates and the revolutionary flame soon engulfed the whole colony. Britain responded by dispatching troops from England, but this was too little too late. The entire colony of Massachusetts had been overrun by the patriots when the troops arrived. The only safe haven for the British was the heavily guarded Port of Boston. The American War of Independence thus resulted from the conditions outlined above and from the contest to fill the vacuum created by loose governmental arrangements. The British were struggling to re-assert power, and the Americans wanted to retain control over their own affairs.

Some historians[1135] claim that the Americans acted reluctantly and engaged in war only after they had concluded that regaining the old status quo within the empire was impossible. The best argument put forward is the extension of an olive branch petition to

King George III, who rejected the attempt at reconciliation. However, the olive branch was offered after the commencement of the war, so this theory cannot be used to support the reluctance of the Americans to emerge from colonialism. A more plausible account of the state of affairs could be that the Americans acted cautiously in the face of the possible resistance from the Loyalists, the American Indians and the French in Canada.

The split between Benjamin Franklin and his Loyalist son, William Franklin, came to symbolize the division between the colonial revolutionaries (Patriots) and the Royalists, but even the Patriots did not have a uniform plan.[1136] The burning of the *Peggy Stewart* exemplifies some of the tensions between different groups of Patriots.[1137] The gentry wanted to protest peacefully and legally, while the crowds of ordinary Americans wanted to employ positive action, including violence.[1138] These divisions resulted in indecision on the part of the Patriots. The search by Americans for principles and arguments to buttress their justification for making the adjustments being thrust on them seems to support the theory that the fear of resistance from the Loyalists, the American Indians and the French in Canada had a crucial influence on the revolution.

The Position of the Indians in the Revolution

Just as in all the wars among the European colonial powers, the Indigenous peoples of America did not present a common front in the American War of Independence. Some supported the Patriots, a higher number supported the British, but a majority remained neutral since the war was waged in a very limited area within the thirteen colonies and the Indigenous populations were mostly outside that war zone. The groups that supported the British included the Cherokee [1139]and the Mohawk nation who, led by Joseph Brant, organized frontier raids on isolated settlements from New York to

Pennsylvania. After being defeated in 1779, Joseph Brant fled into Canada with his group.

The American Revolutionary War was also an international war, and the French involvement in the conflict proved decisive. After an American victory at Saratoga in 1777, France, together with its allies Spain and the Netherlands, crossed the threshold and fought against Great Britain. The French naval victory in the Chesapeake Bay led to the surrender of a British army at Yorktown in 1781. The 1783 *Treaty of Paris* recognized the independence of the United States, was signed on September 3, 1783 and was ratified by the United States Congress on January 14, 1784. Great Britain negotiated the Paris peace treaty without consulting her Indian allies and ostensibly ceded all American Indian territory between the Appalachian Mountains and the Mississippi River to the United States. Full of resentment, Native Americans reluctantly confirmed these land cessions with the United States in a series of treaties, but the fighting renewed along the frontier in the coming years, the largest conflict being the Northwest Indian War.

This chapter started by claiming that the Indigenous Americans were still colonized after the American War of Independence. The Indigenous people would not have fared any differently had the British been conquered by the French or the Spaniards. That is, after the War of Independence the United States also behaved as colonial power towards the Indigenous peoples of America and American Indians remain under colonial rule.

United States as a Colonial Power

As stated above, the 1783 *Treaty of Paris*, which recognized the independence of the United States, was signed without the involvement of the Indigenous peoples. Great

Britain, without consulting her Indian allies, ceded all the American Indian territory between the Appalachian Mountains and the Mississippi River to the United States. Similarly, the same happened to the Indigenous peoples of Canada in the Paris Peace Treaty of 1763. Like the Indigenous peoples of Canada, the Indigenous Americans confirmed these land cessions, but not without a fight. In their weakened state, the United States government initially made concessions to certain groups.

In a letter addressed by Thomas Jefferson to the Cherokees, dated the January 9, 1809, the Cherokees were offered some sort of self-government.[1140] But as the power of the United States improved, the self-governing powers of the Indigenous peoples were curtailed. It did not take long before Indian lands were made the property of the federal government or were placed in the same category as army bases.

> How is the question varied by the residence of the Indians in a territory of the United States?... Is it incompatible with State sovereignty to grant exclusive jurisdiction to the federal government over a number of acres of land for military purposes?... The exercise of the power of self-government by the Indians within a state is undoubtedly contemplated to be temporary.[1141]

The following section will mainly concern itself with the emergence of Ghana, Canada and the United States from colonization.

Canada and Ghana on the Road to Independence

These sections will compare the processes that led to the independence of Canada and Ghana. The aim is first to argue that Ghana's road to independence was not as smooth and amicable as that of Canada and second to demonstrate that the Indigenous peoples of Canada played little, if any, role in the process that made Canada sovereign. The resistance of the Indigenous peoples of Ghana was the driving force that paved the way for Ghana's independence. Consequently, independence was granted to the

Indigenous peoples of Ghana while Canada's independence was granted to a governing body purporting to be in charge of the affairs of the Indigenous peoples of Canada. Furthermore, the Indigenous peoples of Ghana were admitted into the United Nations at independence but the same cannot be said of the Indigenous peoples of Canada. Again, this thesis will abandon the style of outlining the Ghanaian experience and relating it to the Americas because the independence of Canada did not represent a clear break from colonial domination for its Indigenous peoples; to treat the independence of the two countries on the same basis would obscure this fact.

Canada and the Statute of Westminster 1931

Canada's ascent on "Jacob's Ladder"

A dependent territory within the Commonwealth can achieve independence peacefully only through legislation of the Parliament of the United Kingdom. The legislation is required in order to alter the definition of the status of the territory in English law,[1142] which states that "it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom"[1143]

> ...to empower the local legislature to make laws that are repugnant to Acts of Parliament extending to that territory and to make laws with full extra territorial effect; and to abrogate (or to purport to abrogate) the unfettered power of the United Kingdom Parliament to make laws for the territory concerned without the request or consent of the government or legislature of that territory.[1144]

For Canada, the necessary legal changes were made by the *Statute of Westminster* on December 11, 1931[1145] and "[d]ominion status, which meant essentially equality of

status with the United Kingdom, was achieved during a gradual process of conventional evolution,"[1146] which culminated with enactment of the Statute.

Thus, the *Statute of Westminster* was the climactic end to years of intensive negotiations between Britain and her dominions:

> WHEREAS the delegates to His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences.[1147]

As in most developments in British constitutional law, the *Statute of Westminster* was not a *decree nisi*, nor did it constitute a divorce from the past. It simply acknowledged the developmental stage reached by the colony leaving the past developments intact, as suggested by the *Statute of Westminster*, section 7(1).[1148]

In Canada, the ascent on "Jacob's ladder" started in 1847 when the United Kingdom Parliament granted the status of colonial legislature to several colonies in what have now become Canada, Australia, New Zealand and South Africa. These colonies later became Dominions, a term that fell out of favour and gave way to independence. The Canadian Confederation of 1867 was born at this stage of international development. The Dominion and the Provinces of Canada, Nova Scotia and New Brunswick were practically entrusted with full control of all non-military internal matters in Canada. Britain still handled external affairs as well as interior and external defence until 1871, when it withdrew troops from Canada, leaving the territory to control its boundaries and internal security on its own terms. This was a vote of confidence in Canada, which lived up to expectations. Canada flexed its newly acquired muscle of limited sovereignty[1149]

when Macdonald, the Prime Minister of Canada in 1885, refused to send Canadian troops to the Sudan.

On the diplomatic front, an agreement concluded between the United States and the United Kingdom in Washington gave Canada a taste of international diplomacy. The principal articles of the treaty signed in May 1871 provided for the determination by an international commission of the Alabama claims, as well as the arbitration of the San Juan Boundary Dispute and of the Canadian-American fisheries hullabaloo. For the first time in history, a Canadian was included in a British negotiating team to sign a treaty on behalf of Canada.

The *British North America Act* empowered the Canadian Parliament to establish appeal courts under section 101, which stated that

> The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.[1150]

However, it was not until 1875 that Canada took advantage of that section and established the Supreme Court of Canada. Again, the *Statute of Westminster* empowers the local legislature to make laws that are repugnant to British Acts of Parliament extending to that territory. The effect of removing the doctrine of repugnancy and conferring full extraterritorial competence also empowers the legislature of the country concerned to abolish the appeal by special leave from local courts to the Judicial Committee of the Privy Council.[1151] Yet, civil appeals to the Judicial Committee of the Privy Council continued until they were abolished in 1949.

Another step in the ascent to sovereignty was the creation of a London-based High Commissioner's Office in 1878 to "represent"[1152] Canada. The office was an

alternate channel through which diplomatic discussions and grievances could be brought to the attention of the Queen and the British Parliament. Before then, the only official avenue of communication was the Governor General, the Queen's representative in Canada.

It should be remembered that, under sections 55-57 of the BNA Act, the Crown had both the veto and reserve powers.

> 55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.
>
> 56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.
>
> 57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.[1153]

The Crown actually used these powers, the last time being 1873 for the veto power and 1886 for the reserve powers.[1154] However, Crown action was usually based on the recommendation of the federal Prime Minister and his cabinet. Nevertheless, these powers remained on the books even after the Statute of Westminster 1931, but remained dormant until the 1982 *Constitution Act* finally repealed them.

While the final push for international recognition began with the 1909 establishment of the Department of External Affairs, the most important event that propelled the Dominion of Canada to independence was the First World War. The Dominion troops were such excellent fighters that they won the respect of much of the world. After that, no one doubted Canada's ability to be counted as a fully fledged nation. Canada evolved rapidly after the war and in 1919 became a signatory of the Treaty of Versailles. Canada was elected as an independent member of the League of Nations and Raoul Dandurand, a Canadian, became the President of the League in 1925. Even before that achievement, Canada negotiated and signed the Halibut Treaty on its own.

Canada also played a leading role in the construction and the constitution of the *Statute of Westminster.* The Balfour Resolution, the brainchild of the Canadian prime minister and others, was adopted at the meeting of the heads of states of the Dominions (Imperial Conference) in 1926. That was the birth of the Statute of Westminster 1931, in which Britain recognized the Dominions as "autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."[1155]

The reader should note that all the nations in the Dominions were governed by expatriates, even in situations where the majority of the population was comprised of Indigenous peoples. There was no indication that these governing bodies were elected or put in charge with the consent of the Indigenous peoples and there was not a single nation in the group that was governed by Indigenous peoples. This seems to indicate that there was systemic discrimination by the British government and that the British government

intended to keep the Indigenous people under suppression in these Dominions. The Indigenous nations like Ghana had to fight and die for their independence.

The Thorny Issue – Repatriation of the Constitution

Canada is diverse, and even at this stage the issues of federal-provincial relations and constitutional amendments were major hurdles. The framework for the federal-provincial relationship had been established in the 1867 Constitution but, when the second issue, constitutional amendment, came to the fore, Canada had to grasp the nettle. Ernest Lapointe, the federal Minister of Justice, had the first kick at the cat. At a Dominion-Provincial conference in 1927,[1156] he proposed that the United Kingdom government confer upon the federal Parliament powers to change the Constitution of Canada under these terms: that the unanimous consent of all the provinces be required with respect to fundamental changes involving the distribution of governmental powers and minority rights, as outlined in sections 93 and 133. For ordinary amendments to the 1867 *Constitution Act* (then called the *British North America Act*), only the majority consent of the provinces would be required. The provinces, however, rejected the above proposal for being too vague.

G.H. Ferguson, with the support of the Premier of Quebec, Alexandre Taschereau, proposed in 1930 that the unanimous consent of all provinces be sought before the patriation of the Constitution of Canada. The fact that the *Statute of Westminster* granted independence to Canada in 1931 suggests that all the provinces agreed on patriation. This was done without resolving the amendment issue, so the power to amend the Constitution resided with the British Parliament. "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of British North America Acts, 1867 to 1930, or any

order, rule or regulation made thereunder."[1157] All attempts to repatriate the Constitution failed until 1982, when Prime Minister Pierre Trudeau finally brought the Constitution home to Canada.

But where were the Indigenous peoples of Canada thoughout all these achievements? Many constitutional and legal reasons may be offered to explain or justify the loud silence of the Indigenous peoples, but the main reason is that the pre-1979 constitutional developments occurred when the Aboriginal peoples of Canada were at their weakest and most vulnerable point, allowing the world to turn a blind eye. The birth of the Statute of Westminster should have been analogous to Aboriginal self-government. But technically, to the Indigenous peoples of Canada, Canadian independence was not "freedom"[1158] at all, since it did not radically transform their colonial status but merely replaced a distant colonial government with a "foreign local"[1159] government. The reader will appreciate the difference after absorbing the path to Ghana's independence and the glory that followed.

Ghana through the Red Sea to Independence

If Canada's peaceful ascent to independence can be compared to a smooth but tedious climb up "Jacob's Ladder," Ghana's accession to independence is analogous to another Biblical episode describing the parting of the Red Sea. Ghana's independence was achieved through blood, sweat and tears.

After the British systematically ousted their European rivals from the Gold Coast, they found their political penetration into the interior of the Gold Coast frustrated by the Ashanti people.[1160] So much so that, even at the time of independence in 1957,

> the Gold Coast was a multiple dependency, comprising the Gold Coast Colony (a settled colony governed under the British Settlements Acts), the colony of Ashanti (a conquered colony governed by virtue of the prerogative), the Northern Territories protectorate and the mandated or trust territory of Togoland (governed under the Foreign Jurisdiction Acts).[1161]

Togoland, previously a German-held territory, was acquired as a British-mandated land[1162] in 1919 as part of the end of the First World War. It became a trust territory in 1946 and was administered as part of the Gold Coast. The status of the trust territory of Togoland was not decided until a plebiscite was held in May 1956. A majority of the Togolese supported a proposal to enter into union with an independent Gold Coast. The referendum was held under the auspices of the United Nations, and on December 13, 1956, the General Assembly of the United Nations resolved that this proposal be approved and that the trusteeship agreement should on the date of independence cease to be in force, "the objectives of trusteeship having been obtained."[1163]

Except for Togoland, which was an international issue, the Gold Coast was negligently left as a multiple dependency. All this despite the fact that in 1850 a distinct government was established for the Gold Coast, which had formerly been annexed to the colony of Sierra Leone, and the fact that the Gold Coast was finally proclaimed a separate colony in 1874. It is not difficult to imagine the administrative nightmare created by the distribution of legislative authority between the Governor and the Legislative Council that had its own Governor, Executive Council and Legislative Council. This complex governing system was the result of indecision on the part of the British government and a series of Ashanti wars, which did not end until the annexation of Ashanti in 1901. The annexation of Ashanti afforded the British easier access to the Northern Territories,

where a protectorate was established in the same year in which the Ashanti were defeated.

Some scholars have expressed disbelief that the complex system of government lasted until the Constitution of 1925.[1164] They need not be surprised. The secret was that the British left the Akan traditional system intact and the traditional courts ran concurrently with the colonial courts. This remarkable feature of Ghanaian government was retained even after independence. The Ghana 1957 (Constitution) Order in Council[1165] contained a provision that the office of chiefs in Ghana, existing by customary law and usage, was thereby guaranteed. And a "House of Chiefs was required to be established in each region." [1166]

To the average person, who was more affected by the tribal courts, the changes were minimal. For the same reason, the 1925 Constitution lasted for two decades even though the Executive Council consisted entirely of foreign officials until 1942. In this year, two African unofficial members were added. The Legislative Council, composed of 30 members, had only nine elected Africans. This proportion, however, was quite high when compared to the other British African territories.[1167]

African Nationalists on the Move

Since the traditional system of Chieftaincy was left intact, the masses were not perturbed. The Africans who were incensed were scholars to whom the governmental structure was no less repugnant than colonialism. As such, a more radical spirit of nationalism was brewing underground.

If the First World War catapulted the Dominions into the international limelight, the Second World War's catalytic effect and its aftermath on African nationalism proved

to be the dynamite that rocked the United Kingdom into action. The new Constitution of 1946 improved the position of the Africans, but it was not enough to defuse the explosive atmosphere created by the inactivity and indecision of the British government. In the 1946 Constitution, the Legislative Council became a representative legislature with a majority of elected members, but the Executive Council remained responsible to the Governor alone. History has shown that an elected legislature seldom works in "harmony with an irremovable executive. But the tensions that developed in the Gold Coast arose without rather than within the legislature."[1168] The driving force was the more radical spirit of nationalism, which had been festering for a while. African scholars who had been mobilizing the people against imperial domination saw their chance and seized it.

The relative prosperity of the 1920s meant that the slump, when it did come after the Second World War, was felt all the more severely. The resulting adversity and poverty were inexorably allied with colour consciousness and accusations of imperialist exploitation.

Arrival of Osagyefo[1169]

One of the outstanding leaders of the African nationalists was Kwame Nkrumah.[1170] When Nkrumah arrived in the Gold Coast after a 12-year absence for studies in the United States, he was hit in the face with the ugly power of colonization. "Chiefs who showed any inclination towards independence were quickly destooled. Anti-tax movements were rapidly suppressed. Suspect civil servants were sacked and, in some cases, detained."[1171]

This was the British attempt to distill the fermenting political brew started by Wallace Johnson. Wallace Johnson's communist West African Youth League had moved

by diffusion from Nigeria and spread throughout the Gold Coast. The colonial government reacted swiftly and decisively to suppress every contentious political activity. Despite the clampdown, the United Gold Coast Convention (UGCC), founded in August 1947 by such educated Africans as J.B. Danquah, A.G. Grant, R.A. Awoonor-Williams and Edward Akufo Addo, survived. After very few meetings with the executive[1172] and Dr. J.B. Danquah, the leader of the United Gold Coast Convention (UGCC),[1173] Kwame Nkrumah was appointed secretary to the UGCC on January 20, 1948.

Nkrumah wasted no time in crisscrossing the country, delivering electrifying speeches that had the whole territory seething with intense African nationalism and enthusiasm for freedom. Nkrumah's "unique, impassioned and dynamic rhetoric, soon galvanized the people into civil disobedience of all forms. The most effective included the boycott of European goods, work slow downs and general strikes in all sectors of the economy."[1174] The tsunami hit when, on February 28, 1948, a large contingent of unarmed former servicemen marched on Sir Gerald Creasy, the British Governor, to present a petition seeking redress for unfulfilled promises by the government. As the marchers entered the Christianborg Castle cross-roads, government troops opened fire on the unarmed protesters. When the smoke cleared, 63 ex-servicemen were severely wounded or lay dead in the street of Accra. The rioting and looting that ensued lasted for five days.

(Please see over for image of Christianborg Castle, the seat of government.)

On March 1, 1948, Governor Creasy read the Riot Act and declared a state of emergency. Strict press censorship was imposed on a country-wide scale. He also issued Removal Orders and had the entire UGCC Central Executive comprising of Kwame Nkrumah, Dr. Danquah, E. Akufo Addo, William Ofori Atta, E. Obelsebi Lamptey and E. Ako Adjei exiled to the Northern Territories on March 12, 1948. The students at Cape Coast did not sit still, protesting and demanding the release of the UGCC officials on March 14, 1948. Their protest was met with brutal force and, when it was over, the Cape Coast streets were sprinkled with the blood of dead and wounded unarmed students. The Red Sea parted and the march to independence was on. Serious riots, combined with general strikes ensued.

The Colonial Office, upset by the chaotic state of the Gold Coast, appointed a commission chaired by A. K. Watson to investigate the cause of the eruption. Even before Watson's report, the tumultuous situation had compelled Governor Creasy to release the UGCC leadership on April 12, 1948. He followed that action by lifting the press ban on April 19, 1948, but these political moves did nothing to suppress the inflamed mood or quench the thirst for self-determination. The phrase "Self Government Now" echoed throughout the country. The Watson Commission completed its report on April 26, with the principal recommendation being that a "Constitution be drafted as a possible prelude to eventual self-rule. To that end, an all-African Constitutional Committee was appointed under the Chairmanship of an esteemed African jurist, Mr. Justice Henley Coussey of the Gold Coast High Court."[1175]

The Birth of the Convention People's Party

Meanwhile, Kwame Nkrumah was becoming impatient with the UGCC leadership who were aiming for self-government "in the shortest possible time."[1176] Nkrumah wanted "self-government now."[1177] In a highly tense and acrimonious exchange at one of the UGCC meetings at Saltpond, Nkrumah tendered his resignation as General Secretary of the party. On June 12, 1949, at a Committee on Youth Organization (CYO)[1178] rally in Accra, Nkrumah inaugurated the Convention Peoples Party (CPP) and "self-government now" became the heartbeat of the country. As Nkrumah declared: "[i]f the Coussey Committee does not find for self-rule now, we will shut this country down, we will strike, strike, strike!"[1179]

Justice Henry Coussey's committee "recommended *(inter alia)* that the Executive Council," instead of being responsible to the Governor, "should become collectively responsible to the legislature."[1180] The United Kingdom's government accepted the Coussey Committee's recommendations with certain reservations. Of the greatest interest is the fact that the 1946 Constitution was pronounced dead and buried. In its place, the new Constitution of 1950

> provided for a Legislative Assembly of eighty-four members of whom all but nine were elected. More importantly, the Executive Council was reconstituted with a majority of representative members chosen by the Governor from the Assembly and approved by the Assembly.[1181]

The Coussey Committee fell short of advocating self-rule in its report of November 7, 1949, so Nkrumah made good his words. He embarked on "positive action"[1182] that included a planned general strike to begin on January 1, 1950. He called on "all men of goodwill, organize, organize, organize. We prefer self-government in danger, to servitude in tranquility. Forward ever, backward never."[1183]

The people responded. The New Year dawned with labour shutdowns in every conceivable industrial and commercial enterprise. The government responded with another State of Emergency. Flying squads of the Gold Coast Constabulary swooped down and arrested more than 200 CPP and CYO leaders, including the party leadership, made up of Nkrumah, Kojo Botsio, Komla A. Gbedemah and a group of mostly young political activists known as the *Verandah Boys*.[1184]

To the dismay of the Governor, the arrests did not create a vacuum in the CPP leadership. More people than needed stepped forward to carry the banner and the march to Independence steamed ahead. Elections were held in 1951 under the new Constitution and the Convention People's Party won a landslide victory. Its leader, Dr. Kwame Nkrumah, who was then serving a sentence of imprisonment for sedition, registered an extraordinary plurality of 22,780 votes out of the 23,122 votes cast.[1185] Sir Charles Arden-Clarke, the new governor who had replaced Governor Creasy, motivated by fear rather than by philoprogenitive action, ordered Dr. Nkrumah released. On the same day, February 19, 1951, the Governor also signed the Bill of Release freeing the other political prisoners.

The First Indigenous Government

There was more. Sir Charles Arden-Clarke invited Nkrumah to the State House on his release, asked him to form a government and become "Leader of Government Business."[1186] Nkrumah's government was to become the first African-dominated government of the Gold Coast. Nkrumah accepted the offer, but not until he had expressed his feeling about the Coussey-generated Constitution. He stated bluntly that it was "bogus, fraudulent and unacceptable, as it [did] not fully meet the aspirations of the

people of the Gold Coast." He added that he would not rest "until full self-government within the Commonwealth [had been] achieved." Nkrumah was justified because the "ministries of defence, external affairs, finance, and justice were still controlled by British officials who were not responsible to the legislature."[1187]

With his conscience clear, Nkrumah wasted no time in announcing his first cabinet of four Europeans and seven Africans. In 1952, Nkrumah assumed the newly created post of Prime Minister. The newly formed government of the Gold Coast, "conscious of its place in the vanguard of African nationalism, was pressing onward, and its end was freedom."[1188] Nkrumah's government quickly moved into action and within a year presented a further set of proposals for constitutional change to the United Kingdom government. These changes were accepted and the Constitution of 1954[1189] became the law of the new nation.

Election by Universal Suffrage

The 1954 Constitution made the Cabinet the principal instrument of policy. Its members were all to be members of the elected Assembly. The entire Legislative Assembly was to be directly elected by universal suffrage. Thus ended the election of assembly members by the tribal councils. The Prime Minister assumed the authority of presiding over the Cabinet. In most matters of internal government the Governor was restricted to acting in accordance with the advice of the Ministers. "However, the Governor retained certain personal discretions and extensive emergency powers, and was invested with sole responsibility for defence, the police and some aspects of external affairs."[1190] The 1954 Constitution, except for minor amendments, remained in force up to Independence Day.

The 1954 elections ushered the Convention Peoples Party back to power with 79 out of the 104 seats. With that powerful mandate, Nkrumah overhauled the civil service. The main focus was Africanisation of the public service in general. His government immediately began to prepare the Gold Coast for external as well as internal security and, with the consultation of the British government, pressed for the means of getting the Gold Coast ready to establish the Ministries of Defence and External Affairs in anticipation of independence. The multiple dependency of the Gold Coast came to haunt the new government. Nkrumah's government and the CPP pursued a policy of political centralization, but this move ran into serious resistance. Opposition surfaced shortly after the 1954 election and a new party, the Asante-based National Liberation Movement (NLM), was formed.[1191] The NLM, in co-operation with another regionalist group, the Northern People's Party (NPP),[1192] advocated a federal form of government, with increased powers for the various regions. Some intellectual political opportunists even hinted at partitioning the country.

In response to the uncertainty, the British government dispatched the constitutional expert, Sir Frederick Bourne to assess the situation. He recommended "a substantial measure of devolution within the framework of a unitary State."[1193] "The report, issued in December of 1955, is summarized in *Commonwealth survey,* 1956, p. 22."[1194]

The government of the United Kingdom accepted the recommendation and on May 11, 1956, the Secretary of State of the Colonies conceded that the time had come to allow the Gold Coast to take responsibility of its affairs. "The grant of such responsibility is a matter for the United Kingdom Government and Parliament and it has always been

the wish of Her Majesty's Government that the Gold Coast should achieve its independence within the Commonwealth."[1195]

He left the dispute about the nature of the Constitution into independence to be decided by the people of the Gold Coast, preferably in a general election. Nkrumah took up the challenge and immediately called an election for July 1956. His government was returned to power with a more than two-thirds majority, or 72 out of 104 seats. The victory was broad-based. The Convention Peoples Party swept the central, western and the eastern regions. They decisively triumphed in Togoland and obtained a respectable minority of the seats in the Ashanti and Northern Territories.

The Birth of Ghana

Dr. Nkrumah's government took no time in passing a motion calling upon the British government to introduce legislation to provide for the independence of the Gold Coast. The motion passed on August 3, 1956 and the Legislative Assembly elected to have the Gold Coast receive independence under the name of Ghana. The government also asked that Ghana remain within the Commonwealth. The Opposition abstained or did not participate in the debate on the motion, but the United Kingdom government had no choice but to accept the motion or eat its words.

The Secretary of State of the Colonies, in demanding that the people of the Gold Coast decide their fate in a general election, added that "Her Majesty's Government would be ready to accept a motion calling for independence within the Commonwealth passed by a 'reasonable majority'"[1196] in a newly elected legislature. More than two-thirds of the legislature is certainly a "reasonable majority" under any circumstance. Accordingly, the Secretary of State of the Colonies addressed a dispatch 27 to the Gold

Coast governor, stating that "effect would be given to the desire expressed by the Assembly and that independence would come about on March 6, 1957."[1197] The *Ghana Independence Bill* was introduced and was enthusiastically embraced on both sides of the House of Commons.

Nevertheless, a number of speakers expressed disquiet at the seriousness of the boycott by the opposition over the new Constitution of the Gold Coast. In late January 1957, the Secretary of State A.T. Lennox-Boyd, paid a visit to the Gold Coast and successfully secured general agreement on the new Constitution that came into effect upon independence. The *Ghana Independence Bill* received Royal Assent and came into force on March 6, 1957. On February 21, the British prime minister announced that all Commonwealth prime ministers had agreed that Ghana should, as of March 6, 1957, be recognized as a member of the Commonwealth. The external prerogatives and the prerogative of granting imperial honours remained vested in the Queen alone, but in a strange move, the government of Ghana "signified its intention not to request Her Majesty to confer honours on citizens of Ghana."[1198] Ghana was admitted to membership in the United Nations by the unanimous vote of the General Assembly on March 8, 1957.

African nationalists tend to view the Order in Council as the legislative symbol of colonialism. Yet the Ghanaian government did not object to the substance of the Ghana Constitution being contained in an Order in Council.[1199] An Act of Parliament must go through both Houses and may be subjected to amendments, strenuous negotiation and revisions. An order in council, by contrast, may bypass these procedures. In the case of Ghana, it was worth trading pride in the advantages of speed and finality.

What mattered most was that previous limitations on the power of the Cabinet were removed. The Cabinet was charged with the general direction and control of the government of Ghana. It was also made responsible to Parliament and not to the Governor General. With more than a two-thirds majority in Parliament, the new power translated into the Government having a free hand in most matters.

The provisions that could not be crafted by Order in Council under existing Acts of Parliament were incorporated in the *Ghana Independence Act*. On the appointed day of March 6, 1957, the new nation was born. At midnight at Accra's Polo Grounds, Prime Minister Nkrumah announced: "The long battle is over and our beloved country Ghana is free forever." Always the pan-Africanist and mindful of the rest of Africa, he added that "[w]e again re-dedicate ourselves in the struggle to emancipate other countries in Africa, for our independence is meaningless unless it is linked up with the total liberation of the African continent."[1200]

A relatively long course of smooth political conferences and events prior to 1931 had led to the full legislative sovereignty of the settled colonies of Australia, Canada and New Zealand. In Ghana, it was the political revolt by the Indigenous peoples that compelled the United Kingdom government to make decisions that inexorably led to the goal of independence. This difference can partly be explained by the fact that blood is thicker than water. While it may not be totally accurate to explain the decisions made by the British government in relation to the Gold Coast solely in terms of expedience, it seems reasonably clear that the policies adopted were indeed expedient. Sir Keith Hancock's argument that this explanation is inadequate to the point of naivety and that "[i]n the history of British colonial self-government, the calculation of expediency and

the concept of right are interwoven strands of a thread that is continuous for more than three centuries"[1201] applies only to the dominions. Furthermore, Sir Keith Hancock's suggestion that "those who were responsible for taking the vital policy decisions in relation to the Gold Coast were undoubtedly animated by the conviction that they were doing right," can simply be refuted by the everlasting maxim that the road to hell is paved with good intentions. The dominions were governed by legislative bodies comprised mainly of settlers from Europe – particularly from Britain. There was no need to send officials from Britain to run such governments. On the other hand, expatriate European officials were sent to govern the Indigenous peoples of Ghana and the other African colonies. This difference requires attention.

Independence in the settled colonies was handed over to governments that ran the settled colonies on behalf of Britain. The governors were or had become members of the settled colonies. So what has become of the Indigenous people in these settled colonies? The answer will be found in the constitutions of these settled colonies, which will be considered under comparative constitutions. In the African colonies, the expatriate governments were forced out and the new governments were composed of Indigenous peoples. This was not an easy feat. The miracle of Gold Coast independence "...is not that it was achieved but that it was achieved so swiftly."[1202] To zero in on the theme of this thesis, the independence of Ghana was handed over to the Indigenous peoples while the independence of Canada was handed over to a government body that had its roots in Europe. Sovereignty was not handed to the Indigenous peoples of Canada, but rather to a "care-taker"[1203] government. The Indigenous peoples of Canada appear to have been shut out of the liberation process altogether. At Canada's Independence, the sovereignty of the

Indigenous peoples appeared to be in limbo. If that is bad, then consider the situation where the powers that came to control the Indigenous peoples of the United States did not even have the restraining hands of the British Crown.

What became of the Indigenous peoples of America and their lands can be better demonstrated by considering the post-independence constitutions of Ghana, Canada and the United States.

PART V: POST-COLONIAL ERA

Introduction

The hypothesis that power and land acquisition and use[1204] dictate the outcome of sovereignty can be further tested by comparing the constitutions of Ghana, Canada, the United States and the Indigenous peoples of these nations. The direct relationship between the definition of the land and the level of sovereignty enjoyed by the peoples of Ghana and the Indigenous nations chosen to represent the United States of America (the Cherokee and the Menominee) is quite remarkable. It is also at this point that the author will plug in the colonial factors that greatly influenced the type of sovereignty enjoyed by the Indigenous people.

The power of constitutional nations is generally derived from their constitution. It is best to begin by comparing the constitutions of Canada, Ghana and the United States under the following topics in the most economical fashion:

(1) What source(s) of authority for the constitution is/are identified?

(2) How are powers distributed within the central government?

(3) Where do the Indigenous people fit in the scheme?

(4) What is the relationship between the judiciary and central government?

(5) What is the process for amending the constitution?

(6) Where are the military and police powers located?

Comparative Constitutions – Ghana versus North America

The Preamble: Power to Whom?

The preamble of any constitution does not confer power, but its wording usually indicates the source of the powers conferred by the rest of the constitution and states the

purpose of the document. The Ghanaian Constitution starts by stating that the "Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution."[1205] The United States Constitution gives the authoritative power to the people as well: "WE THE PEOPLE OF THE UNITED STATES, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[1206]

The constitutions of both Ghana and the United States employ the words "people" and "we the people" respectively to describe the source of the powers conferred by the rest of the constitution, but that is where the similarities end. The "people" in Ghana means universal suffrage while "we the people" in the United States, until 1910, excluded more adult citizens than it included.[1207] The framers of the unamended United States Constitution were silent as to voting rights, but the voting pattern that followed excluded black men,[1208] women,[1209] Indians, slaves,[1210] white men who did not own property and even white men under the age of twenty-one.[1211]

The issue of the Indigenous American is of particular interest since this thesis nourishes itself on the different expressions of sovereignty as they apply to Indigenous peoples. In the United States the so-called Indigenous sovereignty, rather than empowering Indigenous peoples, actually stripped away Indigenous rights. The Indigenous peoples of the United States were denied the right to vote longer than any other community in the United States.[1212] This is partly due to the tongue-in-cheek form

of sovereignty assigned to the Indigenous peoples in that country. Kenneth W. Johnson[1213] postulates that the same clause that counts "three-fifths" of all other persons in reference to slaves clearly shows that Indians were eligible for citizenship at the time of the making of the Constitution. That seems to be far-fetched for three very important reasons. The first is the "no taxation without representation" doctrine. Indians were exempt from taxes, so they could not be represented.[1214] Second, if the right of Indians to vote was entrenched in the Constitution, then the disenfranchisement laws[1215] and voter suppression actions of the various states[1216] would have been null and void; yet these persisted into the twentieth century. And finally, the *Indian Citizenship Act*[1217] of 1924 would have been meaningless if Indians had already been citizens of the United States within the terms of the Constitution. The Act, approved on June 2, 1924, states as follows:

> BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.[1218]

If the Indians were citizens at the time of the Constitution, then when did they lose their citizenship? Originally, the Indigenous peoples were not meant to be United States citizens. Rather, some of the Indians became citizens by marrying white settlers, being born to or adopted by white settlers, or through military service,[1219] allotments,[1220] treaties or special laws. The most important hermeneutic acrobatic was that Indians were barred from naturalization. This means that Indians were not foreigners and yet they were not citizens, and so could not vote. Indians were sovereign.[1221] If they lived in a reservation, they were considered uncivilized.[1222] Divide them by the guardianship

doctrine which tells them where to live, and they are disabled.[1223] Add them to the Blacks and women, and they are inferior. Subtract their voting rights, and they are subordinates.[1224] The sum total of all the disenfranchisement and voter suppressive tactics equals non-sovereignty. That is, in more than a metaphorical sense, Indians were "sovereign but not sovereign."

This thesis has broached disenfranchisement at this juncture only to highlight the point that "people" in the United States Constitution is not the same as "people" in the Ghanaian Constitution. The Ghanaian Constitution gives power to the people. The United States Constitution gave power to some people – so what were Indians, women, blacks, men who did not own property, indentured workers and those under twenty-one? The Indians, since they were the original owners of the land, were colonized people. The slaves, Blacks and women were property. The children were wards. The indentured workers were aliens.

The Canadian Constitution is in a class by itself. The preamble of the Canadian Constitution makes no reference to the "people," but rather to the initiating provinces[1225] and the United Kingdom, ultimately conferring the power to the Crown:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom...Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows.[1226]

The preamble of the 1867 *Constitution Act* speaks of a "Constitution similar in Principle to that of the United Kingdom," which suggests the importance of British institutions to Canada. It should be noted that Britain does not have a written constitution,

so this must be referring to the rule of law. Thus, Canada's form of government is based in part on the Westminster model of parliamentary supremacy which has been altered to meet the needs of Canada's federal system. The section dealing with executive power installs the British monarchy with executive authority for Canada. This executive authority is exercised by the monarch's representative in Canada – the Governor General. In Canada the rein is from above – hence the opening of s. 91 (Federal powers) of the Canadian Constitution refers to the mission as POGG (peace, order and good government). Like the American Constitution, the Canadian Constitution was silent on voting rights. But Canadians may be excused for excluding the Indigenous peoples from voting, because there was nothing like Canadian citizenship at that time and only few elite men could vote.

The most significant symbol of independent nationhood – Canadian citizenship – would find legal recognition in the *Canadian Citizenship Act*, which was enacted on June 27, 1946 and came into force on the January 1, 1947. It provided for the conferring of a common Canadian citizenship on all Canadians, regardless of where they were born. That means that settlers living in Canada at the time of Confederation were British subjects, and the Royal Proclamation[1227] of 1763 left room for debate as to whether the Indigenous peoples were British subjects. The proclamation gives power to the governors of the colonies immediately under their rule, as defined by the map outlined in the proclamation. It states in part:

> We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under our Great Seal of Great Britain, by which the said Governments are constituted, given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of our Council, summon and call General

> Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government.

Some authors take the exclusion of Indians and the fact that the Crown would deal and sign treaties with the Indians directly to mean that "[t]he Proclamation clearly recognized Indian nations *qua* nations."[1228] If the tribes were separate nations, then excusing members from voting in the colonies is reasonable. Aside from the above arguments, "[i]n Canada's early days, only a select group of privileged men could vote."[1229] Voting was a privilege controlled by politics and economics. Suffrage became truly universal in the late twentieth century, when prisoners and the mentally challenged got the right to vote.[1230]

This does not justify delaying voting rights to the Indigenous peoples after it became obvious that the Indigenous peoples had been annexed into the Canadian federal system of government (*Sanderson* v. *Heap, 1909*).[1231] It would take another half century for the Indigenous peoples of Canada to be franchised; not until 1960 were Canada's Aboriginal peoples finally granted a "no-strings-attached"[1232] right to vote in federal elections.

The question as to when Canadian Aboriginal peoples became Canadian citizens is anybody's guess. The *Citizenship Act* of 1947 was definitely not meant for the Aboriginal peoples and may not have been intended to include the Aboriginal peoples. All recipients of citizenship certificates were immigrants from Europe and elsewhere. Not a single Aboriginal person was included in the ceremony. Does that mean that the Aboriginal peoples, because they were born in Canada, did not need to be represented? If that is the case, then what prevented them from voting from that point onwards? Could it

also mean that Aboriginal peoples were outside the "Canadian Colony," confirming the "Indian nations *qua* nations"[1233] hypothesis? The answers to these questions are beyond the scope of this section, which focuses on the powers conferred by the Constitution. These topics will be fully discussed in the context of the nature of Aboriginal sovereignty in Canada and the United States.

In the final analysis, there is no difference between the Canadian and the United States constitutions in terms of government participation and voting rights of the Indigenous peoples of North America. Qualifications for voting were matters that neither the constitutions nor federal laws governed at the time that the constitutions were written. Both constitutions, though not explicitly denying voting rights to the Indigenous peoples, resulted in the disenfranchisement of the Indigenous peoples. The Indigenous peoples were one of the last groups to gain voting rights in the two countries. Only the Ghana Constitution allowed the Indigenous peoples to fully participate in elections immediately after the Constitution. Of the three constitutions, only Ghana defines "citizen" in its Constitution in Chapter three on Citizenship:

> 6 (1) every person who, on the coming into force of this Constitution, is a citizen of Ghana by the law shall continue to be a citizen of Ghana. (2) Subject to the provisions of this Constitution, a person born in or outside Ghana after the coming into force of this Constitution, shall become a citizen of Ghana at the date of his birth if either of his parents or grandparents is or was [a] citizen of Ghana.[1234]

The 1996 Constitution of Ghana goes further by stating clearly who is eligible to vote. Chapter 7 deals with the "Representation of the People" and section 42 covers the Right to Vote. "Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."[1235]

It may be argued that Ghana was blessed with 20/20 vision and did not have to rely on foresight. That argument does not hold water because, even at the time of the first Ghanaian Constitution (1957), the Indigenous peoples in both the United States[1236] and Canada had not gained full voting rights.[1237]

The United States slowly achieved the same goal of universal suffrage through amendments to the Constitution and through court decisions. Experience has shown that such methods are not efficient and even at present leave many people in the United States disenfranchised.[1238] The Indigenous peoples of Canada gained full voting rights in 1960, but they have, until recently, mostly ignored their right to exercise that privilege. The reasons are varied but the most significant is the feeling of not belonging to the federal system. Their numbers and the fact that they are sparsely distributed makes their votes insignificant, except in the Churchill region of Manitoba, the northernmost portion of Saskatchewan, the Yukon and the former Northwest Territories where the Aboriginal population is in the majority. The table below will exemplify the point:

Table: Percentage of Aboriginal Peoples v. Provincial Population

Province	Aboriginal Population as a percentage of incarceration	Aboriginal Population as a percentage of Province's Population
Newfoundland	7	3.74
Prince Edward Island	1	1.11
Nova Scotia	7	1.89
New Brunswick	Not available	2.36
Quebec	2	1.11
Ontario	9	1.67
Manitoba	64	13.59
Saskatchewan	76	13.52
Alberta	39	5.31
British Columbia	20	4.39

Even in the areas of high density in the provinces, the electoral boundaries make it nearly impossible for the Aboriginal people to elect their own representatives.

Why "We the People" in the American Constitution Differs from Ghana

The origin of the United States government can be traced to the Royal Charters issued to the Virginia Companies of London and Plymouth.[1239] King James I, who issued these charters, soon realized that the democratic principles embedded in these companies could deliver the final death warrant to feudalism. He protested vehemently against the rising tide of representative institutions – the mode of operation of these chartered companies. He executed the first recipient of these charters, Sir Walter Raleigh "chiefly for giving satisfaction to the King of Spain."[1240] He revoked these charters in 1624, but the rising tide of liberalism that had been exported to the New World could not be uprooted. The General Assembly, which met at Jamestown in 1619, was the result of the expanding horizons, which challenged the liberal man's vision and intellect. Some of the planters along the James River were shareholders in the chartered companies. The letter patent gave them the authority to participate in the management of the companies. Attached to this authority are the governmental rights over the civil affairs of the colony. Since the charters allowed for the expansion of the governing body, logically the resident shareholders who were also owners of plantations should have had a say in who managed the environment under which their corporations organized for profit functioned. They had great interest in electing their representatives to the local governing body and they did not let this right slip by.

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The Canadian Constitution sets an eye on keeping order in the house without paying any attention to the individuals in it. It confers power to the federal and provincial governments, but does not discuss who Canadians are. It does not even make a passing reference to the welfare or rights of individual citizens. The only reference to people and aliens is in terms of governmental powers in s. 91(24), which confer legislative jurisdiction over "Indians, and Lands reserved for the Indians" to the federal government. The explanation offered is the symptomatic view but there is also an etiological explanation: The British monarchical system of government has its foundation in the instability of natural rights arguments in the face of positive expressions of sovereign will. According the Hobbes, "man's ability to live 'sociably' with one another is not natural, but rather by covenant; in order to make their agreement lasting, and themselves directed toward the common benefit, they must confer all of their power and, hence, all of their wills into one man and one will – the sovereign."[1241] In the face of that argument, natural right is not essential to good government and the general welfare of the people is the domain of the monarch. Therefore, there is no need to consider individual rights and welfare in the Canadian Constitution.

On the other hand, the Ghanaian Constitution zeroes in on the people, where the system of extended family and the habit of sharing and caring for one another all found expression in the Ghanaian Constitution. The people of Ghana are those "in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution." It is government for the people, and the people come first. The United States Constitution is a hybrid. The nature of unrest, the struggle for political power and the need to bring individualism under control formed the

background for the purpose of the Constitution of the United States "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

The important phrase is "ourselves and our posterity." Those included in the "our" is what is of interest to this thesis. What has actually come to speak for the people in the twentieth century is a phrase in the statement of purpose – "promote the general Welfare." The phrase "promote the general Welfare" has become a magnetic field of inclusion and been of great importance in upholding social legislation. Note that no basis can be found in the enumerated powers of Congress for that function. As for the phrase, "ourselves and our posterity," it arguably referred to the rich and affluent. The United States Empire can be traced to the chartered companies organized for profit by the ablest English businessmen of the seventeeth century.[1242] The charters served as the blueprint of the pattern for a parliamentary system, which slowly and methodically developed into the American form of government. The companies offered an invitation to the industrious to participate in the growing wealth and expansion of the British Empire. Initially, the Crown willingly responded by issuing the charters for the expansion of British influence into the new continent.

It did not take long for the Crown to realize that the democratic system of doing business could seriously undermine the principles of feudalism. As noted above, King James I, for instance, denounced the representative forms of institutions and executed Sir Walter Raleigh for applying the business principles internationally.[1243] King James even revoked the charters in 1624, but that did not stem the tsunami generated by the

representative institutions exemplified by the General Assembly, which met at Jamestown in 1619. The charters stipulated that changes to the governing bodies of the colonies be appointed by members of the King's council,

> and the same Council of Virginia or the more part of them, for the time being shall nominate and appoint the first several Councellours of those several Councells which are to be appointed for those two several Colonies [which are] to be made plantations in Virginia and America between the degrees [before] mentioned, according to our said letters pattents in that behalfe made.[1244]

However, some of the planters along the James River were shareholders in the Company. Based on the principles of this corporation chartered and organized for profit, these plantation owners had a voice in its management. Consequently, these plantation owners had an interest in the local governing body, which had profound effects on the profitability of the corporation. Carried to its logical conclusion, the owners of the plantations deemed it their right to elect their representatives to the civil government and this formed the basis for the first elected government. The electoral base had broadened by the time of the Constitution, but the wave of democracy had not engulfed the common folk by the time of the American Constitution. "Ourselves and our posterity" still referred to the rich and affluent. It certainly did not refer to the Indigenous peoples. They and the common folk eventually came to be covered by the phrase "general welfare."

The Lilies of the Field

> And why do you worry about clothes? See how the lilies of the field grow. They do not labor or spin. Yet I tell you that not even Solomon in all his splendor was dressed like one of these. If that is how God clothes the grass of the field, which is here today and tomorrow is thrown into the fire, will he not much more clothe you, O you of little faith? So do not worry, saying, "What shall we eat?" or "What shall we drink?" or "What shall we wear?"[1245]

If, as in Canada, all the people share a common benefit and have "conferred all of their power and, hence, all of their wills into one man and one will – the sovereign,"[1246] there is no need to worry about the needs or rights of the individual or about "we the people." The sovereign will look after them. The main concern is the general kingdom. Unfortunately, the Indigenous peoples were not part of the kingdom and so were denied the grace of the sovereign. They were left in the hands of the federal government. History has shown that their welfare left much to be desired.

The United States government was the natural child of the Plymouth Company and its principles "were based on those of the corporation chartered and organized for profit by businessmen."[1247] While liberating themselves from the authority of the sovereign, the shareholders had to devise means of bringing individualism under control and of maintaining the power of the middle class. The great vision of the liberal Elizabethans did not encompass the poor, and the struggle to maintain the balance found expression in the United States Constitution. Just as in Canada, the Indigenous peoples were left in the hands of the Federal Government (Congress), with largely the same results.

The Indigenous Ghanaians emerged from colonization well aware of what the government can do. With some bitter experience still in mind, the concern was to place the people at the core of their constitution. This was not difficult since the basic unit of the Ghanaian society is the extended family – caring and sharing spreads from the family to the community. The constitution is based on one people, one country and one world. Of the three groups of Indigenous peoples, only the Ghanaians controlled their destiny at

independence. The Indigenous peoples of Canada and the United States have had to struggle for a second independence and their own constitutions.

Comparative Constitutions - Ghana versus Selected U.S. Tribal Constitutions

A great number of the constitutions of the Indigenous nations of the United States originate from a blueprint provided by the Department of Indian Affairs. It makes sense to use one of these nations as the model for comparison then contrast it with one of the exceptions. The author has selected the Menominee Tribe as the model because it has proven to be exceptionally resilient. Like all Indian tribes in the United States, it lost its right to enter into treaty with the United States government through the Act of March 3, 1871, in which the United States Congress recognized no right in private persons or in Indian nations to execute treaties. Despite the loss of sovereign power and of the accompanying right to engage in treaties, the Menominee Tribe did so well that the Bureau of Indian Affairs placed it at the top of the list of tribes capable of economically supporting its people. The *Termination Act*, regarded by policy-makers as the second phase of the *Wheeler-Howard Act*,[1248] is considered by many Indian tribes as a step backward[1249] from the *Indian Reorganization Act* (IRA),[1250] a key component of the *Wheeler-Howard Act.*

The *Indian Reorganization Act* embodied changes that included a reversal of the *Dawes Act*, which privatized the common holdings of American Indians. The most progressive component of the *Indian Reorganization Act* was the return to local self-government on a tribal basis and the transfer of the management of Indian assets to Indigenous Americans. There were provisions to enable the tribes to develop a sound

economic foundation. Despite its successes, the unproven *Termination Act* was allowed to usher out the IRA.

Proponents of the *Termination Act* or the reformers of the *Wheeler-Howard Act* described their goals as "freeing" and "emancipating" Indians from federal control.[1251] However, the Indian tribes did not see any difference between the *Termination Act* and the ancient policy of assimilation or the intention of "civilizing" the Indians.[1252] The stated intentions of the *Termination Act* were innocuous and, on the surface, even benevolent. They were:

- Repealing laws that discriminated against Indians and gave them a different status from other Americans;
- Disbanding the Bureau of Indian Affairs (BIA) and transferring its duties to other federal and state agencies or to tribes themselves;
- Ending federal supervision of individual Indians;
- Ending federal supervision and trust responsibilities for Indian tribes.[1253]

The *Termination Act* was supposed to apply to all tribes uniformly and its passage did not actually terminate any tribes. However, the effect of the Act would descend through specific legislation on one tribe at a time. The Bureau of Indian Affairs was to assess the survival capabilities of the tribes. The tribes with the economic prosperity needed to sustain themselves after termination would be the culprits. The Menominee Tribe of Wisconsin ended up at the top of the list. Consequently, Congress passed an Act in 1954 that officially called for the termination of the Menominee as a federally recognized Indian tribe. When the curtain came down on the *Termination Act* in the early 1960s, it had caused the legal dismantling of 61 tribal nations within the United States. The Indigenous peoples were right. Out of the 61 tribes affected, only one – the Menominee – survived as a tribal government. The *Termination Act* proved to be a disaster for the Indigenous tribes. Even more devastating is the fact that the most prosperous got wiped

out of existence. The *Termination Act* is possibly one of the best intentioned but unfortunate happenings that could have possibly taken place as far as the Indian people are concerned. In restoring the Menominee Indian Tribe to federal trust status[1254] in December 22, 1973, Richard Nixon[1255] admitted that by "restoring the Menominee Indian Tribe to Federal trust status, the United States has at last made a clear reversal of a policy, which was wrong, the policy of forcibly terminating Indian tribal status."[1256]

With the *Menominee Restoration Act* came the end of the long bitter experiment known as termination. A new phase dawned on the Menominee and one of the milestones was a new Constitution.[1257] Unlike the Ghanaian Constitution in which the sovereignty of Ghana is informed to "reside in the people of Ghana and in whose name and for whose welfare the powers of government are to be exercised,"[1258] Article I of the Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin unceremoniously spells out the jurisdiction of the Menominee government without identifying the source of power or the purpose of the Constitution. It proclaims that the

> governmental powers of the Menominee Indian Tribe of Wisconsin, a federally recognized sovereign Indian Tribe, shall be consistent with applicable Federal law and extend to all persons, and subjects, to all lands and other property including natural resources, and to all waters and airspace, within the exterior boundaries of the Menominee Indian Reservation, including any land which may hereafter be added to the Reservation under any law of the United States.[1259]

Article 1, if it could be regarded as the preamble, differs considerably from all the three constitutions previously discussed. It does not state the source of power or the purpose of the constitution. Rather than "the people" being the source of power of the constitution, as in the constitutions of Ghana and the United States, it is the constitution that ascribes the rights of the people of the Menominee Nation in article 9 of the

Menominee constitution. It states that, in addition to such other rights as are guaranteed by the constitution and bylaws, "members of the Menominee Indian Tribe of Wisconsin shall have the right to hunt, fish, trap, and gather food from plants subject only to those tribal laws which are necessary to conserve these natural resources of the Tribe."[1260] This sounds reasonable, but the article continues in stating that "this right shall not include the right to engage in commercial uses of such tribal resources; such right is reserved to the Tribe acting through its Tribal Legislature in accordance with Section 2 of Article X of this Constitution."[1261] If the Menominee people were in charge of the Constitution, would this provision not be in the laws of the nation rather than in the Constitution?

The objection is reasonable. Suppose it comes to a time when commercial uses of the resources by the individuals become critical to the survival of the Nation and, given the fact that it is easier to change the laws of the nation than to change the Constitution, the question arises as to whether the laws of the nation are not the best place to make the adjustments. The odd position of the provision is not strange because the whole Constitution, which sets out the governmental powers of the "sovereign" Menominee Nation, is controlled by the Federal Government in that its laws must be consistent with applicable federal law. Menominee laws cannot conflict with federal laws. Instead, Menominee laws may have to change in harmony with the respective federal laws, so the best place to place the federal umbrella is in the Constitution. Harmonization of laws between sovereign nations is very rare in modern political architecture. In addition, if it happens, it almost always occurs as an isolated international agreement and not as a permanent synchronized political activity. It appears that the Menominee nation is founded on a wounded knee.

Another major weakness in the Menominee Constitution is that the United States government can alter the boundaries of the territory. To that end, Article X, section 1 places the Secretary of the Interior and the Congress above members of the Menominee Nation in the management of their property, stating that the

> Tribal Legislature shall not transfer land or interests therein out of tribal ownership by any means unless, prior to any such proposed transfer taking effect, such proposed transfer is approved by a vote of two-thirds (2/3) of the total number of eligible voters of the Tribe, by the Secretary of the Interior, and by an Act of Congress.[1262]

If statehood hinges on territoriality as discussed in previous parts, then the stability of the Menominee Nation is weak indeed. The weakness of the nation is further reflected in Article II, which describes the people who make up the Menominee Nation. What is disturbing to the Ghanaian mind is the use of the term "membership" instead of "citizenship"; it is in some way conceding the fact that the Menominee state is a basic unit of a broader nation.

Article III establishes the powers of the tribal government, which includes the power to make and enforce laws – but here again the Federal Government can alter those powers. The Menominee Constitution actually empowers the legislature in Article XIV to engage in trust agreements between the Menominee Indian Tribe and the United States. This sounds like the tribe bringing itself under subjection, but the trust relation is restricted to "Trust and Management Agreement."[1263] The contemplated agreement is intended to provide Federal protection from external forces and State powers, thereby enabling the Menominee Indian Tribe to exercise maximum control over its own property and its own affairs. However, given the overarching power of the Federal Government over the Menominee Constitution, this could be dangerous from the Ghanaian viewpoint.

Like the constitutions of Ghana, Canada and the United States, the judiciary of the Menominee nation appears to have an independent power of its own. Article V, section 3 states that "the Tribal Judiciary shall be separate and equal branches of the Tribal Government. Neither branch shall exercise the powers of the other, nor shall either branch have authority over the other branch except as may be granted by this Constitution and Bylaws."[1264] However, section 2 states that the "powers granted to the Tribal Judiciary by this Section shall include such judicial powers as may in the future be restored or granted to the Tribe by any law of the United States, or other authority."[1265] It seems that the powers of the court are subject to external influences other than through the Constitution. Also strange from the Ghanaian standpoint is the fact that the Menominee Constitution is silent on the issue of law enforcement. This could be an indication that the law enforcement officers are from the State of Wisconsin. External influence seems to permeate the entire Menominee Constitution.

The Ghanaian Parliament may amend the Ghanaian Constitution. Due to the small size of the Menominee Nation, the Menominee Constitution may be amended by a petition signed by at least 300 eligible tribal voters, or when requested by a vote of two-thirds of the entire legislature. But here, again, the process has to be validated in accordance with applicable rules of the Secretary of the Interior, or if none apply, then with applicable tribal ordinance. The Secretary of the Interior is mandated to hold an election to effect the change.[1266] However, the Secretary of the Interior may not propose an amendment to the Menominee Constitution.

Responsible Deductions

The inferiority of the Menominee Constitution to that of the Indigenous peoples of Ghana is not over the fact that the Menominee Constitution originated as an Act of the United States government. After all, the *Ghana Independence Act* and the Canadian *Constitution Act* of 1867 (formerly known as the *BNA Act*) are products of the British Parliament. But the fact is that the United States government maintains a dominant role in the implementation of the Menominee Constitution. Most importantly, changes in U.S. federal legislation may cause corresponding changes in the Menominee Constitution, even though the drafters of the federal law may not specifically have had in mind the people of Menominee during the creation of the new law. As it stands, the Menominee Government is more like a municipal government. There have been some changes since 1977,[1267] but these changes do not apply uniformly across the nations using the BIA blueprint, so it is best to skip these changes and jump to one constitution that approaches the constitution of a true sovereign nation – that of the Cherokees.

The 1999 Constitution of the Cherokee Nation

In order not to diminish the desire of the Menominee people to set themselves free nor to portray the Menominee people as being weak by accepting the 1976 Constitution, the thesis will take the reader through the transition from the 1976 to the 1999 Cherokee Constitution to show that what the Menominee people accepted was standard in that era. It will highlight the most significant changes and offer the Ghanaian opinion on why it was so important.

On March 6, 1999, the Cherokee Constitution Convention Commission adopted a new Constitution.[1268] The greatest obstacle to getting the Constitution to a ratification

vote was contained in Article XV, Section 10 of the previous 1976 Constitution. That section required that "no amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative."[1269] The viewpoint to the clause from the Ghanaian side was expressed during the analysis of the Menominee Constitution. To the Cherokee, the clause is likewise objectionable. In May 2000 the Cherokee Council passed a resolution requesting that the Commission seek approval from the Assistant Secretary of the Interior to authorize a referendum vote on a single amendment to the 1976 Constitution. The amendment was to remove the Presidential authorization clause. In April 2002, an agreement was reached with the BIA to do so, which was a major achievement. Like the Menominee Constitution, the 1976 Cherokee Constitution recognized the dominance of the United States government by admitting that "[t]he Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law[1270] which is in conflict with any Federal law."[1271]

The reader will discover that this clause was modified in the 1999 Constitution to reflect a symbiotic relationship between the Cherokee Nation and the Federal Government. Citizens of a nation are generally not referred to as members. So, rising to the Ghanaian level, the word "membership" in article II, 1976 was replaced by the word "people" in the 1999 Constitution. The 1999 Constitution went further and adopted the word "citizenship" to refer to the Cherokee people in Article IV.

Like the Ghanaian Constitution, the preamble of the Cherokee Constitution confers the authoritative power to the people of the Cherokee Nation in a touching fashion:

> We, the People of the Cherokee Nation, in order to preserve our sovereignty, enrich our culture, achieve and maintain a desirable measure of prosperity and the blessings of freedom, acknowledging with humility and gratitude the goodness, aid and guidance of the Sovereign Ruler of the Universe in permitting us to do so, do ordain and establish this Constitution for the government of the Cherokee Nation.

Thus, the preamble also reaffirms the belief of many Indigenous people that the source of their inherent sovereignty is the Creator, who placed them in their respective locales and instructed them in the proper ways of governing themselves.

Article I, unlike the Menominee Constitution and the Cherokee Constitution of 1976, establishes the sovereignty of the Cherokee Nation. It proclaims that the "Cherokee Nation reaffirms its sovereignty and mutually beneficial relationship with the United States of America." The Cherokee Constitution of 1999 also deletes the United States government ability to alter its boundaries by declaring that the "boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of March 3, 1893."[1272]

Unlike the original Canadian and United States Constitutions, which do not define their citizens, the Cherokee Constitution, like the Ghanaian Constitution, defines the citizens of the Nation in section 1 of Article IV as "[a]ll citizens of the Cherokee Nation [who] must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May, 1867."[1273]

The Cherokee Constitution followed the United State governmental model, which recognized the independent jurisdictions of the Legislative, the Executive and the Judicial branches of government. Although the Cherokee Nation has superficially tried to rein in the power of the Federal Government, it could not help but hide the supremacy of the

United States government within the Constitution. Article V, section 9, stipulates that the council shall have the power of removal, but then goes on to add that "[n]othing herein is intended to abrogate or limit the authority of the President of the United States or any person or agency to which the President or Congress of the United States shall delegate authority therefore, to remove the Principal Chief or his subordinates."[1274]

If officials of the United States government can remove the entire governing body of the Cherokee Nation, then the sovereignty of the Cherokee Nation is questionable. But alas, one aspect of Cherokee sovereignty is recognized in the Cherokee Constitution of 1999. It refers to long-ignored treaties between the United States and the Cherokee nation. These are found in the Article 12 of the Treaty of Hopewell, dated November 28, 1785 and Article 7 of the Treaty of New Echota, dated December 29, 1835. The United States government offered the Hopewell and the Delaware people a seat in the United States Congress as partners in exchange for their support in the War of Independence. That commitment was long ignored and sometimes even denied. At last the United States government has admitted to its existence and the Cherokee now have token delegates in the House of Representatives.[1275]

In Ghana, just as in Canada and the United States, the head of the Armed Forces is the head of the state. The duties of the forces are divided and delegated to the ministries of defence and interior – the former overseeing the army and the latter overseeing the police. The Cherokee has no standing army, but its law enforcement officers come under the jurisdiction of the Chief.

Article VII, Section 14 of the Cherokee Constitution instructs the creation of the office of Marshal. The Marshal is appointed by the Principal Chief and is confirmed by

the Council.[1276] The Marshall, in turn, is authorized to deputize such law enforcement officers as are necessary to maintain peace and order in the Cherokee Nation. The Cherokee Constitution copies the United States model of government in keeping the Legislative, Executive and Judicial branches of government separate and distinct.[1277] No branch is allowed to exercise the powers properly designated to either of the others. The Ghanaian Constitution has a separation of powers but, apart from the Legislature and the Judiciary, the line of demarcation between the Executive and the Legislature is quite blurred. In addition, the Cherokee Constitution establishes a Court on the Judiciary under Article VIII, Section 5, which is the only body responsible for disciplinary action against any member of the judiciary. Such a body is absent or its powers are ignored in Ghana, and past government interference with the Judiciary has been disturbing.

The Cherokee Nation is characterized by its small size. Article XV, Section 1 allows for initiative, referendum and amendment of their Constitution. The people of the Cherokee Nation have reserved to themselves the power to propose laws and amendments to their Constitution and they can affirm these changes by the ballot. This can be achieved with or without the approval of the legislature. That is real power to the people! Of course the legislature, like that of Ghana, can propose changes to the Constitution but, unlike Ghana where these changes can be voted into action by the legislature, this has to be confirmed by a majority of voters of the Cherokee Nation at the next general election. If that proposal is accepted by two-thirds of the members of the legislature, a special election may be called for affirmation by majority of Cherokee voters. Although Presidential authorization was removed from the Cherokee Constitution, Presidential dominance still exists. Hence section 4 states "that no measure which is

required to be approved by the President of the United States or his authorized representative shall be effective until approved."[1278] That means that, although the President need not authorize constitutional changes, Presidential veto still exists.

Epigraph

Indigenous nations of the United States that are using the blueprint provided by the Bureau of Indian Affairs as constitutions are operating as municipal governments. The bigger nations that have managed to draft their own constitutions are inching closer to the sovereignty enjoyed by the Ghanaians. They are in political relations that enable them to relate to themselves and have the will to be themselves but, in doing so, they are transparently grounded in the power of the United States. Until the Presidential and Congressional powers over the Indigenous Nations of the United States are reined in, or the treaty-making powers of the Indigenous peoples are restored, they will remain colonies of the United States. They are colonies not because they are embedded in the United States but because the power by which the Indigenous peoples may preserve and assert their distinctive culture has been eroded by Congress. The next section will show that a nation within a nation can be "sovereign."

Comparative Constitutions – Ghana versus Selected Canadian Tribal Constitutions

This section will view sovereignty from the Ghanaian standpoint and establish that an Indigenous Nation need not be an isolated state to be sovereign because sovereignty is stratified, divisible and sharable. As explained above, a nation may have

the Queen as the head and under her may be the federal, provincial and Aboriginal governments which may be sovereign in their own right. The author selected the Nisga'a Constitution[1279] for comparison because the Nisga'a Treaty is a milestone in Canadian history even though it is the fourteenth modern treaty in Canada since 1976. It is the first modern-day treaty in British Columbia, and was negotiated in the same decade in which the Cherokee (1999) and Ghanaian (1992) constitutions were modified. This places these three Indigenous constitutions within the same time period. The Nisga'a nation is within the confines of Canada, so is not an isolated territory. In 1890, the Nisga'a established a Land Committee in the quest for a treaty to deal with their land claim. Their efforts were frustrated to say the least. The introduction of legislation back in 1927 would have derailed the entire process altogether, since the legislation made it illegal for the Indigenous peoples of Canada to raise funds to advance land claims, but that law was repealed in 1951. The Nisga'a Land Committee was resurrected in 1955 and was renamed the Nisga'a Tribal Council. By the late 1960s it had filed suits in the British Columbia Supreme Court to continue the fight for control of Nisga'a territory. The 1973 *Calder* decision[1280] greatly advanced the cause of the Nisga'a people, resulting in the overhaul of Canada's policy on Indigenous land claims. As a result, the federal government began treaty negotiations with the Nisga'a in 1976 and the B.C. government joined the conference in 1990. The *Nisga'a Final Agreement Act*[1281] was passed in the British Columbia Legislature in April 1999. The last step needed to give legal effect to the Treaty took place on April 13, 2000, when the Canadian Parliament passed the *Nisga'a Final Agreement Act*. It is a very comprehensive document but of interest to this thesis is Chapter 11, which deals with Nisga'a self-government and outlines the Nisga'a

Constitution. This arrangement, compared to the Ghanaian situation, is not strange because the *Ghana Independence Act* is also the source of the Ghanaian Constitution even though it is not that similar.

The Broader Picture

The Nisga'a Final Agreement is a Treaty within the meaning of sections 25 and 35 of the 1982 *Constitution Act.*[1282] Hence, the Nisga'a government operates within the Constitution of Canada just as Canada did under the *British North America Act.* But the agreement goes further and grants some form of "independence" to the Nisga'a people. The three parties at the table agreed that the Nisga'a Nation has the right to self-government and the authority to formulate its own constitution and make laws. However, given the fact that these powers must conform to the conditions set out in the Agreement, it follows that the product is a mere refinement and not a separate or new constitution.

Like the Ghanaian Constitution, the Nisga'a agreement outlines the nature of its citizens. People of Nisga'a ancestry are eligible to enroll as citizens. In addition, children with mothers born into one of the Nisga'a tribes and their descendants, as well as their adopted children, do qualify as Nisga'a citizens. Other Aboriginal Canadians who marry a Nisga'a citizen and are adopted by Ayuukhl Nisga'a[1283] into any of the four Nisga'a tribes may also apply for enrolment.

The Nisga'a Lisim[1284] is a Federal Nation and according to the Nisga'a Constitution it is comprised of the Greater Vancouver Urban Local, the Terrace Urban Local, the Prince Rupert/Port Edward Urban Local[1285] and others.[1286] Each local is to elect one representative to join the elected members of the Nisga'a Village Government

and at least three officers are to be elected by the Nisga'a Nation in a general election to form the Nisga'a Lisims Government. The Nisga'a government is thus divided into two groups: the Nisga'a Lisims Government and the Nisga'a Village Governments. The Nisga'a Lisims is to govern the Nisga'a Nation while the Nisga'a villages are to come under their respective village governments. The Nisga'a Lisims Government is burdened with the responsibility of intergovernmental relations between the Nisga'a Nation on the one hand and Canada and British Columbia on the other hand. Each of the Nisga'a governments has a separate legal personality, with the authority to enter into contracts and agreements and with the accompanying privileges and responsibilities. The Nisga'a people are vested with the power to modify the structure and composition of the villages.

The governmental powers under the Nisga'a Constitution may be divided into two categories. In the first group, the Nisga'a laws will prevail when Nisga'a law conflicts with federal or provincial law. But there is a catch. In most cases, only Nisga'a laws that are consistent with comparable standards established by Parliament, the Legislative Assembly or the relevant administrative tribunals will stand. Compared with Ghana, this is not a major handicap, since many laws around the globe have to conform to international standards upon each party's individual agreement to various legislatures.

What are critical are the areas of jurisdiction and, in that respect, the areas under Nisga'a control are impressive. They include the citizenship of the Nisga'a Nation, the preservation of their culture, education and the use of their land and resources. The second group includes Nisga'a laws that must give way when Nisga'a law conflicts with federal or provincial laws. In those areas, the federal or provincial law prevails. Important in this group are laws regarding Canadian citizenship and immigration, as well

as criminal law. Those powers remain with Parliament.[1287] Federal and provincial laws also govern industrial relations or labour-relations law. There are others, which for all practical consequences deal with standards rather than manifestations of culture.

Security and Law Enforcement

Just as in the United States, the Indigenous peoples have no standing army of their own, but they may have their own law-enforcement officers. The Nisga'a Constitution permits the Nisga'a people to establish their own police board and services. The provincial cabinet must approve these bodies. The spirit of this limitation is not cultural but deals with uniformity of law enforcement in the region. Similarly, the Nisga'a courts allowed under the Constitution must conform to provincial standards. An appeal from the highest Nisga'a court may be referred to the Supreme Court of British Columbia and finally to the Supreme Court of Canada. An important limitation concerns the rights of all persons accused of any offence under Nisga'a law punishable by imprisonment to "elect to be tried in [a court of British Columbia] rather than a Nisga'a Court."[1288] The provincial court, which is under the control of people who have been competing with the Nisga'a people for centuries for their rights, may not be the best tribunal for dealing with infringements that may undermine the Nisga'a Nation with regard to the breach of Nisga'a rights.

Unlike the United States where the federal government, in conjunction with the Indigenous peoples, controls the management of gambling on tribal lands, the Province of British Columbia, in the spirit of the decision in Pamajewon,[1289] retains the right to license or authorize gambling and gaming facilities on Nisga'a lands, though this is done

under Nisga'a terms. The Nisga'a government may set the conditions, which must not conflict with federal and provincial laws.

Ghana and Nisga'a as Sovereign Nations

"Sovereignty represents at the most basic level an assertion of power and authority, a means by which a people may preserve and assert their distinctive culture."[1290] Just as the Ghanaians have, the Nisga'a under their Constitution may be able to preserve and assert their distinctive culture. However, there are two major concerns. The first is that the Nisga'a Constitution operates under the Canadian Constitution of 1982. Although the Canadian Constitution had no amending formula until 1982, it was not static. Moreover, under sections 36 to 41 of the Nisga'a Final Agreement, the agreement may be modified.[1291] There must be a way of transmitting the rights guaranteed in the 1982 Constitution into future constitutions, so that future changes do not seriously affect the integrity of the Nisga'a Nation. Second, in the case of conflict, the Supreme Court of Canada is the final arbitrator. The composition and structure of the courts in Canada is such that the Indigenous peoples live at the mercy of the courts. The majority of judges belong to a group that is in competition for the rights of the Indigenous people. It is clear that some of the decisions of the Supreme Court have been wrong in the past and the consequences of those decisions can never be rectified. A notable example is the decision in *St. Catherine's Lumber* v. *the Queen.*[1292]

So why continue with this trend? It may be argued that the Supreme Court is now more sensitive to the aspirations of the Indigenous peoples, but what is acceptable to this generation may not necessarily be acceptable to future generations. Even the present

generation is struggling with the frozen rights of the Indigenous peoples in the decision in *Pamajewon.*[1293] *Pamajewon* is already anchored in the Nisga'a Constitution as it pertains to gambling. The British Columbian Government has control over gambling in the Nisga'a territory. For the Nisga'a to retain their cultural integrity, the power of the Supreme Court must be reined in until an Indigenous voice in that court's system is demonstrable. Although the Queen is the sovereign head of Canada, the Nisga'a Nation, the Federal Government and the Province of British Columbia are sovereign in their own right according to the Nisga'a Constitution. Fairness demands that only a court with respectable representation of the three governments should be allowed to define the terms of the agreement. The reasons will be discussed in the next section.

PART VI: APPLICATION OF THE CONSTITUTION IN USA VERSUS CANADA

The Effect of American Jurisprudence on Canada

The last chapter outlined how the Nisga'a Nation acquired sovereignty which, in some aspects, is superior (i.e. more stable) to that of their counterparts in the United States. This did not come easily. This part will illustrate the manner in which the importation of American jurisprudence into the Canadian milieu has distorted the traditional British legal notion of Indigenous sovereignty to the detriment of the Indigenous peoples of Canada.[1294] Different states base their relationships with Indigenous peoples on substantially different governing concepts. In the United States, state-Aboriginal interaction is founded on a "trust"[1295] relationship. As a result, the United States regards the Aboriginal peoples as sovereign nations for which the state acts as protector and trustee. This concept originated from the "guardian-ward" theory of federal-Indian relations, which arose out of a dictum in Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia.*[1296] Marshall suggested that the Indians' deprived state of civilization made them like "infants" in relation to their superior conquerors,[1297] and that the Indians' "relation to the United States [thus] resembles that of a ward to his guardian."[1298] Marshall never expanded or outlined the implications[1299] of federal trusteeship over Indian tribes. However, the concept did not fade away. Subsequent case law revisited the guardian-ward analogy and transformed it into a dominant political and ideological premise of federal-Indian dealings. In 1886 the court relied on precedent, treating the Indians like wards or pupils of the government and grounding this into law in *United States* v. *Kagama.*[1300] Then in *United States* v. *Sandoval,*[1301] the court stated that New Mexico's Pueblo Indians, like other reservation Indians, depended on the United

States government's fostering care and protection[1302] in a case dealing with liquor prohibition. The Supreme Court elevated the trust concept to the highest ethical standards in *Seminole Nation* v. *United States.*[1303] The court charged that it is incumbent upon government agents in their dealings with these dependent and sometimes exploited peoples to exercise the most exacting fiduciary standards. The court based its decision on the fact that the government has charged itself with moral obligations of the highest responsibility and trust. These responsibilities are based on a self-imposed policy that has found expression in many acts of Congress and numerous decisions of the courts.[1304] Later, in *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton,* the court described the trust concept as guardianship by the United States, exercised at the government's will, over dependent tribes.[1305]

The thesis has shown from the above that the full-fledged trust concept in the United States stemmed from case law in the late nineteenth and twentieth centuries. It should be noted that trust was established in other ways, including through treaties and statutes. In Canada, by contrast, state-Aboriginal interaction is conducted on the basis of a "fiduciary duty."[1306] While trust responsibility is governed by trust law, fiduciary law, as it is applied in the Aboriginal context, is still largely uncharted and uncertain. Even that moral virtue in Canada appears to be suspect, leading some authors to maintain that "you can't trust the Crown."[1307] To the point is the title of the work by O. Giffiths, *Sui Semantics and Generis Gratuities: The Conundrum of Crown Fiduciary Obligations to Indigenous peoples.* The Royal Proclamation instructed that reserve lands were "for the use of the said Indians."[1308] From that, the *Indian Act*[1309] has always declared that reserve lands are held on trust for the "use or benefit of Indians,"[1310] and the Minister of Indian

Affairs is acknowledged to have "the control and management of the land and property of the Indians of Canada."[1311]

In 1951, while retaining the substance of the Crown's responsibilities, the Minister's management role was expanded by absolving the Superintendent General of a vital responsibility in declaring that the Minister "was responsible for the administration of the Act"[1312] itself. In so doing, the Crown used the overarching power of the Minister to dissolve the liability in law attached to the exercise of trust responsibilities. To solidify and crystallize the "no legal responsibility" powers, the Act was amended to provide that the Governor in Council may determine whether any purpose for which "lands in a reserve are used or are to be used is for the use and benefit of the [Indian] band."[1313] In other words, the government became the prosecutor, the judge and the jury for Indian affairs. It is therefore not surprising that the Supreme Court of Canada has yet to recognize any liability in law for the mismanagement of reserve lands. Even in the overly lauded decision of *Guerin* v. *The Queen*,[1314] the court expressly declared that "accountability would arise only upon disposition, not upon mismanagement of reserve lands."[1315] Based on that presumption, the majority in *Guerin* v. *The Queen*[1316] failed to recognize such accountability, upheld the lower court decision and awarded ten million dollars where the plaintiffs had shown damages in the neighbourhood of 50 million dollars. This was followed by a decision in which the Blueberry River Indian Band[1317] was denied a claim of over 300 million dollars, but was instead given only 150 million. The Crown was held not accountable to the band for the "mismanagement of reserve lands or for the disposition for no consideration of oil and gas"[1318] worth that claim.

Due to the amorphous[1319] character of the fiduciary-duty concept, the exact nature of the Crown-Aboriginal relationship lacks structural definition.

Canadian courts have looked to American jurisprudence for guidance due to its greater clarity. With regard to the issue of sovereignty, the false-fitted plenary power of Congress has indirectly found its way into Canadian law.[1320] The BNA Act and the Royal Proclamation apply to some Caribbean countries, but plenary power over the natives[1321] has not erupted from those documents in those countries. Therefore, the source of the federal government's plenary power is imported and "Canada refined" (section 91(24) of the 1867 *Constitution Act* came after the Marshall trilogy). Again, in terms of property rights, the seminal decision by Chief Justice Marshall in *Johnson* v. *McIntosh*[1322] resolved the thorny issue of title by relying on the distinction between usufructuary rights and ultimate title, even though Marshall did not use the word "usufruct" directly. Although Aboriginal inhabitants enjoy the right to occupy certain territories, legal title lies with the state.

Canadian courts, as they struggle with Aboriginal issues, have come to rely on this oft-cited American principle. With time and repetition, the American interpretation of Aboriginal title as a usufructuary right has become widely accepted as Canadian law.[1323] This conclusion overlooks the profoundly different significance of the Royal Proclamation of 1763 in the historical and legal development of the United States and Canada. Consequently, rather than being a source of greater clarity, American jurisprudence has created great confusion in Canada. While Canada was quick to jump on the United States law that dispossessed Indigenous peoples of their lands and rights, it

has been slow to accept the concept of the "residual sovereignty" of the Indigenous peoples, which also evolved from the Marshall trilogy.

The Supreme Courts' Version of Sovereignty: United States and Canada

Many Clouds No Rain[1324]

One of the major contributions of this thesis is the analysis of the Marshall trilogy in Part I. In that analysis is the cornerstone of the U.S. Supreme Court's stance on Indigenous sovereignty. To canvass the main points, Indigenous states are domestic dependent nations, occupying "a territory to which the United States asserts a title independent of their will which must take effect in point of possession when their right of possession ceases. Their relation to the United States resembles that of a ward to his guardian."[1325] Indian nations are sovereign nations that operate on the residual sovereignty remaining after the progressive and implicit divestiture of parts of their full pre-colonial sovereignty as the consequence of colonization. Their differential status of the Indians in the United States is political[1326] as opposed to racial. More recently, in *United States* v. *Wheeler*,[1327] Stewart J. of the Supreme Court of the United States described the applicable doctrines. He explained how the loss of certain aspects of Indian sovereignty came about. He argued that the incorporation of the Indian Nations within the United States and the fact that the Indian nations accepted the protection of the United States, by implication, divested them of some aspects of their original full sovereign status. The Indian Nations also lost some aspects of their sovereignty through specific treaty provisions. The United States Congress, in the exercise of its plenary control,

further stripped the Indian Nations of some of their remaining powers. The sum total of all these divestitures from pre-contact Indian sovereignty is "inherent powers of a limited sovereignty which has never been extinguished." In other words, Indian nations are no longer "possessed of the full attributes of sovereignty."[1328]

This means that Indian nations still possess those aspects of sovereignty not withdrawn by necessary implication of colonization or their dependency on the United States, not wrenched from them by the Supreme Court[1329] or by statute, and which, furthermore, the Indian nations have not surrendered through treaty. The problem is not so much the loss of certain powers but the fact that the power grab by the federal government and the states is unending. Indian sovereignty is constantly changing. Some Indian rights may be going off the block as we speak and others are in the process of being modified. Furthermore, some of these changes may apply to some, but not all, tribes. This thesis will try to give the current state of affairs while making note of past events, but, no matter how hard it tries, omissions in specific areas cannot be avoided. From the practical point of view, the areas affected by the explicit or implicit divestiture of sovereignty may be examined in relation to intercourse between Indian nations and non-members of the tribe; Indian nations and the states; Indian nations and the federal government; and Indian nations and the international world.

A) Indian Nations and Non-members of the Tribe

One of the stipulations in the Royal Proclamation of 1763 was that individual colonists could not purchase or settle on Indian lands without the permission of the Crown, and that all purchases were to be made through the Crown. That clause was

enacted to protect the Indian lands from encroachment by colonizers and unscrupulous speculators. It states that "We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained."[1330] The Royal Proclamation had been drafted two years (1761) before Chief Pontiac's uprising and so it may be argued that the two events are not related. They are in fact related. It should be noted that the Métis population had been establishing itself as a "'new' Indigenous population on the 'frontier'"[1331] for a century. They had the military might and "proved themselves more than capable of defending their territory and their new lifestyle against all comers."[1332] Similarly, Chief Pontiac's uprising did not spring up in one day and the Royal Proclamation could have been drafted in response to Chief Pontiac's uprising. Yet Marshall was able to inject that condition into the doctrine of discovery. He wrote that the "exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."[1333]

From where did Marshall get the proviso of "sole right of acquiring the soil from the natives"?[1334] As Professor Robertson explained, Marshall was his own historian. How does one reconcile the last statement by Marshall with his other reference with regard to Cabot, who "was empowered to take possession in the name of the King of England, thus asserting a right to take possession, the occupancy of the natives[?]"[1335] The truth is that the Europeans ignored Indian rights whenever possible. There were no arrangements among the Europeans to buy Indian lands; instead, the instructions to the colonies to purchase Indian lands came from the Royal Proclamation, which stated "that the several

Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them." It appears that Marshall did not simply use the Royal Proclamation to support his stand that the federal government had acquired the sole authority to purchase Indian lands in *Johnson* v. *McIntosh*,[1336] because even the use of "nations" in the proclamation is inconsistent with the doctrine of discovery. Nevertheless, cases after *Johnson* ignored these deficiencies and cleverly completed the transformation of the restrictive clause in the Royal Proclamation into the doctrine of discovery. To that end, the court in *Kagama*[1337] stated that:

> the colonies before the Revolution, and the states and the United States since, have recognized in the Indians a possessory right to the soil... But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority.[1338]

Note that the restrictions placed on the settlers have now been transferred to the Indian nations. It is an example of the ease with which the courts could employ collusion and untruth to advance judgmental goals. The court in *Wheeler* (1978) recently held on to that proposition by stating that Indian tribes can no longer freely alienate to non-Indians the land that they occupy. However, that rule is probably not applicable throughout the country.[1339]

Another area of evolving divestiture under interaction between Indian nations and non-members is the role of the Indigenous courts, which is very unclear. For instance, the jurisdiction of Indigenous courts depends on whether the breach occurred on non-Indian land within a reservation. Indian Nations can also abdicate their rights through treaties or

lose them by statute. Non-Indian lands within a reservation include highways and rights-of-way maintained by the state or the federal government. Thus, in the absence of Congressional direction or treaty, Indian tribes lack the civil authority over the conduct of non-members on non-Indian land within a reservation.[1340] Those cases fell within state or federal regulatory and adjudicatory governance. An exception to this rule exists for conduct that threatens, or has some direct effect on, the political integrity, the economic security or the health and welfare of the Indian nation.[1341] In addition, non-members who enter into consensual relationships with a tribe or its members through commercial dealings, contracts, leases or other arrangements cannot avail themselves of the rule in *Montana.*[1342] With respect to criminal jurisdiction, *Oliphant* v. *Suquamish Indian Tribe*[1343] established, through the Supreme Court, that tribal courts cannot try non-Indians, which was affirmed in *Duro* v. *Reina*[1344] – though Congress rejected that decision and confirmed jurisdiction through legislation.

B) Indian Nations and the States

Historically, the provision of services on "Indian country"[1345] has generally been under federal and tribal jurisdictions. The concurrent federal and tribal jurisdiction is both constitutional and legislative. Thus, as sovereign domestic dependent nations, tribes are legally distinct from states possessing a separate jurisdictional relationship with the federal government. Consequently, state regulatory authority over activities on Indian land is pre-empted by both the operation of federal law (*New Mexico* v. *Mescalero Apache Tribe*)[1346] and tribal sovereignty (*California* v. *Cabazon Band of Mission Indians*)[1347]. Since the theatre of Indian actions is within the geographical confines of the

States, there is a constant struggle for judicial control. To aggravate the situation further, the states have rights-of-way to certain portions of some reserves. In these enclaves, the *Montana* rule[1348] that, absent Congressional direction, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation is the law.

One field in which the states have been successful in extending their control over Indigenous areas is with regard to criminal law. It is so varied and changes so quickly that no one can possibly keep abreast of the situation. What is certain is that with respect to criminal jurisdiction, tribal courts cannot try non-members of the tribe.[1349] For state control of criminal cases on reservations, please see the Appendix B under "Curtailment of Jurisdiction of Tribal Courts Criminal Cases."

C) Indian Nations and the Federal Government

The "residual sovereignty" of the Indigenous peoples of America can be best defined as the sovereignty that the Congressional plenary power has not yet taken away, for even existing treaties could be unilaterally nullified by Congress.[1350] Mathematically, if Congress has all the power, then the Indigenous nations have no power. "Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the Government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the Government."[1351] So, with respect to sovereignty, even if Congress takes away nothing, the Indigenous nations still have nothing: nothing from nothing leaves nothing. "Residual sovereignty" in this situation is neither hierarchical

(stratified) nor shared sovereignty. It is a "hanging" or "dangling" sovereignty, an oxymoron. Theoretically, then, the divestiture by the federal government includes all the lost powers listed under the previous sections. The federal government has the sole authority to intercourse with the Indian nations, to regulate trade, to manage all affairs related to trade and to execute treaties. That means all powers transferred to the states were through the federal government or with its blessing. The powers that the federal government extracted for itself include, but are not limited to, all the functions of the Bureau of Indian Affairs, the most important being the management of Indian lands, since the "use of Indian land is controlled by the Bureau, as are sales, exchanges and other land transactions."[1352]

As noted above, the field of sovereignty is evolving. The areas where the Indigenous people are gaining ground are in health, education, child welfare and the right to establish and control gambling activities on their territories. The areas where the Indigenous people are generally losing ground are in the civil and criminal jurisdictions of the tribal courts. Prior to 1885, the tribal courts had jurisdiction to regulate and punish any Indian behaviour affecting other Indians within Indian country. In 1885, Congress enacted the *Major Crimes Act*, making it an offence under the jurisdiction of the United States for one Indian to commit certain enumerated crimes against the person or property of another Indian. The *Montana* rule,[1353] *Strate* v. *A-1 Contractors*[1354] and *Nevada* v. *Hicks*[1355] represent the current state of affairs in civil jurisdiction. Finally, all tribal constitutions have to be approved by the Bureau of Indian Affairs if enacted per IRA 1932.

The Cherokee have recently managed to escape from under that yoke. The greatest obstacle to the 1999 amendment to the Cherokee Constitution was Article XV, Section 10 of the 1976 Constitution requiring that "no amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative."[1356] It can be safely assumed that the Cherokee people did not place Article XV, Section in the 1976 Constitution by choice and that the Cherokee Nation was able to wiggle out of that clause in 2003.

D) Indian Nations and the International World

The Indigenous nations of the United States have no seat of their own at the United Nations. They cannot enter into direct commercial or governmental relations with foreign nations. Since these nations live within the territorial confines of the United States, their freedom to independently determine their external relations has been subsumed by the United States.[1357]

Round Plug in a Square Hole

Reconciling "residual sovereignty" with the plenary powers of Congress is problematic. Sovereignty may be hierarchical and divisible, but, in modern political theory, it cannot be vulnerable to unilateral extinguishment by an external body. A nation cannot be "dependant"[1358] and still sovereign at the same time, although trust territories may be politically dependant and still retain some form of sovereignty. In these situations, the powers of the respective states are both well defined and internationally

respected. But the relationship between the tribes and the United States is based on "colonial trust." How else could the Supreme Court claim that "Congress possesses a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests... even though opposed to the strict letter of a treaty with the Indians."[1359] Implicit in the definition of sovereignty is the concept of stability, which enables the sovereign nation to, among other things, preserve its culture. This cannot be achieved when sovereignty exists at the sufferance of an external body such as the Congress. Neither could sovereignty be subject to complete defeasance, as it is with the Indian nations.[1360] On March 3, 1871, after several years of established treaty making, Congress unilaterally stripped the Indian nations of their nationhood and decided to govern them by acts of Congress. It began with the Act which stated that "[n]o Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty" but all previous treaties remained in full force.[1361] This took place 39 years after Chief Justice Marshall delivered the Indigenous "residual sovereignty" child. What definition of "sovereignty" would accommodate such vanishing acts? This logically leads to questions regarding the source of the plenary powers of Congress. The answer, wrongfully given, is Article 9 of the U.S. Constitution. Recall that jurisdiction over "Indian Country" is drawn from Article 1, Section 8, Clause 3 of the Constitution, which provides Congress with the power to "regulate commerce with the Indian Tribes."[1362] Moreover, pursuant to Article II, Section 2, Clause 2, the President has the power, by and with the advice and consent of the Senate, to make treaties. As a matter of established law as set out in the nineteenth-century cases of *Cherokee* and *Worcester*, Indigenous tribes

are sovereign domestic dependent nations. Thus, tribes are legally distinct from states possessing a separate jurisdictional relationship with the federal government (*Oneida* v. *Oneida County*,[1363] *United States* v. *Kagama*,[1364] *Lone Wolf* v. *Hitchcock*[1365]).

Marshall, in *Worcester*, limited the ninth Article, which provides Congress with the power of "regulat[ing] commerce with the Indian Tribes" and of managing all their affairs to just the regulation of Indian trade and all affairs connected with such trade. Marshall went further to bar that clause from encroachment on Indian sovereignty. He took pains to explain that to construe the expression "managing all their affairs" into a surrender of self-government would be a perversion of their necessary meaning.[1366] Clearly, the commerce clause is not the source of the plenary power of Congress in terms of the Marshall trilogy, since *Worcester* was the last of the trio.

The Guardian-ward Relationship

The "guardian-ward" conjecture of federal-Indian relations sprang up from a dictum in Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia*.[1367] Congress and the courts soon recognized the potential for a second source of congressional power over the Indian nations. The supposition is based on the relative weakness and dependency of the tribes and on the federal government's obligation to protect the Indian nations against the aggressive settlers and land speculators. Implicit in the hypothesis was the federal government's aim of aiding the Indians in coping with an alien culture that has inexorably misshaped the Indian's conventional way of life. Despite the noble aim, the "guardian-ward" concept, in concert with the commerce clause, began to function as rationalization for the exercise of federal authority as against both the Indian nations and

the states. Does a guardian or trustee govern the life of the benefactor? Not in trust law. The Supreme Court's common law idea of "plenary power" in the federal government instead evolved from *Crow Dog*,[1368] *Lonewolf*[1369] and, in particular, *Kagama*.

Justice Miller, delivering the opinion of the court in *Kagama*, listed the attributes in the Marshall trilogy that led to the "guardian-ward" concept and that denigrated the Indians to insignificant beings. He assigned them to be wards of the United States, on whom they largely depended for their daily food and their political rights. He concluded that from their very weakness and helplessness arose the duty of protection and with it the power and justification for evoking the Act of March 3, 1871 whereby the United States recognized no right in private persons or in Indian nations to execute treaties.[1370] Since then, the plenary powers of Congress have become part of the common law of the United States. As a result, an ordinary law of Congress can override the powers of Indian nations.

The Supreme Court's Concept of Self-government in Canada: A Top Loading Washing Machine

The hard-to-define Indigenous self-government in Canada differs in material respects from the U.S. doctrine of domestic dependent nation. According to Professor McNeil and other scholars,[1371] a great deal of uncertainty exists over the inherent right to self-government in Canadian law. Professor McNeil identifies three judicial approaches, namely: [1372]

1. An inherent right of self-government as a freestanding Aboriginal right within the meaning of section 35 of the 1982 *Constitution Act.*
2. An inherent right as a right of self-regulation over all other section 35 Aboriginal and treaty rights.
3. An inherent right as residual sovereignty that was retained by First Nations after European colonization.

The inherent right of self-government as a freestanding Aboriginal right was the approach that the Supreme Court of Canada took in *R.* v. *Pamajewon.*[1373] At the centre of the controversy was the Indigenous claim to the right of self-government in the management of gambling on Indian reserves. The court reverted to the test in *Van der Peet* for the establishment of Indigenous rights.

In a nutshell, the Indigenous tribe seeking the right has to prove that the right sought had been integral to their distinctive culture at the time of contact with Europeans. The shocking news was that, in *Pamajewon*, the Court stipulated that self-government is no different from other Indigenous rights, such as the right to fish commercially, which was the issue in *Van der Peet.*[1374] The question to be asked is whether commercial fishermen have governmental power. The Indigenous peoples in *Pamajewon* were not asking for the right to gamble, since games of chance, such as bingo, were already played on the reserves. The Indigenous peoples in *Pamajewon* were asking for the right to regulate large-scale commercial gambling on their reserves. It is a claim to governmental power, not the act of gambling.

The Supreme Court corrected itself in *Marshall 2*[1375] by drawing a fundamental distinction between the right to fish on the one hand and governmental authority or jurisdiction on the other. The Court wrote:

> The Crown elected not to try to justify the licensing or closed season restriction on the eel fishery in this prosecution, but the resulting acquittal cannot be generalized to a declaration that licensing restrictions or closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial "right to fish."[1376]

This reversal, however, did not rectify the injustice. This is because *Marshall 2* can be distinguished from *Pamajewon* on the ground that the governmental power at

issue in *Marshall 2* rested with the federal government and not with the Indigenous people. But most importantly, *Marshall 2* only confirms that the wrong test was used in *Pamajewon*. That alone does not necessary mean the conclusion arrived at was incorrect. However, later decisions suggest that *Pamajewon* is legally, but not politically, dead.[1377]

The two Anishnabe First Nations who sought the right to regulate gambling on their reserves in *Pamajewon*[1378] failed to establish that high-stakes gambling was integral to their distinctive cultures and was regulated by them at the time of European contact. This was a big blow to inherent Indigenous self-government. The rule in *Pamajewon* carved out Indigenous government as museum pieces. If followed strictly, Indigenous governments, under that rule, are impotent and are unable to evolve. Indigenous governments, for example, would not be able to charge landing fees on their reserves because historically there were no aircraft and because aviation was not integral to their distinctive cultures. Certainly, Indigenous peoples could not have regulated landing fees at the time of European contact. Moreover, each area of governmental authority has to be sought separately. Professor McNeil concludes that this fragmentation of governmental rule is impractical and costly. *Pamajewon* also places the burden of proof on the Indigenous peoples.[1379]

Fortunately, in *Delgamuukw* v. *British Columbia*[1380] the court stated that the claim in the *Pamajewon*[1381] case for the right to self-government was framed "in excessively general terms" and was therefore was not "cognizable"[1382] to the court. Consequently, *Pamajewon* did not determine the Indigenous right to self-government, but it has received attention from another angle. As per Major and Binnie JJ. in *Mitchell* v. *M.N.R.*,[1383] "A frozen rights theory is incompatible with s. 35(1) and aboriginal rights are capable of

growth and evolution." Although this represents the view of only two of the nine judges, it indicates that some of the judges in the Supreme Court are not at ease with the canon in *Pamajewon.*

Apart from that, the courts since *Pamajewon* have adopted other ways of viewing Indigenous self-government. Ironically, one of these approaches actually links Indigenous self-government to other Indigenous rights and treaties, such as title to land.[1384] Widely accepted by the courts is the notion that Indigenous rights and treaties are communal. Cases to support this claim are ample. The court in *Delgamuukw* v. *British Columbia* [1385] also recognized that the Indigenous nations that have title to the land also have decision-making power over those lands. Self-governmental authority over treaty rights is even easier to ascertain. Treaties are not negotiated with the individual tribal members, but rather are negotiated with their leaders (government). Who is in a better position to regulate these rights within the Indigenous communities than these leaders? The answer is too clear to be controversial, but to formalize this in law, *Marshall 2*[1386] did recognize some form of self-regulation in the two sets of rights mentioned. Indeed,

> In this respect, a treaty right differs from an aboriginal right which in its origin, by definition, was exclusively exercised by aboriginal people prior to contact with Europeans. Only those regulatory limits that take the Mi'kmaq catch below the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself have to be justified according to the *Badger* test.[1387]

By accepting the emphasis placed on the word "communal" in the provincial legislature, *Marshall* positioned all Indigenous rights under one umbrella since all Indigenous rights are communal. The fall-out of all these arguments is the summation by

Justice Williamson of the Supreme Court of British Columbia who justified the Indigenous right to self-government when he wrote

> ...that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal.[1388]

Although these proclamations are from a lower court, they are significant in that they have not been challenged and, for the moment at least, remain the law in British Columbia. The Supreme Court of Canada has not refuted Justice Williamson's argument. Rather, the duty to consult placed on the Province of British Columbia in the *Haida* case,[1389] which was rendered after Justice Williamson's verdict, indirectly re-affirms Indigenous self-government. By practice, the province has been dealing with elected representatives of the Haida nation, which by Justice Williamson's analysis is a governmental body saddled with the responsibility of making decisions affecting the use of the community's territory. The Haida dispute was not over reserve lands[1390] but, rather, was over the Haida Nation's claim to a whole territory of Haida Gwaii (the Queen Charlotte Islands) and surrounding waters.[1391] In that judgment, the court dealt with the "Honour of the Crown" and whether the Crown has a duty to consult and accommodate Indigenous peoples "prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims."[1392] The Court made several vital pronouncements on these topics. The duty to consult and Honour of Crown are well established in Canadian law.[1393] What makes the Haida case stand out is the application of these duties to "as yet unproven" Indigenous rights and title claims. The Court stated:

> While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary,

> the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof.[1394]

Added to the British Columbia government's duty to consult is the duty to accommodate. "The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims."[1395] From these rules, Professor McNeil justifiably concludes that established rights need not be "proven in court or recognized in a treaty for First Nations to be able to rely on them."[1396]

Professor McNeil's third approach, "residual sovereignty," stems from Marshall's judgments in *Cherokee* v. *Georgia*[1397] and *Worcester* v. *Georgia.*[1398] It is based on the premise that the Indigenous peoples were self-governing prior to European contact and that Crown sovereignty and colonization reduced, but did not extinguish, the right of the Indigenous peoples to self-government. Section 35 of the 1982 *Constitution Act* recognized and affirmed the existing Aboriginal and treaty rights of the Indigenous peoples of Canada. Where did these rights come from? The Constitution did not create them. Canadian law did not create them. Therefore, they must be remnants of the rights that existed before colonization. *Calder et al.* v. *Attorney General of British Columbia*[1399] affirmed that Aboriginal peoples' historic occupation of the land gave rise to legal rights in the land that survived European settlement. Justice Williamson's analysis draws on these survived rights to support the conclusion that Indigenous self-government did not vanish with colonization. If that is correct, then the only missing rights were those extinguished during or after colonization. That being the case, it would be up to the Canadian government(s) to prove areas of implicit divestiture of Indigenous self-

government. That means that, to determine the current inherent self-government of any given Indigenous nation, the nation should be deemed to have fully self-governing power. Referring to British policy toward the Indians, Justice Lamer wrote in *Sioui* that it "also allowed them autonomy in their internal affairs, intervening in this area as little as possible" (para. 74). From the fully self-governing basis, one can subtract the extinguished rights and determine the existing rights of self-government. That proposal is not without foundation. The division of powers in sections 91 and 92 of the *Constitution Act 1867* was certainly not to extinguish Indigenous rights or self-government. "The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation."[1400]

Thus, the powers distributed were powers that had belonged to the colonies (to the provinces and the Dominion).[1401] It was division of powers within the colonies and not beyond them. The obligations owed by the Crown to aboriginal peoples remained the responsibility of the Crown in right of Canada.[1402]

Chief Justice Dickson summed up the foregoing debate in *Guerin* v. *The Queen.* He engraved in the law books that since 1867

> ...the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.[1403]

According to *R.* v. *Sioui* (1990), that relationship has been nation to nation, since the historical documents demonstrate that "both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North

America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations."[1404]

Justice Lamer then introduced as further evidence the records of Sir William Johnson, who was in charge of Indian affairs in British North America, to confirm that Great Britain recognized the "nation-to-nation" association.[1405] Justice Lamer went as far as to equate the state of affairs in Canada with the conditions in the United States. He did so by referring to the judgment of Chief Justice Marshall in *Worcester* v. *State of Georgia*:

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans…she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.[1406]

Recall that out of these and other findings, Chief Justice Marshall conceived the concept of residual sovereignty for the Indigenous peoples of the United States. It appears that Chief Justice Lamer abandoned the conscious or unconscious quest for residual inherent self-government for the Indigenous peoples of Canada because he is the same judge who six years later delivered the judgment in *Pamajewon*[1407] – a vivid example of the gyrating motions of a washing machine.

Fortunately, Justices Binnie and Major of the Supreme Court of Canada seem to have picked up where Lamer left off. They did so in *Mitchell* v. *M.N.R.*[1408] The court in Mitchell was to consider, among other things, whether the "Mohawks of Akwesasne have Indigenous right to bring goods into Canada from U.S. for trading purposes without paying customs duties and whether the claimed right is incompatible with Canadian sovereignty."[1409] The majority of the court – seven out of nine to be exact – sidestepped

the issue of the compatibility of the claimed right with Canadian sovereignty because the Mohawks of Akwesasne failed to prove their entitlement to the rights sought. That argument did not deter Justices Binnie and Major from addressing the issue, who wrote that a "border has always been a fundamental attribute and incident of sovereignty. Therefore, the international trading/mobility right claimed by the respondent is incompatible with the historical attributes of Canadian sovereignty."[1410]

However, they were very careful to inscribe in their judgment: "This conclusion neither forecloses nor endorses any position on the compatibility or incompatibility of internal self-governing institutions of First Nations with Crown sovereignty, either past or present."[1411] Most encouraging is the fact that these judges referred to the judgments of Chief Justice Marshall[1412] and Justice Stewart[1413] of the Supreme Court of the United States to demonstrate the existence and the possibility of the concept of residual Indigenous sovereignty which is not perfect but is by far more reverential of First Nations than the free-standing Indigenous right proposal in *Pamajewon*. The significance of the resurrection of the concept of residual Indigenous sovereignty in the Supreme Court of Canada from these references has yet to be ascertained. While the world waits for the results, this thesis invites the reader to think about the efficacy of the Supreme Court on Aboriginal issues.

Are the Supreme Courts the Right Forum for Determining Indigenous Sovereignty and Self-government?

The Supreme Courts of both Canada and the United States have an exceptionally difficult task. They are burdened with deciding competing rights between the dominant and politically powerful "newcomers" and the politically weak minority of the

Indigenous peoples. To make matters worse, these courts are part of the dominant society both structurally and by composition. These courts cannot possibly avoid lugging forward doctrines of British colonial law into their interpretations and analyses of the issues. Despite these weaknesses, the court in the United States has taken the bull by the horns and adopted the residual sovereignty concept. Sadly, the unsupported plenary powers of Congress have created a big hole in that idea. Instead of advancing in self-determination, the Indigenous peoples of the United States are more likely to lose self-governing power.

When it comes to Indigenous self-government issues, the Canadian Supreme Court is a top-loading washing machine. It seems to be gyrating between its conscience and the public mood.[1414] Justice Dickson could not express it better when he wrote in *Kruger* v. *The Queen* that "claims to aboriginal title are woven with history, legend, politics and moral obligations."[1415] Anything based on the dominant political opinion is subjective.

The Canadian courts are far more reactive than proactive. With respect to Indigenous rights and sovereignty, the judicial processes are rife with holes and barriers, a past example being the requirement in *Calder*[1416] that the Indigenous peoples obtain a fiat of the Lieutenant-Governor of British Columbia in order to sue the Crown. Would they have received it? The court did not rule on the case due to that omission. Justice delayed is justice denied and the effect lingers on. There ought to be a better forum for calculating Indigenous sovereignty in both Canada and the United States. This topic will be fully explored in Part VII.

PART VIIA: REQUIEM FOR OUTDATED CONCEPTS AND DOCTRINES

Introduction

Elizabeth I of England once candidly told one Spanish ambassador that "to sail to and fro, to build huts, to name a river or a promontory could not confer ownership, since prescription without possession was of no effect."[1417]

The notion of *terra nullius* is a dead fossil, as has been proven in Part III. Even Australia finally abandoned that doctrine in *Mabo*.[1418] But despite the pronouncement of Elizabeth I, the doctrine of discovery, erroneous as it is, has still managed to erect for itself a monument in the Americas. This can, in part, be attributed to the concept of territoriality, which the positivists regarded as fundamental to both statehood and sovereignty. Lawrence wrote that "International Law regards states as political units possessed of proprietary rights over definite portions of the Earth's surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organised and civilised, to come under its provisions."[1419] This is how Marshall transformed the positivists' dream that nomadic tribes have no propriety rights through discovery into American reality.

Marshall, the Doctrine of Discovery and the Royal Proclamation[1420]

The best approach is to refresh the reader's mind by expanding on a topic raised in Part I to prove the inconsistencies in the Marshall trilogy. In *Johnson* v. *McIntosh*, as evidence of the extinguishment of Indian (nomadic tribe) title, Marshall pointed to the terms of nine colonial charters and treaties. Collectively these documents formed the

foundation of British title.[1421] As was pointed out in Part I (Table 6), there is cause for concern. Despite his ready citation of sources elsewhere in the opinion, Marshall failed to identify the source of a very important quotation.[1422] Similarly, as mentioned earlier in this paper, Professor Robertson directly questions the veracity of Marshall's characterization of the British claim and further alleges that Marshall was silent as to his sources for his history of British colonial policy. From Robertson's point of view, Marshall the jurist was also a historical apologist for colonization. Much of the decision was based on Marshall's own work. In particular, Marshall drew heavily on his five-volume biography of George Washington.[1423] Yet, despite considering himself an expert on the historical record, Marshall relies exclusively on secondary sources. Among these authors, only one actually had access to British colonial records.

Thus, the historical reliability of the Marshall judgment is highly questionable.[1424] Indeed, alternative histories utilizing colonial land records have reached dramatically different conclusions. For example, Marshall's cousin and perennial political nemesis, Thomas Jefferson, stated in his *Notes on the State of Virginia* that there existed "repeated proofs of purchase, which cover a considerable part of the lower country; and many more, would doubtless be found on further search."[1425] With this background, Robertson concludes that the full history of the discovery doctrine has yet to be written.[1426] He has indeed done that in his new book: *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands.*[1427]

It is surprising that Marshall failed to consider the Royal Proclamation which was the law of the land during the periods considered.[1428] Such an oversight would lead one to the nearly inescapable conclusion that Marshall selected only those documents that suited

his plan. Yet subsequent case law, especially after Johnson & Graham's *Lessees* v. *McIntosh*,[1429] has perpetuated the myth that fee title to the lands occupied by Indians when the colonists arrived became vested in the United States as the successor to the British Crown.[1430] Upon even modest inspection, however, this proposition is untenable. If the Crown enjoyed title to the land prior to 1763, why would the Crown offer to purchase the same land from the Aboriginal peoples in the 1763 Royal Proclamation? What, to the reasonable mind, can properly be regarded as an admission against interest binding on the British Crown is the use of words like "purchase"[1431] and "ceded,"[1432] as they relate to Indian lands. It seems to offend against reason for the Crown to wish to purchase or lend from the Indians that which belongs to the Crown. Common sense strongly suggests that the Crown wrote in that manner because the Crown well knew that those lands belong to persons other than the British Crown. In using those words, the Crown had considered the Indian land rights in terms of the law of contract. Since, as the legal maxim goes, neither offer nor payment – the parties should depart in peace. Indians, according to the Royal Proclamation, henceforth had a legally recognized right to their title.

It has been suggested that the Royal Proclamation may have been intended as a document to pacify the Indians rather than as a legal document. This argument is imposing but, before we yield to it, closer examination is needed because the argument has several serious flaws. The Royal Proclamation took about four years to complete.[1433] It would not have taken that long to come up with a deceitful document. Most significantly, if that argument were true, why should any Indigenous people trust the Crown – then or now? The position of this thesis is that the Crown will not deceive its

subjects.[1434] Finally, the Supreme Court has declared in more cases than one that "treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians."[1435]

In summary, the Marshall rulings in *Johnson* v. *McIntosh*,[1436] *Cherokee Nation* v. *Georgia*[1437] and *Worcester* v. *Georgia*[1438] were never meant to elucidate a historic or cultural reality. Their purpose was to provide the legal foundation for the new reality of the United States. Marshall was well aware that his application of the discovery doctrine was inconsistent with the traditional doctrines of territorial acquisition under international law.[1439] Marshall, giving credence to Indian treaties, concluded "the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[1440] He went on further to declare that even the Royal Charters "asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[1441] Therefore, the whole concept of discovery from its outset had little foundation in either fact or legal reasoning.[1442] It can best be described as a diplomatic fantasy. Yet the discovery doctrine is repeatedly invoked like a magic formula, to exorcise the spectre of forensic doubt.

False Fitting of Discovery into American Reality

The schematic diagram of sovereignty in Part I shows that the difference between Ghana, Canada and the U.S. is the retention of the positivists' concept of sovereignty in the Americas, which can be found in the words of Marshall:

> We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits[1443]... if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[1444]

In short, the positivists' concept of sovereignty with all its deficiencies has become the law of the Americas through discovery. That leads to the question: Why was there an international outcry over Apartheid?

The Europeans in South Africa were agriculturalists, merchants and manufacturers as opposed to the Indigenous peoples, who, like the American Indians, were generally hunters. The Apartheid principle had been asserted and sustained. South Africa had been acquired and held under Apartheid, which became the law of the land. The Indigenous peoples, like the American Indians, were placed in reservations (homelands). South Africa, like the United States, broke off from Britain. The only difference between the United States/Canada and South Africa is that the property of the great mass of the people in the Americas originated in the abstract principle of discovery. Therefore, the objection to Apartheid by the international community can be justified only[1445] because the property of the great mass of the people did not originate in it. If that is sound, why is the international community fuming over the redistribution of the lands in Zimbabwe (formerly Rhodesia)?

From the Ghanaian viewpoint, this philosophical question should not be buried as Marshall suggests, but needs to be explored. The French monarch claimed all of Canada and Acadia as colonies of France "at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country."[1446] The first American settlement, Jamestown, started with only 105 Europeans. That number was

miniscule in comparison to the Indian population in the area of Virginia, and yet the British claimed title to Virginia. So when did the world wake up to the notion that the property of the great mass of the community is a factor to be considered in nationhood and sovereignty? When the powerful Europeans were appropriating Indian lands on the basis of abstract principles, the property of the great mass of the community was ignored, but when the Europeans had gained the majority, it became a critical factor in the law of the land. This is the clearest demonstration of the principle that genocide is the ultimate definition of sovereignty and that sovereignty could be extended or withdrawn according to the requirements of colonial interests.[1447]

The English traced their title to the discovery of North America by Cabot. But when Cabot arrived, he interacted with the Indigenous peoples who were already living on the soil. It has been well established in Part 2 that these Indigenous peoples had systems of law and were both organized and self-governing, so "these motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[1448]

Lord Denning, in *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*,[1449] insisted that Indigenous laws or customary laws are well established and have the force of law within the community. That means that, for the Indigenous peoples, the law of the land in operation was the law of the Indigenous nations. Evidence supporting the fact that a large portion of Indian lands was lost through encroachment is abundant and complete. The Royal Proclamation of 1763 is a monument to that phenomenon.

Therefore, a great number of wars between the Indigenous peoples and the settlers resulted from the unlawful activities of the colonists. Marshall himself alluded to this by explaining that "the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder."[1450] As Marshall testifies, "the power of war is given only for defense, not for conquest."[1451] Therefore, conquest under the circumstances described is criminal. The courts were aware of the trend so how did the courts get from discovery to the conquest doctrine?

From Discovery to Conquest

The law (Royal Proclamation) mandated and strictly forbid, on "pain of displeasure," all royal subjects from making any purchases or settlements and from taking possession of any reserved lands without special leave and licence from the Crown. The proclamation also ordered the intruders to leave:

> And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements.[1452]

Evidently, the Colonists ignored the law for, in 1772, Governor Gage issued the following order:

> Whereas many persons, contrary to the positive orders of the king upon this subject have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations, particularly on the Ouabache.[1453]

The Royal Proclamation was the law of the land. The activities of the law-breakers were not extravagant. They were criminal. Where were the guardians of the law when the unlawful activities of land theft were going on? Where were the courts? The principle of "adverse possession" will not work in this regard because the Indians protested right from the start and in some instances fought to defend their rights. There is no statute of limitations for theft. This begs the question of how could the court could bury the subject by declaring that

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[1454]

The lesson here is that the powerful could invent any abstract doctrine, apply it, circumvent the law and justify their aggression by instigating war and, after victory, claim the land by conquest. The rule of law then serves as the tomb for the decomposed deed under it. The Ghanaian investigative view requires that the body be exhumed because even the tomb is placed on the wrong soil and under the wrong law.[1455]

From Conquest to Neocolonialism

In *Johnson* v. *McIntosh*,[1456] Marshall posits that, after conquest, if the conquered inhabitants can be merged with the conquerors, the conquered should be incorporated into the dominant society. He then declares that "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[1457] From that, Marshall wraps up by proclaiming that the "law which regulates, and ought to regulate in general, the relations between the

conqueror and conquered, was incapable of application to a people under such circumstances."[1458]

From the Ghanaian angle, some fundamental errors in Marshall's judgment may exist. Apart from the erroneous doctrines, Marshall may not be accurate when he suggests that usually the conquered people are "incorporated with the victorious nation and become subjects or citizens of the government with which they are connected."[1459] The British finally conquered the Ashanti after several wars in the first year of the twentieth century, but the Ashanti people did not become British citizens, nor did they blend in with the English people. They were left to retain their traditions and land systems. It will be recalled that the Europeans, at the Berlin conference, deemed the Ashanti (African) tribes to be too primitive to understand the concept of sovereignty. In consequence, the Ashanti could not possess the land nor cede the land by treaty.[1460] The land could be taken by mere occupation; yet the Ashanti, unlike the Indigenous peoples of America, were left to their own resources.

Again, the Ashanti were labelled primitive, barbarians, uncivilized, savages, warlike, bloodthirsty and any other name that one can imagine. In a dispatch from Governor Hilt to Sir J. Pakington on October 3, 1853, the Governor bewailed: "...but from the restless warlike disposition of those people, and taking into consideration the opinion of all best acquainted with their character, I regret to think that they will never be satisfied without bloodshed."[1461] The Ashanti were thus deemed fierce and warlike savages, but the British did not confine them to reservations. If the "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered"[1462] was capable of application to the notorious Ashanti, why not to the Indigenous peoples of

America? Most interestingly, in *United States* v. *Perchman*[1463] the same Chief Justice Marshall admitted that conquest does not transform or undress the conquered.

Conquest, *per se*, is not a bar to sovereignty. Although subject to the rule of Caesar, the conquered peoples abided by their own laws within the Roman Empire. In the British Empire, the case of *Tanistry*[1464] served as the precedent for the principle of continuity for the seventeenth-century jurists, as they referred to the events following the English conquest of Ireland and prior to the introduction of English municipal laws. The continuity of Indigenous laws in North America can be inferred from English statutes. "[I]n 1764, the imperial ministry drafted a bill to be enacted by Parliament which acknowledged (and in some areas amended) the existing 'Government' and 'Civil Constitution' of Aboriginal nations in British North America."[1465]

There are other ways of proving the doctrine of continuity. In the 1990 *Sioui*[1466] decision of the Supreme Court of Canada, Justice Lamer reaffirmed the contemporary legal implications and obligations of historical treaties. Similarly, Virginia, the first settled colony in the United States, had entered into treaties with "Indian Kings & Queens,"[1467] which acknowledged the tribes' reliance on the English Crown and, at the same time, secured the sovereignty and power of the tribes and their leaders. *Wall* v. *Williamson*[1468] followed Marshall's decision in *Perchman*[1469] and made a declaration that offers the clearest invocation of the doctrine of continuity: "the general principle that '[i]t is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror.'"[1470] In short, the dispossession of the North American Indigenous peoples of their lands by the doctrine of conquest has no foundation.

Conquest Does Not Strip the Conquered of its Land or Culture[1471]

The notion that subject peoples within an imperial realm should be governed by their own laws is an ancient concept. In the Roman Empire, though subject to the rule of Caesar, conquered peoples abided by their own laws.[1472] In the Bible, it will be recalled that Jesus was tried by the chief priests and elders of the Jewish Sanhedrin before being sent to Pilate for a Roman trial. Confronted with what was a local issue of little interest to the Imperium, Pilate washed his hands of the affair. Roman law would later mould European legal traditions.[1473]

After Columbus returned from his first voyage to the New World, Spain petitioned Pope Alexander VI[1474] and was granted dominion over these hitherto unknown lands.[1475] Las Casas took the cause of Indian rights to Pope Paul III, who issued a Papal bull on the subject, *Sublimis Deus*, in 1537.[1476] There were two basic questions. First, were Indians fully "humans" or were they lesser beings? And second, did Indians have rights to liberty or property? The bull unequivocally affirmed the humanity of Indians and concluded "that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect."[1477]

Though independent of Papal canon law, English common law likewise began with the assumption that the assertion of British sovereignty, whether by conquest[1478] or by settlement,[1479] does not automatically strip the local inhabitants of their laws and lands. The earliest example of this standard was illustrated in the 1608 case of *Tanistry*, which was cited in *Mabo*[1480] and established that the rule that the monarch did not

actually acquire tenure of the land by virtue of the conquest unless it was seized. Significantly, Justice Hall held that conquest *per se* did not touch upon the land.[1481]

In the 1973 *Calder* case, the Supreme Court of Canada concluded that Lord Mansfield's propositions that stemmed from Justice Hall's judgment were applicable, since "[*a*] *fortiori* the same principles, particularly Nos. 5 and 6, must apply to lands which become subject to British sovereignty by discovery or by declaration."[1482] Likewise, in *United States* v. *Perchman*,[1483] Chief Justice Marshall commented that

> It is very unusual even in cases of conquest for the conqueror to do more than displace the Sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled.[1484]

No European power unequivocally gave its full subscription to this principle more than England. England's credentials on this subject are ample and absolute. The Royal Proclamation of 1763 is a testimony, but our focus at this point is on the centre of the universe – Ghana.

The Gold Coast, now Ghana, became a separate colony of the United Kingdom in 1850. Like the United States and Canada, different parts of the country came under British rule by various means including occupation, treaty and conquest. But no attempt was made to strip the people of the Gold Coast of their lands or to disturb the culture. As an illustration, the Chief of Assin Cudjoe Chibbo, who was accused of treason for collaborating with the Ashanti, a formidable enemy of the British, was tried by a "court composed of chiefs, the judicial body,"[1485] of his own peers. And he was certainly not tried under common law but rather under the law of the Fantiland and was imprisoned. Most poignantly, when the chiefs later asked the Governor to release him and reinstate

him as the Chief of the Assins in accordance with traditional cultural arrangements, he obliged. The critical condition as relayed by the Governor to his superiors was: "I have been induced to grant their request on the following terms: 1st, That all the nephews or heirs apparent to the different headmen in the Assin country be delivered as hostages, and placed under the care of the Fantee chiefs."[1486]

There is no British law that allows for the substitution of prisoners and, yet, the British government kowtowed to the laws of Fantiland. Of most interest is the fact that Cudjoe Chibbo was a British prisoner but that the substitutes were placed under the supervision of the Fanti Chiefs. Therefore, the switch cannot be considered a prisoner exchange. There are many other examples of the manifestation of retained Indigenous internal sovereignty, but the subject at this juncture is British policy towards conquered lands. The Ashanti were conquered by the British but their land systems remained intact, as it was before conquest and as it is now, except for adaptation to modern trends not necessarily influenced by Britain.[1487] In 1912 the Omanhene of Adansi boasted that "The fact of the British having come to the country has made no difference; things are exactly as they were before."[1488] This was 11 years after the Ashanti succumbed to the British. Incidentally, Adansi is a province of Ashanti.

The British courts confirmed the boasting words of the Adansehene. In *Golightly* v. *Ashirifi*,[1489] a case fully covered above under "Clarification of Land Systems." Lord Denning dealt with a disagreement that centred on a property that the court claimed was owned by three stools. Lord Denning made several important pronouncements. The two most important terms of Ghana land title were outlined in the case. Customary Freehold (usufruct) title carries with it a great deal of weight and stability. Of significant

importance to this thesis is the declaration that "Their Lordships read the word 'allodial' as meaning that the three stools are owners free of external control. They do not hold of anyone else."[1490] Bear in mind that Ghana was a British colony during the controversy. We have Lord Denning declaring that Ghana lands belong to the people of Ghana. Can it be inferred that the Indigenous peoples had possessory rights to their lands from the Royal Proclamation, which stated that the lands reserved for the Indigenous peoples should not be disturbed until after the lands had been ceded or purchased by the Crown? This thesis believes in the affirmative, and that the right to self-government associated with this right should be recognized and sustained.

PART VIIB: INDIGENOUS PERSONALITY DESERVING RECOGNITION

Introduction

If you dwell on the past, you lose an eye, but if you ignore the past, you lose both eyes.[1491]

The existence of native traditions shows that the Indigenous Americans had a well-developed system of recording and transmitting their own lore over many generations. First and foremost, Indigenous peoples have the right to their distinct identities, which includes the right to identify themselves as Indigenous. Since no one is an island, individuals should be allowed to belong to Indigenous communities and nations in accordance with their distinct traditions and customs. On the other hand, since ancient forms of sovereignty inform Indigenous traditions, Indigenous traditions or culture ought to encompass Aboriginal forms of government. Between individual rights and Indigenous forms of government is a shade of values that, when examined from the outside, may sometimes reveal a number of threshold problems associated with the march into modernity. This section will, among other things, describe the Ghanaian experience and anchor it in the muddy waters of Canada.

To be installed as a chief or even "safo hene,"[1492] the individual may be forced to undergo ancient rituals. This takes place whether the individual consents or not. Historically, the ritual was essential for the survival of the tribe. If individuals were given the ability to opt out of responsibilities, the tribe may have missed the opportunity of selecting the best person for this critical position. When it comes to the defence of a nation, second best is not good enough. The installation of the chief, with or without his or her consent, is based on the principle that collective rights supersede individual rights and that the survival of the tribe and its culture is paramount.

From the traditional viewpoint, the ritual is still essential for the cultural survival of the tribe. The individual forced to undergo the ritual may protest, but he or she would be laughed out of the state court – and this is still the case even in modern-day Ghana. The traditional courts are not suitable due to perceived bias or conflict of interest, so the best option for the individual is the regional court, which is composed of state judges and traditional elders. Well aware of the rights of the individual and of the fact that the State of Ghana has absorbed the responsibility of defending the individual tribes that comprise the Ghana nation, tradition has responded by modifying the procedure to accommodate some form of individualism. Nevertheless, the State of Ghana has maintained the *laissez-faire* attitude of the British to the practice of traditional culture. Patrick Macklem,[1493] in his treatment of Indigenous difference and the Constitution, touched on the Canadian imagination. This thesis analyzes and highlights the differences between Ghanaian and Canadian experiences.

Macklem, in covering Indigenous difference, touched on the story of a young man named David Thomas, who was minding his own business when a number of the Coast Salish nation members decided to make him a "spirit dancer."[1494] Sometime in 1988, they accosted him against his will and confined him in a ceremonial long house for four days in accordance with Coast Salish traditions. The initiation included food deprivation, a naked walk through a creek and, as a symbol of superiority, being carried by a group of men who symbolically bit him and dug their fingers into his stomach. After the ordeal, Thomas filed suit in the provincial court against the initiators for assault, battery and false imprisonment.[1495]

The defendants evoked section 35(1) of the Canadian *Constitution Act, 1982*. They argued that the spirit dance initiation ceremony was a cultural practice that had survived colonization and that was affirmed by section 35(1) of the Constitution of 1982. The trial judge disagreed. He ruled that the initiators had failed to establish initiation of spirit dancing as an Indigenous right protected by section 35(1) and that, even if they had succeeded in doing this, the use of force, assault, battery and wrongful confinement did not survive the introduction of English law in British Columbia.[1496]

That is very strange. In the Royal Proclamation of 1763, the Crown asked the Indigenous peoples to be left to their devices. The Aboriginal peoples were free to do whatever they wanted according to their customs. That was their common law. Aboriginal customs continued despite the pretensions of British sovereignty.[1497] Justice Lamer (as he then was) recognized as much when he stated in *Sioui* that Britain "...recognized that the Indians had certain ownership rights over their land. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible."[1498]

There are earlier Canadian cases that recognized the force of customary Aboriginal laws.[1499] Indeed, the judicial recognition of the continuance of Aboriginal laws relative to property and civil-rights issues independent of land rights continues to exist.[1500] Justice Wetmore in *The Queen* v. *Nan-E-Quis-A-Ka* held that English common law "did not abrogate Indian laws and usages."[1501] In *Re Noah Estate*,[1502] Justice Sissons found attacks upon the legal validity of Indigenous marriages to be "scandalous."[1503] So in matters of civil rights and in lesser economic issues, the principles of Aboriginal common law continued to be applied. It is telling that the full force of English tort law is

being brought to bear on the Indigenous peoples by an Indigenous victim in *Norris* v. *Thomas*.[1504]

Subsequent jurisprudence after *Norris* v. *Thomas* has proven that the observations by the trial judge were tangential to both the fact-finding mission of the court and the purpose of section 35(1) of the Canadian Constitution. This is what Justice Lamer had to say about Indigenous rights and culture as they pertain to section 35:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1) [of the *Constitution Act, 1982*], because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[1505]

The emphasis is on the phrase "mandates their special legal, and now constitutional, status." It is an uncontroversial fact that the Coast Salish spirit dance is a practice central to Coast Salish culture. Without a doubt, it was practised long before the Europeans arrived and therefore fully qualifies under the terms set out by Justice Lamer. That being the case, it warrants legal and constitutional protection. But Justice Lamer did not invent that right. As a matter of fact, there is a broader picture. From Ghanaian perspective, the use of "communities" by Justice Lamer elicits governmental authority over the culture. Indigenous cultural rights engulf Indigenous governmental authority. Indigenous governmental authority is, therefore, a given and warrants constitutional protection. Under that formula, the Coast Salish laws, likewise, arguably ought to receive constitutional protection. Perhaps if this aspect of Indigenous difference had been respected by the Canadian judicial system the Coast Salish people would themselves have

modified the procedure as the Ghanaian tribes did on their own. For with use comes modification.

Norris v. *Thomas*[1506] was heard in 1992. One can imagine the "illegal" suppression of Indigenous cultural practices that went on prior to the adoption of section 35(1) of the Canadian Constitution of 1982. Indeed, the legal opinions catalogued in *Norris* v. *Thomas* form a familiar part of the Canadian legal and political landscape. It is not impossible (i.e. perhaps) that the Coast Salish elders took Thomas through the entire ordeal just to challenge the system, which, in the opinion of this thesis, suggests that they knew he would sue. The case of *Norris* v. *Thomas* is one reason why Indigenous-difference issues ought not to be handled through the Canadian judicial system as it stands. The appropriate judicial systems will be discussed in later sections. This thesis dealt with Indigenous self-government at the outset in order to emphasize the fact that individual Indigenous rights do not spring forth their governing powers. Rather, it is the right to Indigenous self-government that gives rise to the individual rights. As observed by James Anaya, "autonomous governance for Indigenous communities is acknowledged to be instrumental to their capacities of control over the development of the multifaceted aspects of their distinctive cultures."[1507] Several others support this.[1508] This includes aspects such as ceremonies, designs, spirituality and sacred sites, technologies and performances.

To the Moon through the Stars

Justification of Indigenous rights almost always starts with or includes terms like "organized societies" and "communities." This community concept – meaning self-

government – is fundamental to Indigenous rights. Yet, Indigenous societies within settled nations sometimes have to go through the individual rights to acquire self-governing power over these rights.[1509] Such a formulation is artificial and a common law construct. It further underscores why Indigenous-difference issues ought not to be handled through the Canadian judicial system as it stands. It is also the reason for which this thesis is devoid of the copious Supreme Court citations that usually plug law treatises. Supreme Court cases are, however, unavoidable just as hostile witnesses are in certain court cases. This should be borne in mind as the thesis highlights the rights that the courts ought to take into account in order to satisfy the ordering of human behaviour in a civilized society.

Traditional Law[1510]

According to Kierkegaard, the self is a nexus of relationships that achieves autonomy by its capacity to will itself into existence, but in so doing is forever grounded in the power relationships at the core of its being.[1511] The law governs social interaction. Thus, every tradition, institution and convention that serves to order and guide the individual in society is, in one form or another, a substrate of the law. The fundamental law of the Indigenous is a simple moral ethic. It can be summed up by the English expression, "what goes around comes around."[1512] In the Dene culture, for instance, the fundamental law is expressed as follows: "Danii Hogha Gotq Wogha Ekw'i Eghalats'eda."[1513] Translated literally, this means "Do things the right way – the way you were taught."[1514] To understand it fully, one has to explore its combination of ecology and spirituality.[1515]

Non-Western religions tend to find the sacred within all aspects of everyday life. There is no hard and fast division between the divine and the mundane. Since there is no clear line of demarcation between the sacred and the profane, the mundane may become sacred depending on the context. As such, as a hunting-and-gathering people, the Indigenous populations have a profound respect for the land. For them, the land is alive, full of supernatural beings that have formed the land and of spiritual creatures that continue to pervade it. Moreover, this otherworldly ethos is firmly attached to the harsh realities of survival. Aside from the weight of tradition, Indigenous culture was maintained by the value it places upon the maintenance of tight familial bonds. Children were imbued with the values of their elders. From generation to generation, the laws of the spirit and the land have been passed down through oral traditions and ancient stories.[1516] Just as there is no clear demarcation between spirituality and the land, and as all creatures blend into the universe, there are no strict territorial boundaries.[1517] However, there is mutual respect for the immediate areas around each hunting campground. To the Indigenous, the camp is the centre of the universe. The climate, the topography, the whole cosmos and its organisms are connected in some way to the territory in which they live. That being said, there is an appreciation of the Indigenous people as a nation in possession of common tribal lands. Therefore, to take the land from the Indigenous nation is to kill the nation both physically and spiritually. So to imagine that the Indigenous peoples would have signed away their lands in treaties – as interpreted in the courts of the settled nations – boggles the mind. It is obvious that the Indigenous peoples, whose faith in the promises made by the colonizers has proved to be misplaced, are suspicious. These feelings are exacerbated when they realize that some of

the promises secured by the treaties could evaporate. To the Indigenous peoples, treaties have great spiritual meaning due to their spiritual relationship with their land and waters. The treaties, therefore, serve as spiritual recognition of the sharing nature of the cosmos and its organisms. It is in no way "selling" the land or of surrendering their status as self-governing peoples or their right to self-determination.

To refresh our memories, the Indigenous rights deserving recognition include Aboriginal prior occupancy, Aboriginal prior sovereignty and oft-neglected international standing as exemplified by the treaty processes. Unfortunately, the courts often portray Indigenous rights as one of several sets of constitutional interests underlying individual Aboriginal and treaty rights. It is the view of this thesis that Indigenous rights protected by the constitution should start with the fundamental rights tied to the prior occupation of Indigenous territory and the distributive justice associated with prior sovereignty. Protection of customs, practices and traditions integral to Aboriginal culture ought to flow from the fundamental rights and not vice versa. Indigenous self-determination and the international dimensions of Indigenous rights may be fully achieved only through a "neutral" court system – that is, a system that allows Indigenous peoples to participate in decisions that affect them. Indigenous peoples ought to be represented in the system that makes and applies the rules. The rules must incorporate Indigenous customs and laws. And, the process should incorporate Indigenous decision-making procedures. Barring any of the above, there is perceived bias or conflict of interest and the only avenue is an international body that can be relied on for help.

CONCLUSION: CELEBRATION WITHOUT SUBSTANCE IS SUPERSTITION

Indigenous Sovereignty is an International Issue

Whoever brings home a scaly fish scales it.[1518]

In Part I, this thesis established the means by which Indigenous peoples were accepted into the international community of nations. Essentially, this occurred after the Indigenous peoples were distorted in various forms into approved European models. The processes and the conceptions did not derive from neutral principles or any necessary conclusions about the Indigenous quality; rather, they originated in European ideologically infused ethical and social practices. In extreme cases, the transformed Indigenous peoples became merely cultural caricatures of their ancestors.

Since international law and forums provided the tools and the arena for placing Indigenous peoples in their current dilemma, it stands to reason that these institutions are the best theatre in which to seek remedy. But there are more urgent reasons. First, the Indigenous peoples of Ghana, Canada and the United States were all sovereign nations prior to colonization. After colonization, the Indigenous peoples of Ghana had representation at the United Nations, while the Indigenous peoples of Canada and the United States can be said to be unrepresented within the organization because they were not consulted on international matters nor, for that matter, on many other issues. The Vatican has its citizens scattered all over the world. The Holy See, like the Indigenous nations of Canada and the United States, is entirely within the territorial limits of a sovereign nation – in this case Italy. It is not even a nation but enjoys standing at the United Nations. The explanation for why the Indigenous peoples of Canada and the United States are treated differently must come from the international body.

Marshall in *Worcester* v. *Georgia* and Lamer in *Sioui* have acknowledged the international nature of Indigenous treaties in the United States and Canada respectively. Calling on the world body is, therefore, consistent with the nation-to-nation concept already established in American law. Accepting the proposition would reaffirm the notion that the laws in the United States and Canada are fair, consistent and genuine. This thesis is not the first to fall on the conscience of the world.

Using the examples of South Africa and Rhodesia in Part III, it was established that the sovereignty of the Ghanaians was not solely due to the majority status of the Indigenous peoples. The Indigenous peoples of both South Africa and Rhodesia constituted a majority but, despite internal military and political action, they were only able to recapture their sovereignty with the intervention of the international community. In that vein, the next reason for appreciating the role of the international organization can be best visualized by considering one basic bias-laden system of operation: the resolution of the deficiencies embedded in section 35 of the new Canadian Constitution.

Deficiencies in Section 35 of the Constitution Act, 1982

The undefined rights in the 1982 *Constitution Act* leave the courts to define these rights. The problem is whether the Canadian law applies to rights that are inherent in another nation's domain, be it a domestic nation or not. These rights exist because Indigenous peoples lived in Canada prior to European contact. They had their own societies, organizations, political systems, legitimate government, laws and "courts." Hence, the rights in section 35 did not spring up from Canadian law or the Canadian constitution. Outstanding sovereignty is an inherent right. It is, therefore, problematic to

use the laws of people who are suppressing or competing for these rights as the standard for defining these rights. "You cannot dismantle the master's house with the master's tools."[1519] Moreover, one does not use British "inch" spanners to adjust vehicles constructed with the metric system of bolts and nuts. The British legal system's adherence to precedent, which is more likely to preserve things in the past, may not be compatible with the valued and progressive consensus decision-making dispute resolution of the Indigenous peoples. Likewise, using the Supreme Court to make decisions on these rights is equivalent to asking the coach of one soccer team to referee a match between his team and an opposing team.

In his book, *Conquest by Law*, Professor Ken Robertson devoted page after page to showing how the land speculators jockeyed to find suitable judges and legislators to hear their case. Furthermore, these judges could not escape the antiquated notions and mistaken perceptions of Indigenous peoples that are grounded transparently in the power that posited them. Human beings and their ways of life are moulded by a set of conditioning factors or processes. These multifarious phenomena are, of course, what goes into that which is labelled culture. The judges are further handicapped by the courts, whose adherence to precedent is more likely to set them in concrete.

The judgments admonished by Professor Robertson have descended on Canada.[1520] So, for both countries, a fair and legitimate adjudicator would be a court composed of elders from both the Indigenous peoples and Canada or an outside arbitrator. However, fairness and reality are two different things. The illegitimately acquired Crown sovereignty is a reality, so instead of rights to sovereignty remaining after interaction with the Europeans, we have rights that keep swinging depending on the

moods of the public[1521] and of the Supreme Court of Canada. In place of a shared responsibility based on interactions among the structures, processes and traditions of two distinct peoples, the current governmental system clearly enforces the belief that tribal consent and input is not an essential or integral component in both the legislative and legal initiatives affecting matters vital to Indigenous rights and status.

"There seems to be a theory of a master race over an inferior race which has to be followed. I have heard it said that the Indians cannot think for themselves. Therefore, somebody has got to do their thinking for them. I am sorry to say in practice in a great many instances that is borne out."[1522] On the contrary, this thesis strongly believes that tribal elders and cultures must have the right to participate meaningfully in the debate and that their systems of law must contribute to the development of legal theories and legislation pertaining to their status within not only Canada but also within all the "settled nations."[1523]

A policy of "impartiality and the appearance of impartiality as well as finality" that should have been obvious since the conception of Canada was eventually hammered home by Gérard La Forest's *Report on Administrative Processes for the Resolution of Specific Indian Claims*.[1524] That did not amount to much.[1525] The Penner Report of 1983 on Indian Self-Government repeated the La Forest recommendation, stressing that it was imperative that Indian - federal government negotiations be neutral and shielded from political intervention. Furthermore, it recommended that a quasi-judicial process for handling failed settlements be instituted.[1526] The 1990 *Report of the House of Commons Standing Committee on Aboriginal Affairs* noted with frustration the ignored "recurring suggestion [that the process] should be managed or monitored by a body or bodies

independent of [DIAND and the DOJ],"[1527] the process in the quotation referring, of course, to Indian-federal government negotiations.

Not long after, the situation exploded. The Oka Crisis of 1990 prompted the then-Minister of Indian Affairs to invite the Assembly of First Nations (AFN) Chiefs to undertake studies of ways to improve the process of Indian claims.[1528] Among its recommendations was the establishment of a joint AFN-DIAND working group to develop an independent claims process. In April 1991 Prime Minister Mulroney went further by creating an interim independent mechanism embodied in the "Specific Land Claim Commission" and a joint working group to review specific claims policy.[1529] The Indian Specific Claims Commission (ISCC)[1530] was established as a temporary independent advisory body with six commissioners (but only one for almost two years), who were mandated to review specific claims. Their recommendations were not binding and the government frustrated their efforts, to say the least.[1531] The members found the process to be "painfully slow" and "in gridlock."[1532] In 1996 the Royal Commission on Aboriginal Peoples re-sounded the alarm on the need for fundamental change in the ways Aboriginal land claims are handled. It also went as far as recommending the establishment of an independent Aboriginal Lands and Treaties Tribunal to replace the ICC.[1533] A second Joint First Nations-Canada Task Force (JTF) was instituted in 1996 to consider the structure and authority in the management of the specific claims process. In its report,[1534] it recommended the creation of an Indian Claims Board (ICB) with broader powers and repeated the call for the elimination of Canada's conflict of interest through an independent legislative mechanism. It again reiterated the need for an independent tribunal with binding powers to resolve disputes in cases of failed negotiations. Five

years after the Royal Commission on Aboriginal Peoples recommended a change in the ways of handling Indigenous claims, the co-chairs of the ICC (in May 2001) informed the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources that the specific claim situation was reaching "crisis proportions."[1535]

"That means that, despite the growing chorus of calls for an independent institution or combination of institutions that would monitor and respond to perceived federal, provincial and territorial government violations of Aboriginal, Treaty and other rights, there had been very little movement in that direction by the end of the twentieth century."[1536] Using the Supreme Court to uphold the substance and integrity of existing Aboriginal and treaty rights as well as of treaty negotiations between the tribes and the Department of Indian Affairs still weighed heavily against the Indigenous peoples. The Indigenous Bar Association (IBA) made this very clear to the Parliamentary Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources in its 2003 presentation regarding the proposed *First Nations Governance Act* (Bill C6 regarding land claims and C7 regarding governance).[1537] That appeal fell on deaf ears until Prime Minister Harper on June 12, 2007 proposed a major reform to the way Indigenous claims are handled.

The Harper Bill: Specific Claims Tribunal Act

This Bill, which received Royal Assent on June 18, 2008, created the Specific Claims Tribunal, which is empowered to investigate the validity of First Nations' specific

claims and to decide on issues of compensation. It repeals the *Specific Claims Resolution Act* and incorporates consequential amendments into other Acts. The outstanding feature of this Act is that it was jointly drafted and endorsed by the Assembly of First Nations. The major changes incorporated in the *Specific Claims Tribunal Act* include the establishment of an independent tribunal. However, the tribunal has yet to prove that it is neutral. Section 7(c) instructs the tribunal to take into consideration cultural diversity in developing and applying its rules of practice and procedure. According to section 3, subsection 2, the Governor in Council is to generate a pool of six to 18 judges, from which a Chairperson and other members of the tribunal are to be selected. It will be difficult to construct a tribunal with balanced cultural representation without overworking the Indigenous judges. Another progressive feature of the Act is that, according to section 34(2), the findings of the tribunal are final and conclusive between the parties. Nonetheless, the decisions of the tribunal are subject to judicial review under section 28 of the *Federal Courts Act*, as noted in section 34(1) of the *Specific Claims Tribunal Act*. If all goes according to plan, arrangements for financial compensation will be more transparent. The Act will also "speed up processing of small claims and improve flexibility in the handling of large claims; and refocus the existing Indian Specific Claims Commission to concentrate on dispute resolution."[1538]

Of great concern is section 16 of the *Specific Claims Tribunal Act*. It theoretically sets up a three-year time limit for the government to deal with Indigenous claims under the tribunal's jurisdiction. But it does not take the skills of a mathematician to realize that the bureaucratic process could stretch the three yeas to six or more. The Indigenous claimant could only file with the tribunal after

> 16(1)(b) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nations in writing of his or her decision on whether to negotiate the claim; (c) in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or (d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.[1539]

It would be trite and unnecessary to go through the self-evident computations, compilations and combinations available to the bureaucrats. It will be more illuminating to ask the reader to add the three years under subsection (b) to the three years in (d) and thereby arrive at six years. The bureaucrats can delay the case for three years less one day, agree to negotiate and then sit on the case for another three years. This is not all. According to section 16(2)(a), the bureaucrats are to set a minimum standard for acceptance of the claim. What stops them from asking that all the "i"s be dotted and the "t"s be crossed before acceptance? This thesis suggests that the standards be set now, approved by the tribunal and fixed. Subsequent changes should not be retroactive. In the next section, the thesis will deal with the other aspects of the Act while considering the deficiencies of the previous settlement processes.

Indigenous Peoples on the Outside Looking In

Poking holes in existing systems of law and government is easy. To shun destructive criticisms, this thesis will avoid 20/20 hindsight and focus on potential mechanisms or institutions that will be more constructive and equitable, in addition to being focused on the future. Bill C-30 has surpassed Bill C-6 and Bill C-7, which did not even come into effect. However, it would be a mistake to ignore the deficiencies in those bills. Firstly, the new legislation is silent on many issues covered in the previous two

bills. Secondly, there are hidden flaws in Bill C-30, which are similar to those of its predecessors. Thirdly, recalling the deficiencies in the abandoned bills will open the eyes of the reader, who should wonder why it took 28 years to correct such obvious defects.

Prior to 1960, the Indigenous peoples were not full citizens of Canada and yet they were subjected to the laws of Canada. That is one way of defining colonized peoples and confirms the continuation of the colonization of the Indigenous peoples of Canada after Canadian independence. After 1960, the Indigenous peoples of Canada became incorporated into the Canadian electoral system. Being in the minority – as exemplified by the "Percentage of Aboriginal Peoples v. Provincial Population" table in Part V – they have little political influence at the polls. So instead of making gains, the Indigenous peoples have actually lost the power to be different and demand independence. One factor that prevented their total assimilation was the fact that a great number of the Indigenous people were concentrated on reserves. It was worth exploring how the colonized indigenes transformed into impotent electors, because holding it in recollection might shed some light on the government's good intentions, which sometimes do not mitigate the objectionable consequences of its actions.

Lack of representation for the Indigenous nations in Canada's governmental bodies is only one handicap of the Indigenous peoples. The governmental bodies, even to the general population, are not always and entirely answerable to the people. To counter abuse, intimidation, suppression and mismanagement, many institutions have been erected to act as watchdogs and guide-rails in the system. These include, but are not limited to auditor generals; electoral commissions; fraud and/or anti-corruption bodies; human-rights commissions and ombudspersons.[1540] The Indigenous peoples certainly

share in the benefits of these sentinel tools, but the Indigenous peoples have other rights that are not common to all Canadians. These rights are varied, numerous and prone to abuse. Yet until Bill C-6, the Indian Claims Commission (ICC) was the only notable body that could be considered a watchdog. It was charged with the responsibility for advising the government on charges of inadequate resolutions to past First Nations' claims to treaty violations. Sad to say, but its corrective and protective mechanisms were woefully inadequate.[1541] Its successor under Bill C-6, the Canadian Centre for the Independent Resolution of First Nations Specific Claims, did not resolve all the issues of Indigenous concern. The fundamental defects are consistent with the theme of this section: derisory consultation, input and representation of the Indigenous peoples within the institute and, in particular, the federal government's unimpeded conflict of interest.

The Chief Executive Officer (CEO) of the Canadian Centre for the Independent Resolution of First Nations Specific Claims was appointed by the Governor in Council on the recommendation of the minister and not on joint AFN-ministerial recommendations. The CEO is to have rank equivalent to that of a deputy minister. However, under Part II of Schedule I to the *Public Service Staff Relations Act*, this position qualifies the CEO as a representative of Her Majesty. That designation allows the CEO some measure of autonomy in the exercise of his or her duties. But this position is renewable after five years and the incumbent has that fact weighing on his or her mind. The Commission is comprised of one full-time chief and one full-time vice-chief commissioner, and up to five part- or full-time commissioners. Like the CEO, the commissioners are to be appointed by the Governor in Council on the minister's recommendation. This appearance of conflict of interest was foreseen by the Joint First Nations-Canada Task

Force (JTF), which recommended joint AFN-ministerial recommendations and required that regional representation be taken into account in the appointment process.[1542] In response to protests by the Assembly of First Nations, the Senate Committee amended the bill by requiring that, prior to making recommendations, the minister "shall"[1543] enable claimants to make representations concerning those appointments within a prescribed time period.[1544] The amendment had no teeth since it did not require the minister to change his or her decision, or even respond to the recommendations. Bill C-30 has taken the appointment of the tribunal members out of the hands of the Minister and, as such, has resolved this issue.

Bill C-6 allows unresolved issues to be sent before a tribunal but whether that tribunal is independent is debatable. The tribunal consists of up to seven members, including a full-time chief and vice-chief. The Governor in Council appoints all members on the minister's recommendation. It suffers from the same impartiality handicap as the other SCRA appointments. Fortunately, Harper's Bill has also resolved that issue. Bill C-6 was geared for specific claims and excluded some categories of claims. Of these, the most pertinent to this thesis are the limitations outlined in clause 26(2), which excluded claims based on Aboriginal rights or title. Title claims are regarded as comprehensive claims, a long-standing federal policy of grouping such claims under outstanding business, which could mean infinity. The comprehensive claims process is now controlled by Bill C-30, which is discussed above. It is designed to address larger questions of land entitlement and self-government issues.

The exclusion of "site-specific" Aboriginal rights was noted with concern by the JTF.[1545] The First Nations' perspective on "site-specific" Aboriginal rights is that

Indigenous peoples "can suffer damage due to infringement on such rights"[1546] but have no recourse for such injustices. Their case was strong enough for the issue to be "flagged for inclusion in the five-year review of the [recommended] new process."[1547] Section 15(1)(g) of the *Specific Claims Tribunal Act* prevents the filing of complaints based on treaty rights related to activities of an ongoing and variable nature. However, section 15(2) creates an exception for a claim based on "a treaty right to lands or to assets to be used for activities, such as ammunition to be used for hunting or plows to be used for cultivation." Whether this resolves the above issue can only be ascertained after that section is put to the test.

Of lesser interest but considerable concern is the exclusion of the delivery or funding of public programs or services such as education, health or social assistance. Some of these programs or services are incorporated into past treaties. Many treaties encompass provisions for the delivery of education to Indigenous children and Treaty 6, in addition, includes an explicit medicine clause. Yet, neglect of these duties is excluded under Bill C-6 and there seems to be no other impartial avenue for remedy. The *Specific Claims Tribunal Act*, under Section 15(1)(d) appears to retain the previous stance. It excludes the filing of claims that "concerns the delivery of funding of programs or services related to...education, health, child protection or social assistance, or of any similar programs or services."

Another issue still unresolved in the Ghanaian perspective is clause 71(1). Under that clause of Bill C-6, tribunal panel decisions are to be subject to judicial review by judges of the Federal Court Trial Division[1548] if that decision is found to be flawed on the basis of well-defined legal grounds. The question is, by what law – Indigenous law or the

law of the settlers?[1549] Harper's Bill does not resolve that issue as pointed out above in section 34(1) of the *Specific Claims Tribunal Act*. The only saving grace is that judicial review does not allow a judge to replace the administrative tribunal's decision, which could only be sent back to the tribunal for reconsideration. The limited impartiality progress made in Bill C-6 is not carved in stone. Instead of an equitable joint AFN-DIAND or ministerial review,[1550] the SCRA required only the minister to conduct a review of the institution within three to five years of the bill's implementation. The Senate Committee softened the blow by requiring the minister to offer First Nations an opportunity to make representations during the review process.[1551] This, however, does not mean that the minister will follow the advice of the First Nations. Bill C-30 retains this feature, but fixes the years to one year after the fifth anniversary, as per section 41(1).

This thesis would like to be positive and inject some constructive criticisms. In pursuit of that goal, it suggests that, if the Indigenous elders are not a part of the tribunal and since Indigenous judges are very few, the tribunal may have to load the 18-member roster of judges with substantial members of Indigenous judges.

From the Ghanaian point of view, the *Specific Claims Tribunal Act* is deficient in another respect. A Ghanaian tribe can exert its right against any private company or individuals in tribunals aside from the courts. These tribunals are erudite of Indigenous law and history, as well as of the reality and ramifications of colonization. Some of the cases heard by these tribunals end up in the courts, but the most beneficial aspect of these tribunals is that the groundwork and research have already been laid out for the judge in the upper court who may not be well versed in Indigenous law or tradition. The constant

struggle of Indigenous communities for injunctions against intrusions on claimed title lands in Canada testifies to the need for such tribunals in Canada. The *Specific Claims Tribunal Act* is deficient in that respect and the only avenue open to the Indigenous people of Canada is the court system, which honestly tries to be impartial but suffers under the yoke of precedent and the lack of Indigenous representation. For the Canadian court system to be neutral (impartial), there must be more native lawyers and judges. In addition, the system should incorporate traditional ways of resolving conflicts.

The *Specific Claims Tribunal Act* has resolved some of the concerns of the Indigenous peoples but retains some of the defects of the Bills that it replaced, thereby creating further grey areas which could lead to problems. While the world waits for its efficacy, this thesis joins the chorus in pleading for a better forum for the arbitration and legal interpretation of Indigenous rights, because celebration without substance is superstition.

The Ghanaian Model

Under the most recent Ghanaian judicial system, citizens may participate in the administration of justice through both the institutions of public and customary tribunals, as well as through the jury and assessor systems. Emphasis is on the most recent system because Canadians may not want to repeat the mistakes made by the Ghanaians during the development of that system. According to the 1992 Constitution, the judiciary shall consist of the Superior Courts of Judicature comprising of the Supreme Court, the Court of Appeal and the High Court and Regional Tribunals.

Of most interest are the regional tribunals. This is where (if they are adopted in Canada) the Indigenous peoples of Canada can manifest their self-government and still be part of the broader justice apparatus. The Ghanaian Regional Tribunals consist of the Chief Justice, one chairman and members who may or may not be lawyers. The last feature may be used to compensate for the shortage of Indigenous lawyers in Canada and at the same time incorporate native tradition into the judiciary. The Chairperson may be a chief or an elder in order to balance the Indigenous-European power scale. The system can fit both the provincial and the federal court systems. The regional tribunals are separate from the traditional courts, which come under the auspices of the House of Chiefs with its own constitutional authority.

Tribal Courts

The Ghanaian Constitution of 1957 contained the following provision: the "office of chiefs in Ghana, existing by customary law and usage, is... guaranteed."[1552] Pursuant to that section, a House of Chiefs was required to be established in each region. These courts heard practically all cases notwithstanding the reference to "customary law and usage." The victim had the choice of selecting the court of preference (traditional or state). With time, victims leaned towards the state court for more serious criminal cases where the offenders received stiffer penalties. The traditional courts gained favour in cases of compensation. The state courts offered no compensation, as all fines went to the state treasury. Traditional courts may have their place in Canada but it may be difficult to anchor their authority in the Canadian Constitution. On the other hand, the Indigenous communities may short-circuit the governmental system and institute courts of their own

to deal with local and tribal matters. Many of the current criminal issues stem from divergent cultural experiences between European and Aboriginal conceptions of crime itself. For example, the French were frequently critical of the Huron for a perceived leniency towards thieves.[1553] Yet the simplicity and relative impermanence of Huron possessions, as well as the sharing of goods and housing among extended families, made the liberal European notion of ownership alien to Huron culture.[1554] Thus, an innocent act in Huron culture of, say, appropriating an object needed for a particular purpose for the benefit of the community, could be misconstrued by Europeans as a crime against individual ownership and thus a crime against the community. To the French, the protection of property is the very basis of society. To the Huron, property is not the possession of individuals, but of society as a whole. Thus taking an object without leave could at one and the same time be a crime among the French, while being socially encouraged among the Huron.

A personal anecdote here is illustrative of this point. When I was working at Lac Brochet, I noticed that every Saturday the residents would go and get logs for heating. Winters in the north can be brutal, but occasionally the temperature turns friendly. On one such "not so cold" Saturday, I asked one of the young men why he did not take advantage of the nice weather to fetch more logs. He responded that if he were to do so, the lazy boys would help themselves. Coming from the Ghanaian culture where we shared things, I was not surprised by the response. What is astonishing is that logs needed for immediate needs would be placed at the exact spot where the extra logs would be stored. This means that the "lazy boys" will not touch what was needed – only the surplus.

Another incident from my personal experience further illustrates the absence of a strong conception of property as an individual right among Indigenous peoples. One day I was invited to go fishing by an Indigenous friend. We went to the dock and while he was putting our gear in the boat, I asked him if he owned the boat. To my surprise, he said no. "Whose is it?" I queried. "John's," he responded. "Did you ask to borrow his boat?" I wondered. "No," came the answer. So I asked, "Did he give you permission to use it?" He had not. What will happen if he decides to go fishing? He assured me that he could use another boat moored nearby. "Does that belong to him?" I asked. It did not. Confused, but trying to be smart, I asked him, "Why don't we take that one?" He agreed and started towards the other boat.

Who owned that one I still do not know and that makes me question some of the theft charges involving Indigenous people at the court of Assiniboia and others. For instance, in the case of *Public Interest* v. *Aysassooquun*,[1555] an Indigenous person is accused of stealing "out of the stable at Upper Fort Garry one cloth Capot of the value of ten shillings."[1556] The accused confessed and received a one-month jail term. However, did the prisoner possess the *mens rea* necessary to have actually "stolen" the coat? The prisoner was probably a worker at the stable and on a very cold winter day borrowed the hooded coat for protection. The question is: Why use a British inch spanner on metric (Indian) nuts? Certain offences are best left to the devices of the Indigenous peoples. It may be argued that Indigenous communities lack the resources and the proficiency. Indigenous communities may appear to lack the expertise because colonization has stripped the Indigenous peoples of the necessary skills. It will not take long for them to re-learn those abilities. We touched on the Ghanaian legal system not only to show how

Canadian Indigenous sovereignty (self-government) is deficient but also to show how the Indigenous peoples of Canada may be suffering from the deficiency. This sets the stage for examining the processes for settling Indigenous self-government issues.

The Comprehensive Claims Process

Bill C-6 allows the Governor in Council to introduce to the SCRA Schedule regulations to include any agreement related to Aboriginal self-government.[1557] That, of course, does not address the problems related to acquiring self-government in the first place. Historically, the Canadian government has been very reluctant to accept the notion of Indigenous self-government. The federal government's 1969 White Paper is a testimony to such an assertion. It was based on individualism, equality and Canadian citizenship. One of the most objectionable points in the content as noted by Dale Turner was the statement that "There is no such thing as Indian nationhood."[1558] Due to mass protest by the Indigenous peoples of Canada, the White Paper was unceremoniously rescinded as official policy. The push for recognition of Indigenous rights in Canada intensified. The Supreme Court of Canada in the aftermath first recognized land rights based on Aboriginal title, which is based on an Aboriginal group's traditional use and occupancy of that land.

In the 1973 *Calder* decision,[1559] the Nisga'a people of British Columbia claimed continued Aboriginal rights in their traditional territory. Although the court dismissed the case on a technicality, its decision led the federal government to announce its willingness to negotiate land claims based on outstanding Aboriginal title. One should not hail the

Supreme Court yet. Apart from zoning bylaws, where in the world is land title tied to "land use"? Where in traditional law is "land use" tied to land title? In Ghana land law, even regions designated as usufruct can evolve into a village, town or whole city. Prior to colonization, Indigenous lands in the Americas could undergo the same evolution. It appears that most judgments by the Supreme Court, however well intentioned, do not accept Aboriginal peoples on their own terms. This is exactly why the Supreme Court should not be the sole arbitrator nor should one use of the laws of people who are suppressing or competing for Indigenous rights as the standard for defining these rights.

Where is the source of the link between "land use" and land title? Proponents of the "land use" hypothesis will claim that it comes from the Royal Proclamation of 1763. They claim that the Royal Proclamation of 1763 asserts that full underlying title is vested in the Crown but not in the Aboriginal peoples. However, when pushed to show the source of Aboriginal title itself, they refer to Aboriginal interest as "common law Aboriginal title." That means that the Aboriginal title that they refer to is an interpretation of events and documents. That leads to the question, by whom and by what law? Interpretation chiefly by the same learned Chief Justice Marshall about whom we heard so much in *Conquest by Law*,[1560] which dealt with Marshall's judgment in *Johnson* v. *McIntosh.*[1561] In that judgment, Marshall wrote:

> So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.[1562]

The rule in *Johnson* v. *McIntosh* was superseded by *Worcester* v. *Georgia*. In *Worcester*, Marshall's statements were clearly inconsistent with his statements in *Johnson* v. *McIntosh*. He wrote

> "that the discovery of parts of the continent of America gave title to the government by whose subjects, or by whose authority It was made, against all other European governments, which title might be consummated by possession," acknowledged by all Europeans, because It was the interest of all to acknowledge it; ... among those who had agreed to It; not one which could annul the previous right of those who had not agreed to It. It regulated the right given, by discovery among the European discoverer; but could not affect the rights of those already in possession, either as aboriginal occupants it as occupants by virtue of a discovery made the memory of man. It gave the exclusive right to purchase, but did not found that right on denial of the right of the possessor to sell.[1563]

Combine the above pronouncement with the fact that the Royal Proclamation of 1763 mandated that the Indian lands be left alone until ceded by them or purchased by the Crown and *Johnson* v. *McIntosh* is without doubt overruled.[1564] Yet subsequent cases tenaciously hung onto the reversed judgment. *Johnson* v. *McIntosh* survived because it facilitated the appropriation of Indian lands. To get to the "Land use" platform, some authors such as Janice G.A.E. Switlo managed to stretch the issue by claiming that "the only lands out of the Crown's lands that the Royal Proclamation of 1763 leaves for the Indians to continue to use are those lands that the Crown views as waste and unoccupied lands."[1565] This author of this thesis has turned the Royal Proclamation of 1763 inside out and upside down but could not find the mention of "waste" or of any of its synonyms in relation to land even once. Nevertheless, "waste and unoccupied" land formed the basis for Switlo's hypothesis. If the lands left for the Indigenous peoples by the proclamation were waste and unoccupied lands, then those lands were no longer available to the Indigenous peoples if and when those lands became usable or valuable to the settlers. Support for her hypothesis is feeble. She uses the judgment in *R.* v. *White and Bob*[1566] as

analysed by A.S. Morton.[1567] Morton referred to this passage in the judgment of *R.* v. *White and Bob*:

> The cession of Canada by France to Great Britain, formally sealed by the Treaty of Paris, 1763, was necessarily followed by the organization of the territory involved...the Proclamation left a strip of no-man's-land between. This was reserved as hunting-ground for the Red Men within which the White Men were not to settle. [1568]

In her footnotes, Madam Janice Switlo interprets "no-man's-land" in this fashion:

> The use of the term "no-man's land" reinforces the prevailing view of the time that the Aboriginal people were not fully human, but rather were "savages" and no better than "beasts of the field". Like the animals, the Aboriginal people were permitted by the Crown to roam these lands.[1569]

While the world waits for the Canadian Government to start negotiating with the Canadian moose,[1570] this thesis will concentrate on the judgment of *R.* v. *White and Bob* itself. The Royal Proclamation did not leave a "strip of no-man's-land" between the British and the French territories. In addition to responding to, among other things, the need for a new government in Quebec and Florida, the Royal Proclamation was also a response to Chief Pontiac's rebellion of 1763. The insurrection threatened the European settlements in the interior of the North American continent. The proclamation therefore applied to the whole North American continent. From the practical point of view, British Columbia and the lands outside Rupert's Land in what would become the provinces of Alberta, Manitoba and Saskatchewan, as well as the lands west of the Mississippi, cannot possibly be considered a strip of wasteland. The Royal Proclamation did not, in itself, create Aboriginal title. But for security reasons, it drew a map establishing the line of demarcation between the land reserved for the Aboriginal peoples, the Crown and the settlers without making any distinction between valuable land and wasteland. Security

and peaceful coexistence, not the assignment of wastelands to the Indigenous peoples, were the paramount reasons for the Royal Proclamation of 1763:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them.[1571]

With reference to hunting grounds, this is what Chief Justice Marshall had to say

> ...with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, how ever, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be a matter of no concern whether their whole territory was devoted to hunting-grounds, or whether an occasional village, and an occasional corn field interrupted, and gave some variety to the scene.[1572]

This thesis will, therefore, beg to differ with Janice Switlo[1573] on her assertion that the requirement of surrendering aboriginal title, if the use of such lands was not consistent with Aboriginal way of life as expressed by Chief Justice Lamer[1574] in *Delgamuukw,* originated from the Royal Proclamation.[1575] Rather, the link between land use and Aboriginal title, like the infamous doctrine of discovery, is a common law construct. The forgoing is an example of a judgement (*White and Bob*) based on wrong information, and the judgment has been interpreted and perpetuated through the literature. Indeed, it is true that "colonization-era events can only be seen as through a glass, darkly."[1576] This thesis would conclude by making it abundantly clear that the Royal Proclamation did not create Aboriginal title. Common law did not create Aboriginal title. The Canadian Constitution did not create Aboriginal title. Treaties did not create Aboriginal title. THIS is Indigenous title:

"I ask for the return of my country to me, and that the reserves be no more. It is not only just now that I came into possession of the country. It has always been mine from the beginning of time."[1577] (Tsudaike, chief of the Nackwacto to the B.C. 1914 Royal Commission looking into Aboriginal land claims).

Unfortunately, Chief Tsudaike's title is very different from the "Indigenous title" recognized by Canadian courts, which, by common law, have transformed Indigenous sovereignty-based title into something smaller. However, some Canadian Judges seem to agree with the chief of the Nackwacto:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Royal Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means, and it does not help one in the solution of this problem to call it a personal or usufructuary right.[1578]

Judgments will come and go, but the invincible quote of Tsudaike, Chief of the Nackwacto, like the rock of Gibraltar, will stand.

The *Calder* decision had its good side. The recognition of Aboriginal title by the court compelled the federal government to announce its willingness to negotiate land claims based on outstanding Aboriginal title. The evolutionary process was slow. The pre-1986 comprehensive claim process had many serious defects, but one fundamental problem with the earlier treaty-making process was the requirement that the Indian nation entering such negotiations would accept "extinguishment"[1579] of their Aboriginal rights and title. The modern (post-1986) Comprehensive Claims Process[1580] provided alternatives to blanket extinguishment. The modern comprehensive claim process also widened the scope of the treaty-making process to encompass offshore wildlife management, the sharing of resource revenues, Indigenous input in environmental

decision-making and, most importantly, a commitment of the Canadian government to negotiate self-government. However, the modern comprehensive claim process still suffers from the same impartiality handicap as other claim negotiations.

> The claims process begins when the federal government accepts an Aboriginal group's statement of claim and supporting materials. The federal government will accept the claim if the statement confirms that the group claiming:
> 1. The Aboriginal group is, and was, an organized society.
> 2. The organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.
> 3. The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies.
> 4. The Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes.
> 5. The group's Aboriginal title and rights to resource use have not been dealt with by treaty.
> 6. Aboriginal title has not been eliminated by other lawful means.[1581]

To eliminate perceived conflict of interest and enhance transparency, this thesis recommends joint AFN (including all Aboriginal associations)-Governmental acceptance of Indigenous claims. The terms agreed upon by the parties are implemented by federal settlement legislation. Unlike the United States, the rights recognized and entrenched in the agreement are protected by the Constitution[1582] and may only be infringed on according to the law laid in sparrow, as opposed to simply extinguished.

Comprehensive Claims and Self-Government

Self-government arrangements are negotiable in tandem with comprehensive claims, but not in tandem with specific claims negotiations in accordance with the federal government policy on the implementation of the Inherent Right. From the Ghanaian point

of view, this presents two problems touched upon earlier. First, self-government is, by itself, an inherent right. Ghanaians automatically regained that right after independence. The Indigenous peoples of Canada did not. Second, according to the fifth condition of the comprehensive claim process, rights that were negotiated in treaties prior to 1986 are excluded from the modern comprehensive claim. Since some pre-1986 treaties did not incorporate self-government, some nations that entered into treaties prior to 1986 could lose their rights to self-government associated with the negotiated rights since the rights considered cannot be revisited. This issue has to be addressed.

While the final elements of the comprehensive claim process are praiseworthy, the processes that lead to the signing of these modern treaties leave much to be desired. The federal and provincial governments, who prefer the status quo, have no incentive to expedite the process. Prime Minister Harper, in announcing his proposed "Canadian Centre for the Independent Resolution of First Nations Specific Claims"[1583] on June 12, 2008 admitted that "the federal government currently acts as both the judge and jury when it comes to resolving land claims."[1584] That is only part of the story. The civil servants who deal with these claims earn their living processing these claims. A considerable number would be out of work if all the claims were to be settled today. What is the motivation for these workers to speed up the process?

According to Stephen Harper, there are over 800 claims outstanding. About 200 claims have been settled. Out of that only 14 are major claims.[1585] The Department of Indian and Northern Affairs paints a different picture, stating that "as of July 1997, 12 claims had been settled. Actual and potential claims involving over 200 First Nations are still to be settled."[1586] The Department of Indian and Northern Affairs may be considering

only comprehensive claims (major land claims) but no matter how one looks at it, the situation is bleak. According to the Prime Minister it takes, on average, 13 years to settle a claim. What is not disclosed is the percentage of the settlement that goes to lawyers and expenses related to the claim process. This thesis suggests the incorporation of motivation factors, such as the award of interest to the Indigenous group from the time of acceptance of their claim into the procedure. The reason is simple: although Harper's bill places a three-year limit on the procedure, this could be stretched to five years or more, as explained above. Alternatively, funds borrowed by the Indigenous nations for the negotiations could be written off. Since these funds automatically increase with time, the respective governments would find it expedient to speed up the process.

This section has clearly proven why the Supreme Courts of both the United States and Canada are not the best avenues for settling or clarifying Indigenous issues. It also questions the validity of using laws of people who are competing with Indigenous rights to clarify the rights of Indigenous groups to lands and resources. It will also be recalled that the comprehensive claims involving the Canadian governments and the Cree of James Bay, as well as the Nisga'a nation, all had their origin in the courts. This demonstrates the unwillingness of the Canadian government to get involved in treaty negotiations. The alternative to the current court system is a free-standing joint tribunal or courts to deal with Indigenous issues. (Courts created under section 101 of the *BNA Act* are not acceptable since they fall below the nation-to-nation notion.) This may not be possible in Canada for constitutional reasons, since the federal government needs the support of the provinces in order to amend the Constitution. From past experience, such as repatriation of the Constitution and the Meech Lake Accord, there is a good chance

that such co-operation may not come to fruition. But there is a third avenue, which involves looking for outside help.

Where Do We Go From Here?

This thesis has offered a critique of what occurred in Ghana, Canada and the United States, and has put forward the proposition that what happened to the Indigenous Peoples of Canada and the United States in the past was wrong, mistaken and misguided. It is too simplistic to accept the view that it is too late to do anything about it, because too much water has passed under the bridge. It is just as cruel as telling the Indigenous peoples to put on their red dancing shoes and dance the blues. The North American experience did not have to be that way. The American experience has short-changed the Indigenous peoples of North America on their sovereignty and based on that the Ghanaian model offers an alternative vision. There really needs to be a reconsideration and reformulation of this relationship. If the courts were truly neutral, an Indigenous person who agrees with the proposition in the thesis could take the argument to the courts and seek a solution. However, as stated above, the court system based on the doctrine of precedent has placed the judges in straightjacket and it is hard for them to break the chain. Nevertheless, the courts can play an important role in resolving the issues. The courts have often recommended or referred issues back to be resolved by negotiations between the relevant governments and the Indigenous peoples. The Chief Justice in *R. v. Delgamuukw* could not express that sentiment any better. "On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake."[1587]

That proposal was accepted and supported in *R.* v. *Marshall* [No. 2].[1588] A recent example is *R.* v. *Powley*,[1589] where the court suggested some form of a dialogue, since "[i]n the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land."[1590] This is a laudable attempt by the court, but the court must be proactive and induce a new atmosphere, new relationships and new partnerships between the Indigenous peoples and the respective governments.

With respect to the atmosphere, the mere suggestion of negotiations is not enough. Negotiations between the Indigenous peoples and the governments – for example, the special and comprehensive claims – have not worked well and will never work effectively under biased conditions. The courts, in addition to promoting a dialogue, must encourage the establishment of an atmosphere of trust for the negotiations. The forum of discussion must be neutral. A special tribunal composed of both the Indigenous peoples and members of the dominant society will go a long way to allay fears and build trust. That tribunal ought to be given the power to make binding decisions.

The court is also aware of the relationship that must exist in Canada. Here again the Court stopped short when it should have been progressive and have continued to steer the respective groups towards bringing that relationship to reality. In *Guerin* v. *The Queen*, Chief Justice Dickson acknowledged the nation-to-nation relationship of the Crown to the Indigenous Peoples of Canada. What he said has already been stated above but is worth repeating. "However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal provincial divisions that the Crown has imposed on

itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations."[1591] Justice Lamer clarified that proposition in *R. v. Sioui* (1990) when he reaffirmed that relationship in no uncertain terms by referring to the fact that the United Kingdom recognized the "nation-to-nation" association with the Indigenous Peoples.[1592] From the Ghanaian point of view, the current relationship between the Indigenous peoples of Canada and the Canadian governments is anything but "nation to nation." The Court has yet to show when and how that relationship disintegrated. It is not enough for the Court to pay lip service to the proposition. It has the duty to see to it that the notion of "nation to nation" becomes a reality.

New Partnership (Or Re-establishing the Original Partnership)

As stated in the introduction, sovereignty may be stratified and divisible. Crown sovereignty is a reality in Canada. From the Crown descends the powers to the federal government and the provincial governments. According to Chief Justice Dickson, "From the aboriginal perspective, any federal provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations."[1593] That implies three distinctive powers – the federal government, the provincial governments and the Indigenous nations. It is immaterial whether the Crown-Indigenous power relations are equal or not. It is a different power relationship. That means that Canada is a three-legged stool. The problem is that the dominant society has failed or refused to recognize the third leg, leading to instability. It is not likely that the dominant society will put the third leg back on and the courts are very slow or unable to force the replacement of the missing leg. Given the fact that the Crown-Indigenous

relationship is "nation to nation," it follows that the Indigenous people may call on international organizations for assistance. These organizations may be barking dogs without teeth; however, they can help and do have psychological impact on even the most stubborn countries.

Canadian Aboriginal women have already experienced the potential of international bodies. Bill C-31[1594] was a response to the decision of the United Nations Human Rights Commission in the case of Sandra Lovelace (Nicholas).[1595] The Canadian courts, in the case of Mary Two-Axe and Corbiere[1596] had the opportunity to correct the injustices to Canadian Aboriginal women, but failed to go all the way to help them achieve equality. The United Nations took the bull by the horns and technically suggested that Canada was discriminating against First Nations women because of the marriage provisions in the *Indian Act*.

International Body – Indigenous Life and Hope

The leadership in international organizations in aiding the Indigenous peoples of sub-Saharan Africa in the quest for sovereignty is well established. Within the past 10 to 15 years, the United Nations has come to recognize that Indigenous peoples possess a unique set of human rights needed to protect their lands and cultures and has been keen to scrutinize state actions that infringe on these rights. Their role in improving the living conditions of Indigenous peoples all over the globe is felt by even the most insensitive nations of the world. On September 13, 2007, the United Nations adopted the U.N. Declaration on the Rights of Indigenous Peoples. This was the result of 20 years' work of progressive development of international human-rights standards, which has become the

focus for the aspirations of Indigenous peoples throughout the world. The Canadian government was supportive from the start, but its attitude changed in 2006 with the change in the federal government, whereupon Canada joined a chorus of four affluent, mainly European and Western countries that refused to sign the declaration. Not surprisingly, the settled nations of Canada, the United States, Australia and New Zealand voted against the adoption of the Declaration. Incidentally, Australia has had a change of heart and signed the Declaration in April of 2009.

The benign document addresses most treaty violations and injustices against the Indigenous peoples of the globe. "The Declaration establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples."[1597] It is comprehensive and covers both individual and collective rights, which guarantee freedom of identity and of belonging to one's culture. The declaration has all the elements that support Indigenous sovereignty and rights. Article 31 reaffirms the need of the Indigenous peoples to govern themselves, by stating that "[a]s a form of self-determination, indigenous peoples have the right to self-government in relation to their own affairs."[1598] It then lists numerous areas of control, but the most rewarding is the control of the "entry by non-members," which is related to the next vital right of any sovereign nation. That right is the right to determine who qualifies as a citizen. The declaration did not miss that important role and included it in Article 32, which also included the right to decide upon the structures and membership of their organizations. Self-government is meaningless without the ability to control one's resources. That right is covered in Article 30, which recommends that Indigenous peoples have the right to determine strategies for the development of their land and resources.

Another right related to sovereignty is expressed in Article 35, which deals with international borders. Indigenous peoples separated by international borders have the right to maintain relations and to undertake activities with one another. The declaration recommends that international bodies should resolve disputes. In summary, Part VII "sets out guidelines for situations in which indigenous peoples exercise their right of self-determination through self-government. It recognizes the right of Indigenous people to determine their citizenship, to their own laws and customs, to relations with other peoples across borders, and to treaties and agreements with governments."[1599]

This paper first suggests the unification of all the Indigenous peoples of the world in seeking the formation of a special international body to give effect to the above Declaration. It further recommends the creation of a special seat at the United Nations.

The "Indigenous See"

The Indigenous peoples of the world, like Catholics, have common faith, hope and aspirations: faith in divine providence, hope in an eternal universe and aspirations to be free and happy. Indigenous peoples in settled countries are many distinct natives in many countries, but with common concerns and a common voice. One of these concerns is to be heard.

As verified by the "Percentage of Aboriginal Peoples v. Provincial Population" table in Part V, Indigenous peoples in settled countries cannot effectively express themselves politically. They are politically mute. To claim that they are represented at the United Nations by the countries in which they reside is, therefore, an insult. Indigenous peoples in settled lands are mute and, when mutes dream, they keep their dreams in their

own heads. The cries of the Indigenous peoples can be heard through the first body, but their dreams need a different means of expression and that is a seat at the United Nations General Assembly. Logistically, that is easy. Indigenous peoples participated fully in the drafting of the Declaration to the Assembly. By the same token, they can elect or select their representatives to the Assembly. Only then, can the dreams of the Indigenous peoples internationally flourish into creative choices based on Indigenous nations' cultural past and aspirations.

Endnotes:

[1] Meaning that there is some kind of mutating analytical concept of sovereignty such that, when you look at it from the different locations, you get a different insight into what it is.

[2] Paul Lee, "The Making Of A Pan-African: Kwame Nkrumah In America," *The Michigan Citizen* (Highland Park), Feb. 10-Feb. 16, 2002.

[3] *Ibid.*

[4] Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 Harv. Int'l L.J. 1 at 58.

[5] The "Ghanaian lens" is an expression that I coined as a proxy for the elements that constitute the Ghanaian colonial experience that has moulded the Ghanaian world-view or the Ghanaian way of thinking. It is not about Ghana itself.

[6] Plenary powers of Congress (USA) and s. 91(24) of the *Constitution Act*, 1867; *Sanderson* v. *Heap* (1909), 11 W.L.R. 238.

[7] *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, (1984), 13 D.L.R. (4th) 321 at 108-109.

[8] Bill C-31 re-instated Indian status to Aboriginal women (and their offspring) who married Europeans.

[9] Caseley J. Hayford, *Gold Coast Native Institutions: With Thoughts upon a Healthy Policy for the Gold Coast and Ashanti* (London: Frank Cass, 1903) at 6.

[10] Indigenous groups were generally characterized as uncivilized (hunters versus farmers).

[11] Fergus M. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century* (New York: Anchor Books, 1997) at 18-19.

[12] For instance, the thesis will not present the Cherokee Constitution by itself, but instead relate it to the Menominee Constitution.

[13] Rebirth African Art Gallery, online: South Africa Cradle of Humankind, Origin of Man <http://www.rebirth.co.za/world_heritage_sites/origin_of_man.htm>, accessed March 31, 2009.

[14] China.org.cn: online: Formation of the Chinese Civilization <http://www.china.org.cn/e-gudai/index.htm>, accessed March 31, 2009.

[15] *Ibid.*

[16] Rebirth African Art Gallery, *supra* note 13.

[17] *Ibid.*

[18] Philip True, Jr., AfricaWithin, online: An Overview of Black History <http://www.africawithin.com/black_history/overview_chapter1.htm>, accessed March 31, 2009.

[19] *Ibid.*

[20] *Ibid.*

[21] LiveScience, online: DNA Study Supports African Origin of Man: <http://www.livescience.com/history/080221-ap-human-origins.html>, accessed November 7, 2008.

[22] *Ibid.*

[23] See Christopher Chase-Dunn & Thomas Hall, "World-Systems and Modes of Production: Toward the Comparative Study of Transformations" (1985) 8:4 Humboldt Journal of Social Relations at 81; Christopher Chase-Dunn & Thomas Hall, "Cross World-System Comparisons. Similarities and Differences" in S. Sanderson, ed., *Civilizations and World-Systems: Two Approaches to the Study of World-Historical Change* (London: Sage Publications, 1997) at 109; Christopher Chase-Dunn & Thomas Hall, "Ecological Degradation and the Evolution of World-Systems" (1997) 3:3 Journal of World-Systems Research at 403; S.K. McIntosh, "Changing Perceptions of West Africa's Past: Archaeological Research Since 1988" (1994) 10:3 Journal of Archaeological Research at 165; S.K. McIntosh, *Excavations at Jenné-Jeno, Hambarketolo, and Kaniana (Inland Niger Delta, Mali), the 1981 Season* (Berkeley: University of California Press, 1995); C. Meillassoux, *The Development of Indigenous Trade and Markets in West Africa* (London: Oxford University Press, 1971).

[24] Susan J. Herlin, University of Louisville: online: *Ancient African Civilizations to ca. 1500: Text Supplement and Study Guide for History/PAS 393* <http://www.louisville.edu/a-s/history/herlin/textsup.htm>, accessed March 31, 2009.

[25] Chase-Dunn, "World-Systems and Modes of Production," *supra* note 23 at 109.

[26] Diaspora is the brain child of Pan-Africanism.

[27] After all, a majority of the Indigenous peoples who took sides in the war supported the British who they believed would better protect their rights.

[28] The United States, like Spain, adopted appropriation as the main colonizing process.

[29] J.W. Blake, *Europeans in West Africa, 1450-1560*, vol. I (London: Hakluyt Society 1942) at 50, and vol. II at 270 n; see also: D. Kimble, *A Political History of Ghana: The Rise of Gold Coast Nationalism 1850-1928* (Oxford: Clarendon Press, 1963) at 1.

[30] Reverend Richard Kelly, "Synchronicity" (Sermon, 12 August 2007), [unpublished].

[31] R. Harvey, *The Coast Connection* (Lantzville, B.C.: Oolichan Books, 1994) at 26 in M. Hirch, "Trading across time and space: Culture along the North American 'Grease Trails' from a European perspective" (Paper presented at the Canadian Studies International Interdisciplinary Conference: Across Time & Space Visions of Canada from Abroad, University College of the Cariboo, September 12-14, 2003) [unpublished].

[32] If the current trend continues, the Indigenous population in Prince Albert, Saskachewan, Canada may exceed the white population by the year 2010.

[33] Hayford, *supra* note 9 at 4.

[34] *Ibid.* at 5.

[35] Theodore Dwight Woolsey, *Introduction to the Study of International Law*, 5th ed. (New York: C. Scribner Armstrong & Co., 1878) § 36 at 34 (as cited in *Black's Law Dictionary*).

[36] For their contribution to black liberation and African independence movements see LiveScience, Lee, *supra* note 2.

[37] NewspaperARCHIVE, online: July 13 Events in History <www.NewspaperArchive.com/1940's>, accessed October 28, 2008.

[38] Hayford, *supra* note 9 at 5.

[39] Anghie, *supra* note 4 at 70.

[40] Hayford, *supra* note 9 at 19.

[41] *Ibid.* at 5.

[42] *Supra* note 6.

[43] What non-English body can take away the rights of the English people? How could tribes preserve and assert their distinctive culture when Congress could ban any ceremony (e.g. Sundance banned until the reign of President Carter), re-locate the tribe or take away part of their lands (e.g. the Crow tribe), order how the tribe deals with its land or take away the tribe's right to deal with its criminals (e.g. *Major Crimes Act*)?

[44] Although Canadian courts have not had much of a chance to address the issue, they have had ample opportunities to offer their opinion. *Sioui* (see *infra* note 65) did recognize that sovereignty had once existed while *Campbell* at BCSC (see *infra* note 66) did suggest that it still exists, albeit within a domestic context. The court could have been firm and clarified the issue in *Guerin* (see *supra* note 7).

[45] An excellent example is in the judgment in *Delgamuukw*, where Lamer C.J. poked a hole in section 35 of the 1982 Constitution. What kind of sovereignty do the Aboriginal people have if they cannot use their land the way that they think will preserve their culture, if that use is mining? *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.

[46] Anghie, *supra* note 4 at 70.

[47] This should not have happened according to the Royal Proclamation but it did and we have to face reality.

[48] For the proposition that cessions of territory by African tribes fall outside international law, see John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894) at 149-155. Lassa Oppenheim applies the principle generally to Indigenous peoples – see Lassa Oppenheim, *International Law: A Treatise*, 2d ed. (London: Longman, Green & Co., 1912) at 285-286.

[49] Anghie, *supra* note 4 at 58.

[50] This will be dealt in details in later chapters.

[51] Anghie, *supra* note 4 at 58.

[52] Chief Pontiac's rebellion was a major factor leading to the Royal Proclamation. By using phrases such as "not having been ceded to or perchased by Us, are reserved to them" in regard to the land, the Royal Proclamation confirms treaty relations. For full text, see Appendix M.

[53] One only has to look at the recent blockades of rail lines in Canada (April-July 2007) by the Indigenous peoples of Canada to come to the conclusion that they are not happy with their situation.

[54] This will be explained in the next chapter under "shifting definition of statehood."

[55] *Worcester* v. *Georgia*, 31 U.S. 350 (1832), 6 Pet. 515.

[56] *Ibid.*

[57] "Sovereignty represents at the most basic level an assertion of power and authority, a means by which a people may preserve and assert their distinctive culture" in Anghie, *supra* note 4 at 70. If Congress can unilaterally limit the rights of the Indigenous American, what authority is left for them? In *Lone Wolf v. Hitchcock*, the court ruled that "Congress possesses a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests ... even though opposed to the strict letter of a treaty with the Indians." *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 at 565 (1903). The *Major Crimes Act* is a testimony to that power of Congress.

[58] *Worcester, supra* note 55.

[59] *Lone Wolf, supra* note 57.

[60] Does this mean plenary powers? Marshall did not think so in *Worcester, supra* note 55 at 498.

[61] *Oneida* v. *Oneida County*, 470 U.S. 226 (1985); *United States v. Kagama*, 118 U.S. 375 (1886) at 382; *Lone Wolf, supra* note 57.

[62] *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983).

[63] *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[64] This may never happen but it is possible. The situation is impossible in Ghana.

[65] *R. v. Sioui*, [1990] 1 S.C.R. 1025.

[66] *Campbell et al.* v. *A.G.* (2000) BCSC 1123.

[67] In *Mitchell* v. *Peguis Indian Band,* [1990] 2 S.C.R. 85; (1990), 71 D.L.R. (4th) 193 at 108-109, cited to S.C.R. In speaking about *Guerin,* the Chief Justice noted that: "Since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations." The court could have expanded on the issue and taken a stand.

[68] H. Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21:3 Man. L.J. at 341.

[69] *Sanderson, supra* note 6; see also *Logan* v. *Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) (associated with Crown protection).

[70] "Mankind as a whole has a goal (and this we have shown to be so), then it needs one person to govern or rule over it, and the title appropriate to this person is Monarch or Emperor. Thus it has been demonstrated that a Monarch or Emperor is necessary for the well-being of the world" in Dante Alighieri, *Monarchy and Three Political Letters*, Book 1 (New York: The Noonday Press, 1954) at ch. 5;
"Man's ability to live 'sociably' with one another is not natural, but rather by covenant; in order to make their agreement lasting, and themselves directed toward the common benefit, they must confer all of their power and, hence, all of their wills into one man and one will - the sovereign" in T. Hobbes, *Leviathan*, ed. by M. Oakeshott (Indianapolis, Indiana: Hackett, 1967) at 111-112. See also, Foster, *supra* note 68 at 341.

[71] Hobbes, *supra* note 70 at 111-112; see also Foster, *supra* note 68 at 341.

[72] According to Morgenthau, power in the hands of one or a few men is necessary for a nation, since sovereignty is "the result of the actual distribution of power in the state." H. Morgenthau, *Politics Among Nations* (New York: Knopf, 1985) at 335.

[73] P. Macklem "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

[74] *Mitchell, supra* note 67.

[75] *Guerin, supra* note 7.

[76] *Campbell, supra* note 66.

[77] *Ibid.* at paras. 80-81.

[78] Royal Proclamation, October 7, 1763, reproduced in A. Shortt & A.G. Doughty, eds. *Documents Relating to the Constitutional History of Canada, 1759-1791* (Ottawa: The Public Archives of Canada, The King's Printer, 1918) at 163. Royal Proclamation, 1763, R.S.C., 1985, App. II, No.1. *The Royal Proclamation* of October 7, 1763, (U.K.) 3 GEO. 3, reprinted in R.S.C., App. I; for the full text of the *Proclamation,* see Appendix M.

[79] This is based on the "nation qua nation" concept which will be explored upon later in this paper. See Canada, *Report of the Commission on Aboriginal Peoples, Looking Forward, Looking Back*, online: Indian

and Northern Affairs Canada <http:// www.inac.gc.ca/rcap/report/look.html>. *DCL 5125/CML 4162 Issues in Aboriginal Law*, Faculty of Law, University of Ottawa (January 17, 2002); see also *Sioui*, *supra* note 65 at para. 69; Macklem, *supra* note 73.

[80] *Sioui*, *supra* note 65.

[81] M. Shepardson, "Navajo Ways in Government: A Study in Political Process" (Menasha, WI: American Anthropological Association, 1963) 113, cited in A. Goldberg, "Dynamic View of Tribal Jurisdiction to Tax, Non-Indians" (1976) 40 Law & Contemporary Problems 166; see also D. H. Getches et al., *Cases and Materials on Federal Indian Law*, 4th ed. (St. Paul, Minn: West Group, 1998) at 302.

[82] R. Young, *White Mythologies: Writing History and the West* (New York: Routledge, 1990) at 2..

[83] "Although the Colonial Office was at the time firmly opposed to any extension of political authority on the Gold Coast, no objections were raised to this pushing of the 'traders' frontier' northwards. In fact, where British interests could not be protected by the informal methods of commercial expansion, local administrators were only too eager to extend their formal sovereignty. A case in point was the south-east corner of the Gold Coast, where the essential interaction between economic and political imperialism is illustrated by a process that might be called the extension of the 'smugglers' frontier.' In 1878, the local Commissioner, Lieutenant A.B. Ellis, attempted to put down smuggling by force, but this led immediately to disturbances, and soon afterwards to fresh treaties ceding further territory along the seaboard to Britain." (as narrated in Kimble, *supra* note 29 at 12).

[84] "Contact" kept shifting in time due to westward and northward expansion. The Indigenous peoples progressively resisted the Europeans during these expansions and, hence, the necessity to tie this chapter to Atlantic Coast contact of the seventeenth century. Since most of the policies in both Canada and the United States stemmed from the Atlantic coast regions, the issue of sovereignty enjoyed by the new subordinated nations could be moot.

[85] After the first emperor Qin Shi Huang had united China by conquering all six kingdoms in 219 B.C., he ordered his generals to conquer the regions of present-day Guangdong and Guangxi. The conquest was completed in 214 B.C.

[86] Fueled by its economic vitality, the kingdom of Ghana rapidly expanded into an empire. It conquered local chieftaincies and required tribute from these subordinate states. Encyclopedia Britannica, online: Ghana Empire <http://www.britannica.com/ebi/article-9311401>, accessed March 31, 2009.

[87] For the Spanish treatment of the Mexicans see Lewis Hanke, *Aristotle and the American Indians: A Study in Race Prejudice in the Modern World* (Chicago: Henry Regnery Company, 1959).

[88] J.J. Williams, *Whence the 'Black Irish' of Jamaica?* (New York: Dial Press, 1932).

[89] Talism O. Elias, *Africa and the Development of International Law* (London: A.W. Sijthoff, Oceana Publications, 1972) at 6-15; Anghie, *supra* note 4 at 27.

[90] *Cherokee* v. *Georgia*, 30 U.S. 1 at 31 (1831).

[91] Jens Bartelson, *Genealogy of Sovereignty* (Stockholm: Cambridge University Press, 1995) at 1.

[92] *Ibid.* at 2.

[93] Anghie, *supra* note 4 at 56.

[94] *Ibid.*, at 70.

[95] It will be shown that these nations had to make some changes to their legal systems or administration in order to be accepted into the family of nations.

[96] Thomas Lawrence, *The Principles of International Law* (London: Macmillan, 1895) at 58; see also Anghie, *supra* note 4 at 28.

[97] For example, see the Bowring Treaty between Queen Victoria and the Kings of Siam April 18, 1855 in Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (New York: Oxford/Clarendon Press, 1984) at 211.

[98] *Ibid.* at 29; see also Anghie, *supra* note 4 at 36 and footnote 187.

[99] Westlake, *supra* note 48 at 141-142; Oppenheim, *supra* note 48 at 395; Gong, *supra* note 97 at 29; Anghie, *supra* note 4 at 55.

[100] Anghie, *supra* note 4 at 53. An example is the Bowring Treaty between Queen Victoria and the Kings of Siam, April 18, 1855.

[101] Anghie, *supra* note 4 at 67.

[102] Bartelson, *supra* note 91 at 15.

[103] The trade in humans as slaves makes it impossible for the Europeans to consider the Africans as equals. However, the Europeans traded with the elite group and initially left the Indigenous nations to govern themselves.

[104] "Equals" is used guardedly here and only refers to acts such as treaty making.

[105] Oppenheim, *supra* note 48 at 34-35 (as quoted in Anghie, *supra* note 4 at 48).

[106] Canadian Archives, Q. 337, pt. II at 367-368 (as quoted by Riddell J. in *Sera* v. *Gault* (1922), 64 D.L.R. 327 at 330).

[107] The reader should remember Lawrence when he justified the denial of sovereignty to non-European nations by proclaiming that "They would want various characteristics, which, though not essential to sovereignty, are essential to the membership of the family of nations." (Lawrence, *supra* note 96 at 58. Japan had to extensively revise its civil and criminal codes in order to be admitted to the Family of Nations. To this paper, that amounts to cultural amputation. See Gong, *supra* note 97 at 29; also see Anghie, *supra* note 4.

[108] Richard Ashley, "Untying the Sovereign State: A Double Reading of the Anarchy Problematique," (1988) 38:2 Millennium; Anghie, *supra* note 4.

[109] "The attempt to create political units all over the world based on the model first tested in Western Europe in the seventeenth century is causing much of the present international unrest, notably in Africa and Eastern Europe." C.G. Roelofsen, *Grotius and the Development of International Relations Theory: "The Long Seventeenth Century' and the Elaboration of a European States System* (1997) 17 Q.L.R. 35.

[110] Anghie, *supra* note 4 at 67.

[111] A common phrase used by baseball commentators at the start of baseball games.

[112] Anghie, *supra* note 4 at 70.

[113] K. Wheare, *The Statute of Westminster and Dominion Status* (London: Oxford University Press, 1953); for the full text of *Ghana Independence Act 1957*, see Appendix J.

[114] *Ibid.*

[115] F.M. Bourret, *The Gold Coast* (Stanford: Stanford University Press, 1952).

[116] S.A. de Smith, "The Independence of Ghana" (1957) 20:4 Modern Law Review 357; see also Bourret, *supra* note 115.

[117] de Smith, *supra* note 116 at 357-358.

[118] See Williams & Henderson, "Toward a Critical Examination of Third World Legal Issues" (1982) 3 B.C. Third World L.J. 1-2, 28-34, for the claim that Western world has denied Indigenous cultures the right to self-determination.

[119] Jill Lepore, *The Name of War: King Philip's War and the Origins of American Identity* (New York: Vintage Books, 1999).

[120] Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: Chicago University Press, 1962) at 10ff.

[121] *United States v. Joseph*, 94 U.S. 614, 4 Otto 614, 24 L. Ed. 295 (1876).

[122] *United States v. Sandoval*, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913).

[123] *Ibid.*

[124] Williams, *supra* note 88.

[125] Anghie, *supra* note 4 at 10.

[126] *Ibid.*

[127] This is a word coined by Dr. Kwame Nkrumah in his book, *Consciencism: Philosophy and Ideology for Decolonization and Development* (London: Heinemann, 1964).

[128] Anghie, *supra* note 4 at 66.

[129] *Ibid.* at 24.

[130] *Ibid.* at 25.

[131] Anghie noted that "Positivist jurisprudence was to be made, not in the realm of sovereignty, but of society. Society, and the constellation of ideas associated with it, promised to enable the jurist to link a legal status to a cultural distinction" (see *supra* note 4 at 70).

[132] Lawrence, *supra* note 96 at 58; see also Anghie, *supra* note 4 at 28.

[133] Westlake, *supra* note 48 at 142 (as cited in Anghie, *supra* note 4 at 52).

[134] Compare with Robert John Araujo, "The International Personality and Sovereignty of the Holy See" (2001) 50 Cath. U. L. Rev. 291 at 5, who believes that these terms are well understood.

[135] *Ibid.* at 292.

[136] Montevideo Convention on Rights and Duties of States (Inter-American), Dec. 26, 1933, art. 1 (as cited in Araujo, *supra* note 134 at 5); see also *Restatement (Third) of Foreign Relations Law of the United States* at 201 (1986).

[137] Bartelson, *supra* note 91 at ix.

[138] Presocratic Pythagoreans including Leucippus and Democritus believed in a flat Earth.

[139] In the Babylonian world view or in Mesopotamian thought, the Earth was considered a flat disc. The flat-Earth concept is also found in the Scriptures, such as in Isaiah 40:22.

[140] This subject is beyond the scope of this thesis.

[141] Woolsey, *supra* note 35, § 36 at 34 (as cited in the *Black's Law Dictionary*).

[142] D.E. Stannard, *American Holocaust: The Conquest of the New World* (Oxford: Oxford University Press, 1992) at 32.

[143] *Ibid.*, at 14.

[144] In Thompson's words, a political myth is "a tale told about the past to legitimize or discredit a regime," whereas a political mythology is "a cluster of such myths that reinforce one another and jointly constitute the historical element in the ideology of the regime or its rival." Leonard Thompson, *The Political Mythology of Apartheid* (New Haven: Yale University Press, 1985) at 1 (as cited in Stannard, *supra* note 142 at 14).

[145] Thompson, *supra* note 144 at 70 (as cited in Stannard, *supra* note 142 at 14).

[146] "Squanto was one of the five natives kidnapped from the coast of New England in the year 1615 by a Captain George Weymouth who was sent by England in search of a Northwest Passage." See RootsWeb, online: The Pilgrims and the Plymouth Colony: 1620 <http://www.rootsweb.com/~mosmd/>, accessed March 31, 2009.

[147] *Ibid.*

[148] Duane A. Cline, RootsWeb, online: The Pilgrims and the Plymouth Colony: 1620 – Squanto <http://www.rootsweb.com/~mosmd/squanto.htm>, accessed March 31, 2009.

[149] *Ibid.*

[150] *Ibid.*

[151] This subject will be dealt with in part II.

[152] Thompson, *supra* note 144.

[153] Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill: University of North Carolina Press, 1975) at 15; for a concise account, see Stannard, *supra* note 142 at 14.

[154] The title of his book pins the issue in North America.

[155] Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Alfred A. Knopf, 1978) at 119 (as cited in Stannard, *supra* note 142 at 14).

[156] "One of the instructions of the Laws of Burgos and the *Requerimiento* was to relocate the Indians in new villages closer to the civilizing influence of the Spaniards, and their old dwellings destroyed so that they might lose the longing to return to them" in Hanke, *supra* note 87 at 24.

[157] See C. Gibson, *The Aztecs Under Spanish Rule: A History of the Indians of the Valley of Mexico, 1519-1810* (Stanford: Stanford University Press, 1964) at 377-378.

[158] Stannard, *supra* note 142 at 32.

[159] R. Silverberg, *Mound Builders of Ancient America: The Archaeology of a Myth* (Greenwich, Conn.: New York Graphic Society, 1968) at 312. For full details see Stannard, *supra* note 142 at 32.

[160] Getches, *supra* note 81 at 300.

[161] "In the Spanish town of Burgos, a council composed principally of theologians and canon law scholars assembled in 1512 to promulgate the first comprehensive legislative code dealing with Indian affairs in the New World, the *Laws of Burgos*. The *Laws of Burgos* and the *Requerimiento*, outlined the papal hierocratic ideology that formally relegated Indian tribal culture to a deficient and diminished legal status" in Robert A. Williams, Jr., "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought" (1983) 57 Cal. L. Rev. 1 at 43.

[162] The title of this entry tells it all. Francesco Gioseppe Bressani, *The Jesuit Relations and Allied Documents, Travels and Explorations of the Jesuit Missionaries in New France,* "Government of the Canadian Barbarians," Bressani's Relation, volume 38, fourth chapter at 1653.

[163] The following are examples of parallelism between Catholicism and the Indigenous culture:

1. Both believe in The Almighty but with different names;

2. Both believe that there is spiritual life after death – i.e. Ghosts and Saints;
3. Both believe that there is intercession or communion of spirits (Saints);
4. Both believe in miracles or mysteries; and
5. Both believe God/gods can work through humans.

Differences include:

1. The belief in multiple gods by "primitive" cultures;
2. Sacrifice to appease God/gods; Christians believe this was satisfied by the crucifixion of Jesus;
3. The Trinity even among Christians; and
4. The Eucharist, even among Christians.

Are these differences great enough to create conflict? The similarities are much stronger than the differences and, with slight modification, could merge or be complementary.

[164] I. Bussidor & Ü. Bilgen, *Night Spirits: The Story of the Relocation of the Sayisi Dene* (Winnipeg: University of Manitoba Press, 1997) at 31. In the mid-1920s, Indian Affairs considered settling the *Sayisi* Indigenous at Reindeer Lake, close to the Indigenous community of Lac Brochet in north-western Manitoba, but the Anglican bishop opposed the move because he thought he might lose the Anglicans to the Catholic mission at Lac Brochet.

[165] D.E. Kofi Baku, "History and National Development: The Case of John Mensah Sarbah and the Reconstruction of Gold Coast History" (1990) 6:1 Research Review NS 36, online: <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/Institue%20of%20African%20Studies%20Research%20Review/1990v6n1/asrv006001004.pdf>.

[166] Len Jeffries, text of a speech at the Empire State Black Arts and Cultural Festival in Albany, New York, July 20, 1991, online: <http://www.nbufront.org/html/MastersMuseums/LenJeffries/OurSacredMission.html>, accessed November 16, 2006.

[167] *Ibid.*

[168] *Ibid.*

[169] *Ibid.*

[170] *Ibid.*

[171] *Ibid.*

[172] *Ibid.* (Dr. Len Jeffries supports his claim with the magazine called Liberty, the anniversary edition of the magazine France and a book by Marvin Trachtenberg called *The Statue of Liberty.*)

[173] *Ibid.*

[174] *Ibid.*

[175] *Ibid.*

[176] *Ibid.*

[177] *Ibid.*

[178] *Ibid.*

[179] Stannard, *supra* note 142 at 13.

[180] *Ibid.*

[181] Hugh Trevor-Roper, *The Rise of Christian Europe* (New York: Harcourt, Brace & World, 1965) at 9 (as cited in Stannard, *supra* note 142 at 13).

[182] Trevor-Roper, *supra* note 181 at 9.

[183] "In the Spanish town of Burgos, a council composed principally of theologians and canon law scholars, assembled in 1512 to promulgate the first comprehensive legislative code dealing with Indian affairs in the New World, the *Laws of Burgos*. The *Laws of Burgos* and the *Requerimiento*, outlined the Papal hierocratic ideology that formally relegated Indian tribal culture to a deficient and diminished legal status." One of the instructions was to relocate the Indians "in new villages closer to the civilizing influence of the Spaniards, and their old dwellings destroyed 'so that they might lose the longing to return to them.'" Williams Jr., quoting Hanke, *supra* note 161 at 43.

[184] The reader can take judicial notice from the Western movies.

[185] Although modern horses originated in the Americas, they had become extinct by 10,000 B.C. The only survivors from then until their reintroduction by the Spanish were the Old World breeds that had migrated to Asia (see Stannard, *supra* note 142 at 19).

[186] John Hemming, *Red Gold: The Conquest of the Brazilian Indians* (Cambridge: Harvard University Press, 1978) at 46.

[187] Henry Wheaton, *Elements of International Law* (George Grafton Wilson ed., The Carnegie Institute of Washington photo-reprint 1964) (1866) at 15; see also Anghie *supra* note 4 at 23.

[188] J.K. Cartwright, "Contributions of the Papacy to International Peace" (1928) 8 Cath. Hist. Rev. 157 at 159, quoting François Guizot (as cited in Anghie, *supra* note 4 at 13).

[189] Anghie, *supra* note 4 at 7.

[190] *Ibid.*

[191] Bartelson, *supra* note 91 at 2.

[192] *Ibid.*

[193] Anghie, *supra* note 4 at 28.

[194] C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967) at 14 (as quoted in Anghie, *supra* note 4 at 27).

[195] Taslim O. Elias, *Africa and the Development of International Law* (Leiden, A. W. Sijthoff; Dobbs Ferry, NY: Oceana Publications 1972) at 6-15 (as cited in Anghie, *supra* note 4 at 27); also see C.H. Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (Leiden: Sijthoff, 1973) for additional information on the history of treaty formation between African and European peoples.

[196] C.H. Alexandrowicz, "Doctrinal Aspects of the Universality of the Law of Nations" (1961) 37 Brit. Y.B. Int'l L. at 506 (as quoted in Anghie, *supra* note 4 at 28).

[197] Thomas Jeremy, "History and International Law in Asia: A Time for Review?" in Ronald St. John Macdonald, ed., *Essays in Honour of Wang Tieya* (Dordrecht, Netherlands: Martinus Nijhoff Publishers) at 813 (quoted in Anghie, *supra* note 4 at 28).

[198] Anghie, *supra* note 4 at 28.

[199] Oppenheim, *supra* note 48 at 110.

[200] Anghie, *supra* note 4 at 28.

[201] *Ibid.*, at 7.

[202] Rebecca Wallace, *International Law*, 3rd ed. (London: Sweet and Maxwell, 1997) at 59.

[203] Lawrence, *supra* note 96.

[204] *Ibid.* at 58 (as quoted in Anghie, *supra* note 4 at 26).

[205] *Ibid.*

[206] *Ibid.*

[207] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1998) at 61-62 (as cited in Araujo, *supra* note 134 at 322).

[208] S. William Halperin, *Italy and the Vatican at War: A Study of their Relations from the Outbreak of the Franco-Prussian War to the Death of Pius IX* (Chicago: University of Chicago Press, 1939); Wallace, Lillian Parker, *The Papacy and European Diplomacy 1869-1878* (North Carolina: Chapel Hill, 1948) (as cited in Araujo, *supra* note 134 at 302).

[209] Lawrence, *supra* note 96 at 136 (as quoted in Anghie, *supra* note 4 at 27).

[210] Westlake, *supra* note 48 at viii; see also Anghie, *supra* note 4 at 29.

[211] Westlake, *supra* note 48 at viii; see also Anghie, *supra* note 4 at 29.

[212] Anghie, *supra* note 4 at 29.

[213] Westlake, *supra* note 48 (as quoted in Anghie, *supra* note 4 at 29).

[214] Even God had to take human form to enter into this relationship.

[215] Lawrence, *supra* note 96 at 190 (as quoted in Anghie, *supra* note 4 at 27).

[216] Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (New York: Oxford University Press, 1996) at 66.

[217] Anghie, *supra* note 4 at 50.

[218] Under the *Statute of the Permanent Court of International Justice*, art. 34 (1946), only states could bring cases before international courts. For a definition of international personality, see Oppenheim, *supra* note 48, as reprinted in R. Wallace, *International Law,* 2nd ed. (London: Sweet and Maxwell, 1992).

[219] I read this proverb and committed it to mind but cannot recall where I found it.

[220] Riles notes that many jurists, including Lawrence, "...diverted attention from the positivist vision of law as force, and reorganized international law around the theme of order to reassure the reader of viability of the discipline's project"; see Annelise Riles, "Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture" (1993) 106 Harv. L. Rev. 723 at 726 (as quoted in Anghie, *supra* note 4 at note 104).

[221] W. Benjamin, *Illuminations* (New York: Harcourt, Brace and World, 1969) at 256-257.

[222] C. Gibson, *The Spanish Tradition in America* (Columbia: University of South Carolina Press, 1968) at 59-60 (as quoted in Williams Jr., *supra* note 161 at 46).

[223] Jacobo Rosales (1588-1662) describes how all knowledge was given to men by God. He adopts Platonic ideas in explanation of the structure of the world and considers that through wisdom men achieve immortality, for this is a link with God and the time prior to the expulsion from paradise. See Reyes Bertolin, Simon Fraser University, online: Greek Influences in Jewish Spain <http://www2.sfu.ca/cacw2002/papers/bertolin.htm>, accessed March 31, 2009.

[224] For instance, Plato believed in the position that "God is everything and everything is God... the world is either identical with God or in some way a self-expression of his nature" in Michael Levine, The Stanford Encyclopedia of Philosophy, online: Pantheism <http://plato.stanford.edu/archives/spr2006/entries/pantheism/>, accessed March 31, 2009.

[225] Matthew 16:18-19 (New International); see also S. Ehler, *Twenty Centuries of Church and State: A Survey of Their Relations in Past and Present* (Westminster, MD: Newman Press, 1957) at 30-32.

[226] S. Ehler and J. Morrall, trans. and eds., *Church and State Through the Centuries* (New York: Biblo and Tannen, 1967) at 146-153.

[227] *Ibid.*, at 146.

[228] Williams Jr., *supra* note 161 at 11.

[229] NewAdvent.org Catholic Library, online: Unam Sanctam <http://www.newadvent.org/library/docs_bo08us.htm>, accessed March 31, 2009.

[230] *Ibid.* See also Ehler, *supra* note 226 at 3-37; for further discussion see also Pope Leo XIII, Immortale Dei: Encyclical Letter On the Christian Constitution of States (Nov. 1, 1885), reprinted in The Papal Encyclicals 1878-1903, Nos. 11-13 (1990), where the Pope addresses the Church's powers and sovereignties in a more contemporary light (as quoted in Araujo, *supra* note 134 at 31).

[231] Williams Jr., *supra* note 161 at 12, citing Otto Gierke, F. Maitland, trans., *Political Theories of the Middle Ages* (Boston: Beacon Press, 1958) at 12-13.

[232] Compare this with Lawrence, who ties sovereignty to states and later to territories. Lawrence states that "International Law regards states as political units possessed of proprietary rights over definite portions of the earth's surface" in *The Principles of International Law*, *supra* note 96 at 136.

[233] NewAdvent.org, Catholic Library, online: General Councils <http://www.newadvent.org/cathen/04423f.htm>; see also Araujo, *supra* note 134 at 296.

[234] Araujo, *supra* note 134 at 296.

[235] NewAdvent.org, Catholic Library, online: General Councils <http://www.newadvent.org/cathen/04423f.htm>; Araujo, *supra* note 134 at 19.

[236] These legations included those at Venice, Naples, Tuscany, Savoy, Spain, France, Portugal, Belgium, the Holy Roman Empire, Cologne, Switzerland (Como, Graz, and Lucerne) and Poland. Hyginus Eugene Cardinale, *The Holy See and the International Order* (Gerrards Cross: Smythe, 1976) at 70 (as cited in Araujo, *supra* note 134 at 300).

[237] See Joseph J. Murphy, "The Pontifical Diplomatic Service" (1909) 41 The Ecclesiastical Review at 1 (as cited in Araujo, *supra* note 134 at 300).

[238] Loius Duchesne, *The Beginnings of the Temporal Sovereignty of the Popes: AD 754-1073* (London: K. Paul, Trench, Trübner & Co., 1908) (as cited in Araujo, *supra* note 134 at 296).

[239] These territories lasted from the eighth century to 1870 with few interruptions. It can be noted that some Indigenous peoples occupied their lands for tens of thousands of years and yet had no rights upon contact.

[240] See generally I.S. Robinson, *The Papacy 1073-1198* (Cambridge: University of Cambridge, 1990) (as cited in Araujo, *supra* note 134 at 297).

[241] See translation of the Papal Bull Laudabiliter in Ehler, *supra* note 226 at 53-55.

[242] The Avalon Project at the Yale Law School, online: The Bull of Pope Adrian IV Empowering Henry II To Conquer Ireland AD 1155 <http://avalon.law.yale.edu/medieval/bullad.asp>, accessed March 31, 2009; see also translation of the Papal Bull Laudabiliter in Ehler, *supra* note 226 at 53-55.

[243]NewAdvent.org, Catholic Library, online: Unam Sanctam <http://www.newadvent.org/library/docs_bo08us.htm>, accessed March 31, 2009; Araujo, *supra* note 134 at 297.

[244] Araujo, *supra* note 134 at 298.

[245] US-Israel.org, online: Pope Gregory X, Papal Protection of the Jews <http://www.us-israel.org/jsource/anti-semitism/Papal_Protection_of_the_ Jews.html>, accessed February 28, 2006.

[246] Edward G. Bourne, "The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries" (1892) 1 Yale Rev. 35 at 55; Ehler, *supra* note 226 at 155-159 (provides the text of the *Bull Inter Caetem Divinae* promulgated on May 4, 1493); for further details see Araujo, *supra* note 134 at 299.

[247] See also F. Cohen, "Original Indian Title" (1947) 32 Minn. L. Rev. 28 at 45.

[248] Ehler, *supra* note 226 at 163-164 (as cited in Araujo, *supra* note 134 at 301).

[249] L. Oppenheim, International Law: A Treatise 251 n.1 (Lauterpacht ed., 8th ed. 1955), as noted in Araujo, *supra* note 134 at 301.

[250] Hyginus, *supra* note 236 at 88.

[251] Walter Ullmann, *Law and Politics in the Middle Ages: An introduction to the sources of medieval political ideas,* (Ithaca, N.Y: Cornell University Press, 1975) at 269.

[252] Robert S. Wood, "History, Thought and Images: The Development of International Law and Organization" 1971 12 Va. J. Int'l L. 35 at 37-39.

[253] Ullmann, *supra* note 251 at 269.

[254] Williams Jr., *supra* note 161 at 55.

[255] *Ibid.*

[256] *Ibid.* at 56.

[257] *Ibid.*

[258] Ullmann, *supra* note 251 at 272.

[259] Walter Ullmann, *Medieval Foundations of Renaissance Humanism* (Ithaca, N.Y: Cornell University Press, 1977) at 100 (as cited in Williams Jr., *supra* note 161 at 57).

[260] Williams Jr., *supra* note 161 at 57.

[261] *Ibid.* at 57-58.

[262] R. Unger, *Knowledge and Politics* (New York: Free Press, 1975) at 71.

[263] *Ibid.*; see also Williams Jr., *supra* note 161 at note 2.

[264] For details see, Hanke, *supra* note 87 at 11-13.

[265] The most prominent was Franciscus de Victoria; for details see Lewis Hanke, *The First Social Experiments in American* (Cambridge: Harvard University Press, 1939) at 4-5.

[266] Williams Jr., *supra* note 161 at 43.

[267] Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia: University of Philadelphia, 1949) at 17.

[268] Friar Bernardo de Mesa presented a thesis which postulated that, despite their freedom, the Indians' greatest vice was their idleness, which imposed upon the king the duty to "curb their vicious inclinations and compel them to industry." (see Hanke, *supra* note 267 at 23).

[269] Hanke, *supra* note 267 at 30.

[270] Getches, *supra* note 81 at 30.

[271] Hanke, *supra* note 267 at 17 (as cited in Williams Jr., supra note 161 at 41).

[272] Williams Jr., *supra* note 161 at 68.

[273] Cohen, *supra* note 247 at 44, footnote 34; see also Getches, *supra* note 81 at 30.

[274] Getches, *supra* note 81 at 72; Williams Jr., *supra* note 161 at 72.

[275] Getches, *supra* note 81 at 30.

[276] Colonization implies dispossession of Indigenous lands. Pope Alexander VI gave his blessing to the colonization of the Indigenous peoples when he promulgated the Line of Demarcation between the zones of colonial exploration among the then-contemporary imperial powers, Portugal and Spain. Edward G. Bourne, "The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries" (1892) 1 Yale Rev. 35 and 55.

[277] "Victoria, a Dominican, as was Aquinas, held the *prima* chair in theology at the University of Salamanca from 1526 until his death in 1546." Francisco de Victoria, *F. Victoria de indis et de ivre belli relectiones*, E. Nys, ed., J. Bate trans., (Washington: The Carnegie Institution of Washington, 1917) at 69 (as cited in Williams Jr., *supra* note 161 at 70).

[278] Bourne, *supra* note 276 at 55.

[279] Williams Jr., citing F.S. Cohen and referring to Victoria, claims that "[e]ven in the twentieth century United States, his work is recognized as originating 'the pattern and creative principles that are the distinctive contribution of Spanish juristic thought to our Federal Indian law.'" (Williams Jr., *supra* note

161 at 69, citing Cohen, "The Spanish Origin of Indian Rights in the Law of the United States" (1942) 31:1 GEO L.J. at 1).

[280] Royal Proclamation, *supra* note 78.

[281] Williams Jr., *supra* note 161 at 3, citing *Johnson* v. *McIntosh*, 21 U.S. 503 at 515 (1823).

[282] Williams, Jr., *supra* note 161 at 71.

[283] Bourne, *supra* note 276 at 55.

[284] Williams Jr., *supra* note 161at 70.

[285] Williams Jr. employs Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. at 234 to compare Francisco de Victoria to Blackstone in that both found a way to legitimise the evils of their days but on humanitarian grounds (see Williams Jr., *supra* note 161 at 71).

[286] *Johnson*, *supra* note 281.

[287] Royal Proclamation, *supra* note 78.

[288] Williams Jr., *supra* note 161 at 3, citing *Johnson*, *supra* note 281at 515.

[289] Westlake, *supra* note 48 at 137 (as cited in Anghie, *supra* note 4 at 80).

[290] *Johnson*, *supra* note 281.

[291] *Ibid.* at 692.

[292] *Worcester*, *supra* note 55.

[293] *Ibid.* at 496.

[294] *Ibid.*

[295] *Johnson*, *supra* note 281 at 693.

[296] That justification does not address the past injustices nor prevent future aggression. If there are two peoples, why should one be subordinate to the other?

[297] Hayford, *supra* note 9 at 5.

[298] *Worcester*, *supra* note 55.

[299] *Johnson*, *supra* note 281.

[300] *Cherokee*, *supra* note 90.

[301] The reversals would be covered in this section. In brief, they include: the rejection of the doctrines of conquest and discovery to some extent; the more positive declaration of the nationhood of the Indigenous people; limitation of article 9 to trade as opposed to the overarching guardian doctrine or a plenary power; even granting the Indigenous people the power to punish settlers who illegally remain on their land.

[302] *Worcester*, *supra* note 55 at 496.

[303] *Johnson*, *supra* note 281 at 692.

[304] *Worcester*, *supra* note 55 at 495.

[305] *Ibid.* at 510.

[306] *Ibid.* at 511.

[307] The labeling can be found at pages 32, 33 and 45.

[308] *Johnson*, *supra* note 281 at 689.

[309] *Ibid.*

[310] *Cherokee*, *supra* note 90.

[311] *Worcester*, *supra* note 55.

[312] *Johnson*, *supra* note 281.

[313] *Worcester*, *supra* note 55 at 484.

[314] *Ibid.* at 500.

[315] *Johnson*, *supra* note 281 at 689.

[316] *Worcester*, *supra* note 55 at 484.

[317] *Ibid.* at 494.

[318] In the sense that, despite the treaties and the *None Intercorse Act*, Congress can ignore any treaty with the Indians; see *Lone Wolf*, *supra* note 57 at 565.

[319] *Cherokee*, *supra* note 90 at 31.

[320] *Worcester*, *supra* note 55 at 501.

[321] *Johnson*, *supra* note 281 at 690.

[322] Discovery "gave the exclusive right to purchase, but did not found that right on denial of the right of the possessor to sell." See *Worcester*, *supra* note 55 at 484.

[323] *Johnson*, *supra* note 281 at 689.

[324] *Worcester, supra* note 55 at 495.

[325] *Johnson, supra* note 281 at 690.

[326] *Ameoda v. Pordier and Ameoda v. Forzi and Others* (Consolidated), [1967] G.L.R. 479 at 494; Bentsi-Enchill, Kwamena, *Ghana Land Law: An Exposition, Analysis and Critique* (London: Sweet & Maxwell; Lagos: African Universities Press, 1964) at 16.

[327] *Johnson, supra* note 281.

[328] Excerpts from L. Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine" (1997) 13 J. L. & Politics at 759.

[329] *Ibid.*

[330] *Ibid.*

[331] Royal Proclamation, *supra* note 78.

[332] The Hane-Webster Debate, online: Charleston, SC, and the Nullification Movement <http://www.constitution.org/hwdebate/hwdebate.htm>, accessed April 1, 2009.

[333] *Johnson, supra* note 281.

[334] Royal Proclamation, *supra* note 78.

[335] *Worcester, supra* note 55 at 495.

[336] United States Supreme Court Reports, 8 L. Ed. U.S. 30-33, Peters 5 at 498.

[337] *Worcester, supra* note 55 at 496-497.

[338] *Ibid.* at 497.

[339] Federal powers as opposed to State powers.

[340] *Worcester, supra* note 55 at 497.

[341] Treaty with the Delawares, September 17, 1778, in C.J. Kappler, ed., *Indian Treaties, 1778-1883* (New York: Interland Publishing, 1972) at 3-5.

[342] Other examples include San Marino (Italy) and Liechtenstein, which operates within the Swiss economic system and has delegated a number of sovereign powers to Switzerland; see R. Wallace, *International Law*, 3rd ed., (London: Sweet and Maxwell, 1997) at 64.

[343] Kimble, *supra* note 29 at 202.

[344] As narrated in Kimble, *supra* note 29 at 202.

[345] B.E. Johansen & D.A. Grindle, "The Debate Regarding Native American Precedents for Democracy: A Recent Historiography" (1990) 14 American Indian Culture and Research Journal 61-88.

[346] About.com, online: Coverture <http://womenshistory.about.com/od/laws/g/coverture.htm>, accessed April 1, 2009.

[347] Charles Radlauer, "The League of the Iroquois: From Constitution to Sovereignty" (2000) 13 St. Thomas L. Rev. 341 at 348.

[348] See Stannard, *supra* note 142 at 28; Johansen, *supra* note 345.

[349] Stannard, *supra* note 142 at 28.

[350] E. Tooker, "The United States Constitution and the Iroquois League" (1988) 35 Ethnohistory at 329 (as cited in Stannard, *supra* note 142 at 28).

[351] Donald Grinde, Jr., "Iroquois Political Theory and the Roots of American Democracy," in Oren R. Lyons & John C. Mohawk eds., *Exiled in the Land of the Free* (Clear Light Publishers, 1992) at 231 (as cited in Radlauer, *supra* note 347 at 349).

[352] Royal Proclamation, *supra* note 78.

[353] *Johnson, supra* note 281.

[354] *Cherokee, supra* note 90.

[355] This refers to the mentality of the colonist before the American Constitution.

[356] Marshall suggested that the Indians' deprived state of civilization made them like "infants" in relation to their superior conquerors; see *Cherokee, supra* note 90 at 181.

[357] W. Wesley Pue, "Lawyering for a Fragmented World: Professionalism after God" (1998) 5 International Journal of the Legal Profession at 2-3.

[358] *Worcester, supra* note 55.

[359] United States Supreme Court Reports, 8 Law. Ed. U.S. 30-33, Peters 5 at 498.

[360] *Kagama, supra* note 61 at 483.

[361] *Board of County Commers* v. *Seber*, 318 U.S. 705 at 715 (1943).

[362] *Cherokee, supra* note 90 at 26.

[363] *Ibid.* at 28.

[364] *Ibid.*

[365] *Worcester*, *supra* note 55.

[366] Class notes for American Indian Law, University of New Mexico, October 14 2003; HistoryCentral.com, online: Indian Removal Act <ttp://www.historycentral.com/Indians/RemovalAct.html>, accessed April 1, 2009.

[367] Lindsay Gordon Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford, New York: Oxford University Press, 2005) at 143.

[368] Williams, *supra* note 88.

[369] *Ibid.*

[370] This does not necessarily mean genocide, but may include the eradication of the culture.

[371] Welcome to Rich Geib's Universe, online: Thomas Hobbes <http://www.rjgeib.com/thoughts/nature/hobbes-bio.html>, accessed on April 1, 2009.

[372] Oregon State University, online: Chapter XIII Of the Natural Condition of Mankind as Concerning Their Felicity and Misery <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html>, accessed April 1, 2009.

[373] *Ibid.*

[374] Young, *supra* note 82 at 2.

[375] Williams, *supra* note 88.

[376] Roelofsen, *supra* note 109.

[377] Anghie, *supra* note 4 at 3.

[378] C.H. Alexandrowicz, whose extensive and pioneering body of work includes *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967); *The European-African Confrontation: A Study in Treaty Making* (Leiden: Sijthoff, 1973) (as cited in Anghie, *supra* note 4 at 4).

[379] Hernando Cortés, in attempting to recount for his king the sights of the country surrounding Tenochtitlán and the "many provinces and lands containing very many and very great cities, towns and fortresses," could only say "that they seem almost unbelievable." (as quoted in Stannard, *supra* note 142 at 8). The Aztec civilization is but only one of several civilizations in North America.

[380] Anghie, *supra* note 4 at 4.

[381] *Ibid.*

[382] See Alexandrowicz, *supra* note 378 (as quoted in Anghie, *supra* note 4 at 8).

[383] Anghie, *supra* note 4.

[384] *Ibid.*

[385] *Ibid.*

[386] B.H. Ziff, *Principles of Property Law* (Scarborough: Carswell, 1993) at chapter 13.

[387] Genesis 3:19 (King James version).

[388] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 104.

[389] S. Crosby, "Territoriality: The Transcendental, Primordial Feature of Modern Societies" (1995) 1 Nations and Nationalism at 148-149.

[390] M. Chapman, "Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection" (1997) 26 Anglo-Am. L. Rev. 360.

[391] Getches, *supra* note 81 at 93.

[392] Kimble, *supra* note 29 at 12.

[393] Hancock's penetrating analysis of the "traders' frontier" in his *Survey of British Commonwealth Affairs* (London: Oxford University Press, 1940) has placed all subsequent writers in his debt. Particularly relevant here is his account of the "underlying identity of process between the 'old imperialism' and the 'new imperialism,'" between the economic frontier and the frontier of imperial rule. See vol. II, pt. I, ch. I, section 1 (as quoted in Kimble, supra note 29 at 12).

[394] Royal Proclamation, *supra* note 78.

[395] S. Cornell, "Sovereignty, Prosperity and Policy in Indian Country Today" (1997) 5 Community Reinvestment 5-7, 9-13.

[396] *Ibid.*

[397] Media power is a form of economics.

[398] Ethiopia was accepted not because of its civilization but military might.

[399] Lawrence, *supra* note 96 at 136 (as quoted in Anghie, *supra* note 4 at 27).

[400] *Johnson*, *supra* note 279 at 689.

[401] *Ibid.* at 693.

[402] *Johnson*, *supra* note 281 at 692.

[403] *Ibid.* at 693.

[404] One reason offered by Marshall is that the Indigenous nations were not recognized by the international law or the world community as being separate from the United States; see *Cherokee*, *supra* note 90 at 30.

[405] *Cherokee*, *supra* note 90 at 31.

[406] A. Goldberg, "Dynamic View of Tribal Jurisdiction to Tax, Non-Indians" (1976) 40 Law & Contemporary Problems at 166.

[407] *Johnson*, *supra* note 281 at 692.

[408] Stannard, *supra* note 142 at 145.

[409] *Ibid.*

[410] J. Hemming, *The Conquest of the Incas* (New York: Harcourt Brace Jovanovich, 1970) at 348 (as quoted in Stannard, *supra* note 142 at 146).

[411] Stannard, *supra* note 142 at 146.

[412] Diego de Robles Cornejo wrote: "If the natives cease, the land is finished," as quoted in Stannard, *supra* note 142 at 145. He further explained: "I mean its wealth: for all the gold and silver that comes to Spain is extracted by means of these Indians." See also Hemming, *supra* note 410.

[413] Thompson, *supra* note 144 at 70.

[414] In Thompson's words, a political myth is "a tale told about the past to legitimize or discredit a regime," whereas a political mythology is "a cluster of such myths that reinforce one another and jointly constitute the historical element in the ideology of the regime or its rival"; see Thompson, *supra* note 144 at 1 (as cited in Stannard, *supra* note 142 at 14).

[415] Woodrow Borah and Sherburne F. Cook, *The Aboriginal Population of Central Mexico on the Eve of the Spanish Conquest, Ibero-Americana,* Number 45 (Berkeley: University of California Press, 1963); Michael Coe, Dean Snow and Elizabeth Benson, *Atlas of Ancient America* (New York: Facts on File Publications, 1986) at 145 (as quoted in Stannard, *supra* note 142 at 4).

[416] Stannard, *supra* note 142 at 4.

[417] Rudolph van Zantwijk, *The Aztec Arrangement: The Social History of Pre-Spanish Mexico* (Norman: University of Oklahoma Press, 1985) at 281; Charles Gibson, *The Aztecs Under Spanish Rule: A History of the Indians of the Valley of Mexico, 1519-1810* (Stanford: Stanford University Press, 1964) at 377-378. Gibson puts the figure between 250 and 4,000 and claims the figure was about million in the sixteenth century. See also Stannard, *supra* note 142 at 4.

[418] Lawrence Stone, *The Family, Sex and Marriage in England, 1500-1800* (New York: Harper & Row, 1977) at 147.

[419] J.H. Elliott, *Imperial Spain, 1469-1716* (New York: St. Martin's Press, 1964) at 177.

[420] Stannard, *supra* note 142 at 4.

[421] *Ibid.* at 5.

[422] *Ibid.* at 4.

[423] *Ibid.* at 6.

[424] *Ibid.*

[425] *Ibid.* at 8.

[426] *Ibid.*

[427] The 8,000,000 figure may refer to the entire Caribbean region. The usual figure noted for Hispaniola ranges from 250,000 to 500,000 at the time of Columbus. From an estimated initial population of 250,000 in 1492, the Arawaks had dropped to 14,000 by 1517 in only a few years. See Michael R. Haines, Richard H. Steckel, *A Population History of North America* (Cambridge, UK; New York, NY: Cambridge University Press, 2000), which can be found in electronic format at <http://www.amazon.ca/Population-History_North-America/dp/0521496667>. On the other hand, the lower figure may refer only to the part of the island colonized by the Spaniards.

[428] Stannard, *supra* note 142 at ix.

[429] William T. Badcock, *Who Owns Canada? Aboriginal Title and Canadian Courts* (Ottawa: Canadian Association in Support of the Native Peoples, 1976) at 1.

[430] See *Report of the Select Committee of the British House of Commons on Aborigines, 1837*, at 6; L.F.S. Upton, "The Extermination of the Beothucks of Newfoundland" (1977) 58 Can. Hist. Rev. 133-153 at 150.

[431] Ziff, *supra* note 386 at chapter 3, headnote.

[432] W. Benjamin, *Illuminations*, H. Arendt ed. (New York: Schocken, 1969) at 256-257.

[433] See *supra* note 427.

[434] Linda Newson, *The Cost of Conquest: Indian Decline in Honduras Under Spanish Rule* (Boulder: Westview Press, 1986) at 91.

[435] Stannard, *supra* note 142 at 75.

[436] *Ibid.* at 76.

[437] *Ibid.* at 77.

[438] Bernardino de Sahagun, *Conquest of New Spain*, [1585] trans. Howard F. Cline (Salt Lake City: University of Utah Press, 1989) at 78.

[439] Alfred W. Crosby, *The Columbian Exchange: Biological and Cultural Consequences of 1492* (Westport, CT: Greenwood Press, 1972) at 35-63 (as quoted in Stannard, *supra* note 142 at 77).

[440] Stannard, *supra* note 142 at 78.

[441] Hernan Cortés, *Letters From Mexico,* A.R. Pagden, trans. and ed., (New York: Grossman Publishers, 1971) at 252-253 (reproduced in Stannard, *supra* note 142 at 79).

[442] *Ibid.*

[443] Stannard, *supra* note 142 at 4.

[444] Cortés, *supra* note 441 at 263.

[445] Stannard, *supra* note 142 at 8.

[446] *Ibid.* at 83.

[447] *Ibid,* at 80.

[448] *Ibid.* at 81.

[449] *Ibid.* at 8.

[450] This is a metaphor and is purely symbolic. It does not mean that they are dogs but that they do not scare anyone and their complaints and even threats are ignored.

[451] There were other British colonies surrounded by the French, but these colonies had little to offer while others, such as Nigeria, were too large to be run over by the French.

[452] de Smith, *supra* note 116 at 348-349.

[453] Generally, see: 2nd ed., in Ade Ajayi & Michael Crowder, eds., *History of West Africa* (Essex: Longman, 1987).

[454] Adu Boahen *et al.*, 2nd ed., *Topics in West African History: French West Africa* (Essex: Longman, 1986) at 123 (as cited in Stephen Wooten, University of Pennsylvania African Studies Centre, online: The French in West Africa: Early Contact to Independence <http://www.africa.upenn.edu/K-12/French_16178.html>, accessed April 1, 2009).

[455] This is a term that I coined to describe the project. France would be the main farm house and the colonies would be farm buildings on the expanded farm under the umbrella of the main house, France.

[456] According to Cartier, the Mi'kmaq loved to trade. His accounts say the Native people "showed a marvelously great pleasure in possessing and obtaining these iron wares and other commodities, dancing and going through many ceremonies." (as cited in Craig Brown, ed., *The Illustrated History of Canada* (Toronto: Lester Publishing, 1987) at 74).

[457] Ajayi, *supra* note 453.

[458] Michael Crowder, *History of French West Africa Until Independence* (London: Europa Publications, 1990) at 76-78.

[459] *Ibid.*

[460] Roland Oliver & Michael Crowder, eds., *The Cambridge Encyclopedia of Africa* (New York: Cambridge University Press, 1981).

[461] *Ibid.*

[462] Crowder, *supra* note 458 at 77-78.

[463] *Ibid.*

[464] BBC Accra, "Focus on Africa" 103.4 FM, February 14, 2008, 5:45 pm GMT.

[465] *Johnson, supra* note 281 at 689.

[466] This myth consists of placing so much emphasis on the Pilgrims when in fact the purposes of the initial colonies were colonization and the acquisition of wealth. The original settlers to Jamestown were 105 and there is no record of any being religious separatists. Among the 102 pilgrims, there were only 41 Christian Puritan Separatists; see William Murray, The Time Page, online: 13 Originals: Founding the American Colonies <http://www.timepage.org/spl/13colony.html>, accessed April 1, 2009.

[467] *Worcester*, *supra* note 55.

[468] See Appendix H for the text of the Charter.

[469] Murray, *supra* note 466.

[470] Getches, *supra* note 81 at 30.

[471] Richard H. Bartlett, "Parallels in Aboriginal Land Policy in Canada and South Africa" (1988) 4 Canadian Native Law Reporter at 3.

[472] Westlake, *supra* note 48 (as cited in Anghie, *supra* note 4 at 25).

[473] West Africa is used instead of Ghana in certain instances because the boundaries of Ghana had not been established by the twentieth century.

[474] See generally Library of Congress, online: A Country Study: Ghana <http://lcweb2.loc.gov/frd/cs/ghtoc.html>, accessed April 4, 2009.

[475] Susan J. Herlin, *Ancient African Civilizations to ca. 1500: Text Supplement and Study Guide for History/PAS 393*, online: University of Louisville <http://www.louisville.edu/a-s/history/herlin/textsup.htm>, accessed April 1, 2009.

[476] Nii Lante Wallace-Bruce, "Africa and International Law: The Emergence to Statehood" (1985) 23:4 The Journal of Modern African Studies at 577-579.

[477] Chase-Dunn, "World-Systems and Modes of Production," *supra* note 23; see generally Chase-Dunn, "Cross World-System Comparisons," *supra* note 23; Chase-Dunn, "Ecological Degradation and the Evolution of World-Systems," *supra* note 23 at 403.

[478] See generally A. Boahen, *Ghana: Evolution and Change in the Nineteenth and Twentieth Centuries* (London: Longman, 1975) at 7-10.

[479] The terms *Asante* and *Ashanti* are synonymous, with Ashanti being a more anglicized version of Asante.

[480] The term *Hene* means *king* and *Asantehene* means *King of the Asantes*.

[481] *Komfo* means Fetish Priest or High Priest.

[482] Boahen, *supra* note 478 at 12.

[483] *Ibid.*

[484] *Ibid.*

[485] *Ibid.*

[486] *Ibid.*

[487] *Ibid.*

[488] As one explorer acknowledged, these hardy and ingenious people of the Arctic and sub-Arctic possessed all the tools "that gave them an abundant and secure economy [and] they developed a way of life that was probably as rich as any other in the non-agricultural and non-industrial world." R. McGhee, *Canadian Arctic Prehistory* (Toronto: Van Nostrand Reinhold, 1978) (as cited in B. Lopez, *Arctic Dreams: Imagination and Desire in a Northern Landscape* (New York: Charles Scribner, 1986) at 181-184).

[489] John Cabot was an Italian who travelled in the service of the British monarch; see Badcock, *supra* note 429 at 58; see generally D. Croxton, "The Cabot Dilemma: John Cabot's 1497 Voyage & The Limits of Historiography" (1990-1991) 33 Essays in History.

[490] Croxton, *supra* note 489 at 21; see also *Johnson*, *supra* note 281at 689.

[491] Croxton, *supra* note 489 at 21.

[492] *Ibid.*

[493] Anghie, *supra* note 4 at 59.

[494] That statement turned out to be hot air. Competition among the Europeans forced the Europeans into treaties with the Indigenous peoples of Africa.

[495] Anghie, *supra* note 4 at 59.

[496] T.O. Elias, *Africa and the Development of International Law* (Leiden: A.W. Sijthoff, 1972) at 18-33.

[497] Westlake, *supra* note 48 at 138 (as cited in Anghie, *supra* note 4 at 59).

[498] J. Crawford, *The Creation of States in International Law* (New York: Oxford University Press, 1979) at 178.

[499] *Ibid.*, as cited in Anghie, *supra* note 4 at 61 (emphasis in original removed).

[500] Anghie, *supra* note 4 at 61.

[501] In Thompson's words, a political myth is "a tale told about the past to legitimize or discredit a regime," whereas a political mythology is "a cluster of such myths that reinforce one another and jointly constitute the historical element in the ideology of the regime or its rival." Thompson, *supra* note 144 at 1 (as cited in Stannard, *supra* note 142 at 14).

[502] Highlights from the Report of the Royal Commission on Aboriginal Peoples, online: Looking Forward, Looking Back and Restructuring the Relationship <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp>, accessed April 1, 2009.

[503] "First Nation Identities and Individual Equality Rights: A Discussion of Citizenship, Band Membership and Indian Status." Discussion Paper prepared by Wendy Cornet for the National Aboriginal Women's Organization, presented on January 26, 2003 [unpublished].

[504] The analysis below demonstrates the complexities of Aboriginal national structure:

Community of Kahnawake
Mohawk Nation Communities
Iroquois Confederacy
Six Nations
Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tuscarora
Mohawk Communities
Gibson, Tyendinaga, Kanesatake, Akwesasne, Kanatsoharake, Kanienkeh, Kahnawake;

see also N. M. Kahanu & Jon M. Van Dyke, "Native Hawaiian Entitlement to Sovereignty: An Overview" (1995) 17 U. Haw. L. Rev. at 432-433 and 445. This article lists 499 "tribal groups" with American federal recognition and 136 without. See also, Bureau of Indian Affairs, online: American Indian Today <http://www.doi.gov/bia/aitoday/aitoday.html>, accessed March 24, 2005 (listed were 554 tribal governments with more than 250 languages).

[505] Fergus M. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century* (New York: Anchor Books, 1997) at 18-19.

[506] S. O'Brien, "The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families" (1984) 53 Fordham L. Rev. at 315. The author deals with the socio-economic state of Indigenous people of Canada and the United States. She notes many similarities and demonstrates that the standard is well below the average population in both countries. See also B.W. Morse, "A View from the North: Aboriginal and Treaty Issues in Canada" (1995) 7 St. Thomas L. Rev. 671 at 674-676.

[507] See C.F. Wilkinson, "Land Tenure in the Pacific: The Context for Native Hawaiian Land Rights" (1989) 64 Wash. L. Rev. 227 at 231.

[508] NewAdvent Catholic Encyclopedia, online: Blackfoot Indians <http://www.newadvent.org/cathen/02590d.htm>, accessed April 1, 2009.

[509] R. Brush, online: The Wichita Indians <http://www.texasindians.com/wichita.htm>, accessed April 1, 2009.

[510] Jan Vansina, *Living with Africa: Reminiscences and Historiography* (Madison: Univ of Wisconsin Press, 1994) at 40.

[511] This section is modified from K. Baffoe, "Aboriginal Title: The Black Hole and the Supreme Court" [research paper (DCL 7066) University of Ottawa (August 2002)].

[512] J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada,* (University of Toronto Press: 1989, Revised edition 1991) at 6.

[513] *Ibid.*

[514] *Ibid.* at 23.

[515] *Ibid.* at 24.

[516] Most of the information for this table was obtained from the following websites: Compact History, online: Geographic Overview <http://www.dickshovel.com/up.html>, accessed April 1, 2009; AccessGenealogy: Indian Tribal Records, online: North American Indian Tribes <http://www.accessgenealogy.com/native/indianlocation.htm>, accessed April 1, 2009; AmericanPentimento.com, online: <www.americanpentimento.com>, accessed April 1, 2009; Encyclopedia.com, online: North American Natives

<http://www.encyclopedia.com/topic/North_American_Natives.aspx>, accessed April 1, 2009.

[517] Bussidor, *supra* note 164.

[518] Stannard, *supra* note 142 at 20.

[519] R. McGhee, *Canadian Arctic Prehistory* (Toronto: Van Nostrand Reinhold, 1978) (as cited in B. Lopez, *Arctic Dreams: Imagination and Desire in a Northern Landscape* (New York: Charles Scribner's Sons, 1986) at 181-184). See also Stannard, *supra* note 142 at 20.

[520] R.K. Nelson, *Make Prayers to the Raven: A Koyukon View of the Northern Forest* (Chicago: University of Chicago Press, 1983) at 245-246 (as quoted in Stannard, *supra* note 135 at 21).

[521] Stannard, *supra* note 142 at 21. See also Nelson, *supra* note 520 at 245-246.

[522] "In much of North America, especially in what is now Canada, the Europeans at first had no intention of settling the country. They cared only that fur was abundant and could be marketed in Europe." T.R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992* (Vancouver, Toronto: Douglas & McIntyre, 1995) at 55.

[523] The procurement (by hunting and trading) and exportation of furs remained the principal business of the Russians until the middle of the nineteenth century; see J. R. Gibson, *Imperial Russia in Frontier America: The Changing Geography of Supply of Russian America, 1784-1867* (New York: Oxford University Press, 1976) at 32.

[524] This is a phrase used by poets like Blake and his contemporaries to describe how the scientists and philosophers denoted humans as being detached from life reality and as critically observing the world from the outside.

[525] J. Burrows & L. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary* (Toronto: Butterworths Canada Ltd., 1998) at 8.

[526] J.Y. Henderson, M.L. Benson & I. M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell Thomson Professional Publishing, 2000) at 90.

[527] Susan J. Herlin, University of Louisville, online: *Ancient African Civilizations to ca. 1500: Text Supplement and Study Guide for History/PAS 393* <http://www.louisville.edu/a-s/history/herlin/textsup.htm>, accessed April 1, 2009.

[528] *Ibid.*

[529] Stannard, *supra* note 142 at 21.

[530] N.D. Cook, *Demographic Collapse: Indian Peru, 1520-1620* (Cambridge: Cambridge University Press, 1981) at 108; H.F. Dobyns, *Their Number Become Thinned: Native American Population Dynamics in Eastern North America* (Knoxville: University of Tennessee Press, 1983) at 38 (as quoted in Stannard, *supra* note 142 at 22).

[531] Stannard, *supra* note 142 at 25.

[532] *Ibid.* at 22.

[533] "Potlatch" in Frederick E. Hoxie, ed., *Encyclopedia of North American Indians* (Boston, New York: Houghton Mifflin Company, 1996) at 509; see also: B. Donovan, *The Common Law Basis of Aboriginal Entitlements to Land in Canada: The Law's Crooked Path* (Winnipeg: University of Manitoba, 2001) at 8; B. Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of Delgamuukw" (2001) 35 U.B.C.L. Rev. 1.

[534] "Potlatch," *supra* note 533 at 509.

[535] *Ibid.*

[536] Ellie Crystal Metaphysical and Science Website, online: Cree Nation <www.crystalinks.com/cree.html>, accessed April 1, 2009.

[537] *Ibid.*

[538] *Ibid.* The use of the term "band" is an example of incorporation of modern terms into the past. Did the Native Cree call themselves bands? Are these bands the same as the bands as we currently know them? The answer is emphatically not! They were sub-tribes or clans.

[539] *Supra* note 536.

[540] Badcock, *supra* note 429.

[541] *Supra* note 536.

[542] *Ibid.*

[543] Badcock, *supra* note 429.

[544] *Supra* note 536.

[545] Burrows, *supra* note 525 at 8.

[546] Public Anthropology, online: American Anthropologist 1911 <http://www.publicanthropology.org/Archive/Aa1911.htm>, accessed April 21, 2009.

[547] Sagard is remembered for his writings on New France and the Hurons in *Le grand voyage au pays des Hurons* (Paris, 1632); *L'histoire du Canada* (1636), which includes a revised and expanded *Le grand voyage* and *Dictionnaire de la langue huronne*. An English translation of *Le grand voyage* by historian George M. Wrong was published by the Champlain Society in 1939 under the title *Sagard's Long Journey to the Country of the Hurons* and is available online at the Champlain Society website.

[548] Reference.com, online: Gabriel Sagard <http://www.Reference.com/Encyclopedia/Gabriel Sagard>, accessed August 27, 2002.

[549] Joseph Brant (Thyendanegea), Indians.org, online: Mohawk <www.indians.org/welker/brant.htm>, accessed April 1, 2009.

[550] *Ibid.*

[551] *Ibid.*

[552] Nova Scotia Archives and Records Management, online: Mi'kmaq Holding Resource Guide <www.gov.ns.ca/nsarm/virtual/mikmaq/>, accessed April 1, 2009.

[553] Noel Knockwood, Mi'kmaq Elder and Spiritual Leader, *Excerpt from an Address to the Federation of Newfoundland Indians, 1982*; in records of the Micmac Association of Cultural Studies, MG 20, vol. 3088.; see also Nova Scotia Archives and Records Management, online: Mi'kmaq Holding Resource Guide <www.gov.ns.ca/nsarm/virtual/mikmaq/>, accessed April 1, 2009.

[554] Daniel N. Paul, "We Were Not Savages – First Nations History" online: British Scalp Proclamations <www.danielnpaul.com/BritishScalpProclamation-1749.html>, accessed April 1, 2009.

[555] *Ibid.* It should be noted that treaties were signed later in the 1600s when the British encountered stiffer resistance.

[556] *Ibid.*

[557] See *Report of the Select Committee of the British House of Commons on Aborigines, 1837* at 6; Upton, *supra* note 430 at 150.

[558] J.C. Smith, "The Concept of Native Title," (1975) 24 U. of T. L.J. 1 at 1-3.

[559] Information was sought from the Elders of Tadoule Lake. There are too many elders to mention, but the one who stood out the most was John Clipping. He was the chief in 1964. I lived with him, fished with him and he visited me in The Pas. Others include former chiefs Gladys Powderhorn, Moses Powderhorn, David Thorassie, and Sarah Cheekie, who was also the administrator of the nursing station where I worked and lived at Tadoule Lake. Ila Bussidor, Steven Thorassie, Fred Duck, Sammy Bussidor, Joe Thorassie, Jimmy Clipping and, best of all, Betsy Anderson. At the age of about 70, she could well have been the oldest person in the community at that time.

[560] Elders of Tadoule Lake, *supra* note 559.

[561] *Ibid.*; see also J. Ryan, Excerpt from Final Report: "Traditional Dene Justice Project, 1983" [unpublished]. Pieces of the survey were first given to me in 1985 by Mr. John Carton, who was the principal of the Lac Brochet Elementary School from the 1970s to the late 1980s. I later came upon a more organized version that was also not complete. Supplied by L. Chartrand, "Course Manual: Studies In Human Rights Aboriginal Law Course Code: DCL 5123 / CML 3162" (2001) [unpublished, archived at: University of Ottawa] at 96.

[562] Ryan, *supra* note 561; Chartrand, *supra* note 561 at 96. Ms. Ryan made this observation. The elders from Tadoule Lake, however, were more protective than Ryan suggests. We may be dealing with two different periods, since Ryan did not seem to draw a strict line between pre- and post-contact periods the way I do.

[563] The details on the location of most of these tribes has come from Compact History, online: Geographic Overview <http://www.dickshovel.com/up.html>, accessed April 1, 2009; Access Genealogy, Indian Tribal Records, online: North American Indian Tribes <http://www.accessgenealogy.com/native/indianlocation.htm>, accessed April 1, 2009; Encyclopedia.com, online: North American Natives <http://www.encyclopedia.com/topic/North_American_Natives.aspx>, accessed April 1, 2009; W.C. Sturtevant, "Early Indian Tribes, Culture Areas, and Linguistic Stocks" in *National Atlas of the United States* (Reston, Virginia: Department of the Interior, 1967).

[564] This term is very appropriate for several reasons. First, Cabot did not know where he landed in North America. Second, the North American got in the way of Cabot, who was sailing to Asia, so his landing was purely accidental. Third, there is a robust debate as to his arrival in Virginia. See Croxton, *supra* note 489.

[565] Badcock, *supra* note 429 at 12.

[566] Language Log, online: Thoughts on the Pericu <http://itre.cis.upenn.edu/~myl/languagelog/archives/001441.html>, accessed April 1, 2009.

[567] Scientifically, specimens that prove the origin of man found in Africa and Asia are lacking in America. Some authors totally reject the *in situ* theory; see Robert McGhee, *Ancient Canada* (Ottawa: Canadian Museum of Civilization/Libre Expression, 1989) at 12.

[568] Examples are the Blackfoot in present-day southern Alberta and Montana who have legends of being created where they are. See John Ewers, *The Blackfeet: Raiders on the NorthWestern Plains* (Norman: University of Oklahoma Press, 1958) at 3-4. Finally the Mandans and the Navaho have traditions of migration.

[569] For a discussion of the Beringian theory, see Alice Kehoe, *North American Indians: A Comprehensive Account*, 2nd ed. (Englewood Cliffs, NJ: Prentice-Hall, 1992) at 2.

[570] Language Log, online: Thoughts on the Pericu <http://itre.cis.upenn.edu/~myl/languagelog/archives/001441.html>, accessed April 1, 2009.

[571] *Ibid.*

[572] *Ibid.*

[573] The movement was so slow that these people were no longer Asians by the time they reached America.

[574] Stannard, *supra* note 142 at 10.

[575] *Ibid.* at 17; for further details, consult *Encyclopedia of Indians of the Americas*, Keith Irvine, ed., vol. 1 (Michigan: Scholarly Press Inc, 1974) at "Adena Culture"; R. Silverberg, *Mound Builders of Ancient America* (Greenwich, Connecticut: New York Graphic Society Ltd., 1968).

[576] Stannard, *supra* note 142 at 17.

[577] For details, consult L.N. Shaffer, *Native Americans Before 1492: The Moundbuilding Centers of the Eastern Woodlands* (Armonk, NY; M.E. Sharpe, 1992).

[578] *Ibid.*

[579] W. Dancey, "The Enigmatic Hopewell of the Eastern Woodlands" in T.R. Pauketat & D.D. Loren, eds., *North American Archaeology* (Malden: Blackwell Publishing Ltd., 2005) at 123.

[580] See generally Shaffer, *supra* note 577.

[581] *Ibid.*

[582] Stannard, *supra* note 142 at 18.

[583] Dancey, *supra* note 579.

[584] *Ibid.* at 108-137.

[585] *Ibid.*

[586] Stannard, *supra* note 142 at 18.

[587] Dancey, *supra* note 579 at 114.

[588] Minnesota State University, online: Hopewell <www.mnsu.edu/emuseum/prehistory/northamerica/culture/plains/hopewell2.html>, accessed April 2, 2009.

[589] Dancey, *supra* note 579.

[590] Minnesota State University, *supra* note 588.

[591] Dancey, *supra* note 579.

[592] J.B. Griffin, "The Midlands" in J.D. Jennings, ed., *Ancient North Americans* (New York: W.H. Freeman and Company, 1983) at 255-265.

[593] Dancey, *supra* note 579 at 117.

[594] C.E. Snow, "Adena Portraiture" in W.S. Webb & R.S. Baby, eds., *The Adena People*, number two (Columbus: Ohio Historical Society, 1957) at 47-53 (as quoted in Stannard, *supra* note 142 at 18).

[595] For artifacts from Hopewell culture, consult N.B. Greber & K.C. Ruhl, *The Hopewell Site: A Contemporary Analysis Based on the Work of Charles C. Willoughby* (Boulder: Westview Press, 1989).

[596] Snow, *supra* note 594.

[597] Stannard, *supra* note 135 at 18.

[598] For details of trading posts see Griffin, *supra* note 592 at 254-267.

[599] Griffin, *supra* note 592.

[600] Stannard, *supra* note 142 at 19.

[601] For the spatial relationship between the Hopewell and the Mississippi cultures, see C. Waldman, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985).

[602] Some authors put this figure at 40,000 – 45,000; see M.L. Gregg, "A Population Estimate for Cahokia" (1975) Perspectives in Cahokia Archaeology: Illinois Archaeological Survey Bulletin 10126.

[603] Stannard, *supra* note 142 at 32.

[604] *Ibid.* at 32.

[605] *Ibid.*

[606] University of Tennessee Center for Transportation Research, online: "Cultural Periods in Tennessee" <http://deep13.ra.utk.edu/tc/arch/miss1.html>, accessed April 2, 2009.

[607] Stannard, *supra* note 142 at 38.

[608] F.V. Hayden, "Contributions to the ethnography and philology of the Indian tribes of the Missouri Valley" (1862) 12:2 Transactions of the American Philosophical Society 231-461; F.W. Hodge, ed., *Handbook of American Indians North of Mexico* (New York: Rowman and Littlefield, 1971).

[609] R.C. Hollow & D. Parks, "Studies in Plains Linguistics: A Review" in W.R. Wood & M.P. Liberty, eds., *Anthropology on the Great Plains* (Lincoln: University of Nebraska Press, 1980) at 68-97; G. Will & H. J. Spinden, "The Mandans: A Study of Their Culture, Archaeology and Language" (1906) 3:4 Papers of the Peabody Museum of American Archaeology and Ethnology at 81.

[610] B. Pritzker, *A Native American Encyclopedia: History, Culture and Peoples* (New York: Oxford University Press, 2000) at 336-337.

[611] *Ibid.*

[612] E.J. Dodson, Civilizations under Siege - The European Conquest of the Americas, online: Viking settlement and the Mandans <http://www.let.rug.nl/usa/E/conquest/siege01.htm>, accessed April 2, 2009.

[613] See generally William Clark, *The Field Notes of Captain William Clark, 1803-1805* (New Haven, CT: Yale University Press, 1964).

[614] Pritzker, *supra* note 610.

[615] Knife River Indian Villages, online: Teacher's Guide History <http://www.nps.gov/archive/knri/teach/history.htm>, accessed April 8, 2009; G. Jahoda, *Trail of Tears: The Story of the American Indian Removals, 1813-1835* (New York: Wings Books, 1975); "Mandan" in Sharon Malinowski, ed., *The Gale Encyclopedia of Native American Tribes,* vol. 3 (Detroit: Gale, 1998).

[616] Malinowski, *supra* note 615; Dodson, *supra* note 612; Will, *supra* note 609 at 81.

[617] Incidentally, Lewis and Clark took Chief Four Bear to meet President Jefferson. The Chief is believed to have died in Washington; see Clark, *supra* note 613; see also Jefferson River.org, online: Lewis and Clark on the Jefferson River <http://www.jeffersonriver.org/Lewis_and_Clark.htm>, accessed April 21, 2009.

[618] This version is depicted in the 1970 film *A Man Called Horse*, starring Richard Harris.

[619] Stannard, *supra* note 142 at 128.

[620] Some estimates are much lower – see UK.Geocities.com, online: Eyewitness History of America 1827-1842 <http://uk.geocities.com/haywardlass/page8.html>, accessed April 21, 2009.

[621] Paul Allen, ed., *History of the Expedition under the Command of Captains Lewis and Clark to the sources of the Missouri, across the Rocky Mountains, down the Columbia River to the Pacific in 1804-1806* (New York: New Amsterdam Book Company, 1902).

[622] See generally C. Wissler, "Blackfoot Indians in Ontario" *Archæological Report for 1905* (Toronto, 1906).

[623] NewAdvent.org, *The Catholic Encyclopedia*, online: Blackfoot Indians <http://www.newadvent.org/cathen/02590d.htm>, accessed on April 2, 2009.

[624] Wissler, *supra* note 622.

[625] Alexander Mackenzie, *The Journals and Letters of Sir Alexander Mackenzie, 1786–1819*, W. Lamb, ed., (Toronto: Macmillan, 1970).

[626] Wissler, *supra* note 622.

[627] Badcock, supra note 429.

[628] D.G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical and Comparative study* (Regina: Canadian Plains Research Centre, 1979).

[629] Some sources present the situation in such a way that it appears that the Blackfoot are roaming aimlessly all over the place - e.g. NewAdvent, *The Catholic Encyclopedia*, online: Blackfoot Indians <http://www.newadvent.org/cathen/02590d.htm>, accessed on April 2, 2009.

[630] Mandelbaum, *supra* note 628.

[631] K. Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

[632] A. Arzoz, The Peoples of the World Foundation, online: The Crow <http://www.peoplesoftheworld.org/hosted/crow>, accessed April 2, 2009.

[633] *Ibid.*

[634] *Ibid.*

[635] *Ibid.*

[636] *Ibid.*

[637] *Ibid.*

[638] *Ibid.*

[639] *Ibid.*

[640] Mandelbaum, *supra* note 628.

[641] Pettipas, *supra* note 631.

[642] The Electronic Encyclopedia of Chicago, online: Marquette's Map <www.encyclopedia.chicagohistory.org/pages/3603.html>, accessed April 2, 2009.

[643] R.E. Bohlander, ed., *World Explorers and Discoverers* (New York: Macmillan, 1992).

[644] Rebecca Brush, TexasIndians.com, online: The Wichita Indians <www.texasindians.com>, accessed April 7, 2009.

[645] *Ibid.*; Todd F. Smith, *The Wichita Indians: Traders of Texas and the Southern Plains, 1540-1945* (College Station, TX: Centennial Series of the Association of Former Students, Texas A&M University, 2000).

[646] Brush, *supra* note 644.

[647] *Ibid.*

[648] ComancheLodge, online: Wichita Indian Tribe <www.comanchelodge.com/nations/wichita-tribe.html>, accessed April 2, 2009.

[649] Brush, *supra* note 644.

[650] NativeAmericans.com, online: Wichita <www.nativeamericans.com/Wichita.htm>, accessed April 2, 2009.

[651] Smith, *supra* note 638.

[652] Ken Martin, CherokeeHistory, online: First European Contact <http://cherokeehistory.com/firstcon.html>, accessed April 2, 2009.

[653] Donald E. Sheppard and Jeremiah Wolfe, FloridaHistory.com, online: Fire in the Mountains <http://floridahistory.com/inset2.html>, accessed April 2, 2009.

[654] *Ibid.*

[655] *Ibid.*

[656] *Ibid.*

[657] *Ibid.*

[658] The second theory is based on Ken Martin, CherokeeHistory, online: The Legend of the Keetoowah <http://cherokeehistory.com/legendke.html>, accessed April 2, 2009.

[659] *Ibid.*

[660] *Ibid.*

[661] *Ibid.*

[662] Michael Rutledge, CherokeeHistory.org, online: Cherokee Law - Excerpt from Forgiveness in the Age of Forgetfulness <http://cherokeehistory.com/law.html>, accessed April 8, 2009.

[663] Statement of Patrick Charles, Koosharem Band, Paiute Indian Tribe of Utah, before the House Interior and Insular Affairs Committee on H.R. 2898, July 14, 1983.

[664] Stannard, *supra* note 142 at 32.

[665] Gerald Caplan, Rabble.ca, online: In Their Own Words, <http://www.rabble.ca/politics.shtml?x=53871>, accessed December 26, 2006.

[666] *Ibid.*

[667] *Supra* note 488.

[668] One anxious colonist wrote in anguish: "The Tribes were the 'rightful owners of the soil in the Protectorate,' and the Chiefs were unlikely to agree that any change of ownership might be for their own good" – Dispatch No. 143 of 29 Sept. 1877, from Freeling to Carnarvon; CO/96/121 (as cited in Kimble, *supra* note 29 at 17).

[669] Pope Nicholas V (1447-1455), in exchange for a favourable response by the Crown in Lisbon to a papal request for the outfitting of a future planned crusade against the Turks, issued the first of a series of papal bulls effectively granting a title and trading monopoly to Portugal in Africa in 1452.

[670] An ascendant Portuguese mercantile class greatly encouraged expansion of Portuguese colonies in West Africa.

[671] Williams Jr., *supra* note 161.

[672] Consult E. W. Bovill, *The Golden Trade of the Moors* (London: Oxford University Press, 1958); see especially chapter 22. See also Kimble, *supra* note 29 at 1.

[673] Kimble, *supra* note 29 at 11.

[674] The Portuguese encountered strong opposition to the construction of their first Gold Coast fort, and were never welcome in the surrounding country; see Blake, *supra* note 29, vol. I at 43-44.

[675] The other factors will be outlined later.

[676] Moure is less than ten miles from the Elmina Castle and less than three miles from the Cape Coast Castle.

[677] See generally Ajayi, *supra* note 453; Oliver, *supra* note 460.

[678] Dispatch no. 143 of Sept. 29, 1877, from Freeling to Carnarvon; CO/96/121 (as cited in Kimble, *supra* note 29 at 17).

[679] In fact, where British interests could not be protected by the informal methods of commercial expansion, local administrators were only too eager to extend their formal sovereignty. A case in point was the south-east corner of the Gold Coast, where the essential interaction between economic and political imperialism is illustrated by a process that might be called the extension of the "smugglers' frontier." In 1878 the local Commissioner, Lieutenant A.B. Ellis, attempted to put down smuggling by force, but this led immediately to disturbances, and soon afterwards to fresh treaties ceding further territory along the seaboard to Britain (as narrated in Kimble, *supra* note 29 at 12).

[680] Ajayi, *supra* note 453.

[681] It was the opposition of the Chiefs, rather than the adverse climate, that kept the European merchants from venturing into the interior or seeking territorial conquests. Later, African traders jealously resisted any attempt to usurp their functions as middlemen between the coast and the interior. See K.O. Dike, *Trade and Politics in the Niger Delta, 1830-1885* (Oxford: The Clarendon Press, 1956) at 6-7.

[682] Boxer, C.R., *The Portuguese Seaborne Empire 1415-1825* (London: Hutchinson, 1969) at 15-38; Blake, *supra* note 29, vol. I at 50 and vol. II at 270; see also Kimble, *supra* note 29 at 1.

[683] Blake, *supra* note 29, vol. I at 50 and vol. II at 270; see also Kimble, *supra* note 29 at 1.

[684] West-Indische Compagnie (or WIC) was a company of Dutch merchants. On June 3, 1621, the Dutch West Indian Company was granted a Charter for a trade monopoly in the West Indies by the Republic of the Seven United Netherlands and was given jurisdiction over the African slave trade.

[685] "Report from the Committee on the West Coast of Africa; Together with the Minutes of Evidence, Appendix, and Index" in Rebecca Scott, Thomas Holt, Frederick Cooper and Aims McGinness, eds., *Societies After Slavery: A Select Annotated Bibliography of Printed Sources on Cuba, Brazil, British Colonial Africa, South Africa, and the British West Indies* (Pittsburgh, PA: University of Pittsburgh Press, 2002) at 162.

[686] Kimble, *supra* note 29 at 11.

[687] *Ibid.*

[688] *Report on the Economic Agriculture of the Gold Coast* (London, 1890) at 32 (as quoted in Kimble, *supra* note 29 at 8).

[689] Kimble, *supra* note 29 at 2.

[690] *Report on the Economic Agriculture of the Gold Coast* (London, 1890) at 32 (as quoted in Kimble, *supra* note 29 at 8).

[691] W. Brandon, *New Worlds for Old: Reports from the New World and Their Effect on the Development of Social Thought in Europe, 1500-1800* (Athens: Ohio University Press, 1986) at 60.

[692] Bartlett, *supra* note 471 at 10.

[693] The section dealing with Cartier's voyages is based on Miller, *supra* note 512.

[694] Brandon, *supra* note 691 at 60.

[695] For other proof of Indian hospitality, see G.M. Asher, ed., *Henry Hudson the Navigator*, reprint ed. (New York: Burt Franklin, 1953; first published 1860) at 114-115.

[696] Cartier's narrative of 1534 in H.P. Biggar, *The Voyages of Jacques Cartier* (Ottawa: King's Printer 1924) at 64-65 (as cited in Miller, *supra* note 512 at 3).

[697] Miller, *supra* note 512 at 3.

[698] O. Lissitzyn and F. Mann, *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800* (New York: Columbia UP, 1938) at 7.

[699] "Long live the King of France" is not a farewell gesture.

[700] Miller, *supra* note 512 at 6.

[701] *Ibid.* at 23.

[702] *Ibid.*

[703] *Ibid.* at 24.

[704] *Ibid.* at 25.

[705] *Ibid.* at 25-26.

[706] As we shall discover, the explorers were prone to kidnapping the Indigenous peoples and smuggling them to Europe.

[707] Cartier's narrative of 1534, in Biggar, *supra* note 696 at 53; see also Miller, *supra* note 512 at 25-26.

[708] Miller, *supra* note 512 at 26.

[709] *Ibid.*

[710] W. J. Eccles, *The Canadian Frontier 1534-1760* (New York: Holt, Rinehart and Winston 1969) at 15. See also C.J. Jaenen, *Friend and Foe: Aspects of French Amerindian Cultural Contact in the Sixteenth and Seventeenth Centuries* (New York: Columbia University Press 1976) at 12-13.
See also Miller, *supra* note 512 at 26-27.

[711] Miller, *supra* note 512 at 27.

[712] Compare that to Ghana, where even the members of the same tribe had to trade their goods through the representatives selected by the Chief.

[713] Miller, *supra* note 512 at 26ff.

[714] *Ibid.* at 27. The situation is similar to what befell the new settlers in Jamestown. See W. Murray, TimePage.org, online: 13 Originals - Founding the American Colonies <http://www.timepage.org/spl/13colony.html>, accessed last modified November 12, 2006.

[715] Miller, *supra* note 512 at 27.

[716] This would not have happened in Ghana (West Africa) without compensation or war.

[717] Especially when the cross was left unprotected.

[718] This is a common story passed down from generation to generation.

[719] Cartier's narrative of 1534 in Biggar, *supra* note 696 at 60. See also Miller, *supra* note 512 at 27-28.

[720] Miller, *supra* note 512 at 28.

[721] See Stannard, *supra* note 142.

[722] See generally, Roelofsen, *supra* note 109.

[723] Miller, *supra* note 512 at 29.

[724] This hypothesis is not impossible due to situations exemplified by Squanto's account, as well as by The Great Plague of 1616-17, which killed between one third and perhaps as much as 80 per cent of the Indians of southern New England; see Duane A. Cline, RootsWeb, online: The Pilgrims and Plymouth Colony - 1620 <http://www.rootsweb.com/~mosmd/squanto.htm>, accessed April 2, 2009.

[725] Miller, *supra* 512 at 29.

[726] *Ibid.* at 30.

[727] *Ibid.* at 31.

[728] *Ibid.* at 32.

[729] Compare that to the situation in Ghana (West Africa), where middlemen were professionals within their own clan or tribe. The producer could live in the same house with that middleman and the division of labour still applied.

[730] The Franciscans known as the *Récollets* were friars desirous of devoting themselves to prayers, penance and spiritual recollection. The first *Récollet* missionaries arrived from Rouen on June 2, 1615 and settled in Quebec City. O.M. Jouve, *Dictionnaire, biographique des Récollets missionaires en Nouvelle-France, 1615-1645, 1670-1849, province franciscaine Saint-Joseph du Canada*, trans., (Saint Laurent, Quebec: Bellarmin, 1996).

[731] Miller, *supra* note 512 at 34-35.

[732] Jouve, *supra* note 730

[733] F. Parkman, *France and England in North America: A Series of Historical Narratives* (Boston: Little, Brown, and Company, 1877). Original from the University of Michigan, digitized Feb 17, 2006, part 2.

[734] Miller, *supra* note 512 at 35.

[735] P.F.X. de Charlevoix, *History and General Description of New France*, J.G. Shea, trans. (Chicago: Loyola University Press 1870; first published Paris 1743) at IV at 198; quoted in Miller, *supra* note 512 at 34.

[736] Roelofsen, *supra* note 109.

[737] See generally, P.G. Cornell, J. Hamelin, F. Ouellet and M. Trudel, *Canada: Unity in Diversity* (Toronto: Holt, Rinehart and Winston, 1967).

[738] This is similar to the reluctance of the British to colonize Ghana (West Africa), though there were no orders barring the traders from settling.

[739] This was the year that the Hudson Bay Company received its Charter; for full text see Appendix D.

[740] Miller, *supra* 512 at 30.

[741] *Ibid.*

[742] In West Africa, some people made it their job to be middlemen and that is all they did. Even the European traders had to sell their goods through middlewomen ("Makola women"). This still occurs in Ghana. The fishermen cannot not sell their catch directly to the public, or they risk boycott. They get more for their catch by selling it to "middlewomen" (fish mongers), who in turn sell the fish to the public.

[743] These women are very aggressive commercial entrepreneurs who act as "middlewomen" between exporters and the consumers. They would tan the hide of any exporter who dares sell directly to the public within their market.

[744] Patrick Charles, Koosharem Band, Paiute Indian Tribe of Utah, before the House Interior and Insular Affairs Committee on H.R. 2898, July 14, 1983.

[745] Europeans who came from Europe to trade (Cartier, de La Vérendrye, etc.) and returned to Europe as opposed to the colonists who had made America their abode.

[746] The account of Roanoke does not mention the names of the scouts who influenced Sir Walter Raleigh (K. O. Kupperman, "Roanoke: Lost and Found" (1986) 14 American History at 55-60).

[747] Paul Allen, ed., *History of the Expedition under the Command of Captains Lewis and Clark to the Sources of the Missouri, across the Rocky Mountains, down the Columbia River to the Pacific in 1804-1806* (New York: New Amsterdam Book Company, 1902).

[748] R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991). For the accomplishment of de La Salle, see Civilization.ca, The Virtual Museum of New-France, online: Cavelier de La Salle <http://www.civilization.ca/cmc/explore/virtual-museum-of-new-france/explorers/the-virtual-museum-of-new-france-cavelier-de-la-salle2>, accessed April 2, 2009.

[749] ComancheLondge.com, online: Wichita Indian Tribe <www.comanchelodge.com/nations/wichita-tribe.html>, April 2, 2009.

[750] For instance, Meriwether Lewis (1774-1809) and William Clark (1770-1838) who set out in May 1804 to explore and map the American West were accompanied by the Shoshone Indian guide and interpreter Sacajawea (also spelled Sacagawea).

[751] Examples of such praises are:

1. Chieftain Powhatan, who literally kept the settlers of Jamestown alive by providing them with much of their food in that first year.
2. Squanto continued with the Pilgrims, becoming their interpreter refered to as a special instrument sent of God for their good beyond their expectation. Yet, there are scanty records of Indian friendliness but numerous records of Indian hostility against the settlers.

[752] Knife River Indian Villages, online: Teacher's Guide History

<http://www.nps.gov/archive/knri/teach/history.htm>, accessed April 8, 2009; Allen, *supra* note 747.

[753] Stannard, *supra* note 135 at 128.

[754] See generally Allen, *supra* note 747.

[755] *Ibid.*

[756] *Ibid.*

[757] Some estimates are much lower – see UK.Geocities.com, online: Eyewitness History of America 1827-1842 <http://uk.geocities.com/haywardlass/page8.html>, accessed April 21, 2009.

[758] Mackenzie, *supra* note 625.

[759] Clark, *supra* note 613.

[760] Stannard, *supra* note 142 at 128.

[761] Jaenen, *supra* note 710 at 122-123 (as cited in Miller, *supra* note 512 at 60-61).

[762] Knife River Indian Villages, *supra* note 752; Allen, *supra* note 747.

[763] Mandelbaum, *supra* note 628.

[764] A. Arzoz, The Peoples of the World Foundation, online: The Crow <http://www.peoplesoftheworld.org/hosted/crow>, accessed April 2, 2009.

[765] See also G. Valencia-Weber, "The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets" (2003) 5 U. Pa. J. Const. L. 405.

[766] Arzoz, *supra* note 764.

[767] *Ibid.*

[768] Allen, *supra* note 747.

[769] AccessGenealogy, online: Omaha Indian Tribe History <http://www.accessgenealogy.com/native/tribes/omaha/omahahist.htm>, accessed April 21, 2009; see also John Joseph Mathews, *The Osages: Children of the Middle Waters* (University of Oklahoma Press 1961).

[770] Bohlander, *supra* note 643.

[771] *Ibid.*

[772] ComancheLodge.com, online: Wichita Indian Tribe <www.comanchelodge.com/nations/wichita-tribe.html>, accessed April 2, 2009.

[773] Bohlander, *supra* note 643.

[774] NativeAmericans.com, online: Wichita <www.nativeamericans.com/Wichita.htm>, accessed April 2, 2009.

[775] *Ibid.*

[776] Smith, *The Wichita Indians*, *supra* note 645.

[777] For details see Stannard, *supra* note 142 at 121ff.

[778] Ken Martin, CherokeeHistory, online: First European Contact <http://cherokeehistory.com/firstcon.html>, accessed April 2, 2009.

[779] *Ibid.*

[780] *Ibid.*

[781] Donald E. Sheppard & Jeremiah Wolfe, FloridaHistory.com, online: Fire in the Mountains <http://floridahistory.com/inset2.html>, accessed April 2, 2009.

[782] Ken Martin, CherokeeHistory, online: Initial Contacts with the English Colonists <http://cherokeehistory.com/initialc.html>, accessed April 2, 2009.

[783] *Ibid.*

[784] *Ibid.*

[785] Ken Martin, CherokeeHistory.org, online: 1700 Through the Revolutionary War <http://cherokeehistory.com/1700thro.html>, accessed April 2, 2009.

[786] *Ibid.*

[787] Lee Sultzman has compiled an excellent and thorough chronology of treaties, see Lee Sultzman, CherokeeHistory.org – Cherokee History Resources on the Web, online: Cherokee History <http://www.tolatsga.org/Cherokee1.html>, accessed April 2, 2009.

[788] Ken Martin, CherokeeHistory.org, online: 1700 Through the Revolutionary War <http://cherokeehistory.com/1700thro.html>, accessed April 2, 2009.

[789] Ken Martin, CherokeeHistory.org, online: Cherokee Images 1800 to 1838 <http://cherokeehistory.com/image1a.html>, accessed April 4, 2009.

[790] Fred Olsen, *On the Trail of the Arawaks* (Norman: University of Oklahoma Press, 1974) at 342; see also Stannard *supra* 142 at 121.

[791] Carl Ortwin Sauer, *The Early Spanish Main* (Berkeley: University of California Press, 1966) at 58-59; Robert S. Weddle, *Spanish Sea: The Gulf of Mexico in North American Discovery, 1800-1688* (College Station: Texas A&M University Press, 1985) at 28 (as cited in Stannard, *supra* note 142 at 121).

[792] *Ibid.* at 69.

[793] J.H. Elliott, "The Discovery of America and the Discovery of Man" (1972) Proceedings of the British Academy 58 at 119 (as cited in Stannard, *supra* note 142 at 122).

[794] William Brandon, *New Worlds for Old: Reports from the New World and Their Effect on the Development of Social Thought in Europe, 1500-1800* (Athens: Ohio University Press, 1986) at 60 (as referred to in Stannard, *supra* note 142 at 122).

[795] Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975) at 39 (as cited in Stannard, *supra* note 142 at 122).

[796] Stannard, *supra* note 142 at 122.

[797] Morgan, *supra* note 795 at 40 (as cited in Stannard, *supra* note 142 at 122).

[798] Stannard, *supra* note 142 at 122; see also John C. Super, *Food, Conquest, and Colonization in Sixteenth-Century Spanish America* (Albuquerque: University of New Mexico Press, 1988) at 79-88.

[799] Stannard, *supra* note 142 at 122, referring to Jane E. Buikstra, ed., *Prehistoric Tuberculosis in the Americas* (Evanston: Northwestern University Archaeological Program, Scientific Papers Number 5, 1981) at 18; Brenda J. Baker and George J. Armelagos, "The Origin and Antiquity of Syphilis" (1988) Current Anthropology 29 at 703-720; see also the commentaries following the Baker and Armelagos article and Henry F. Dobyns, "On Issues in Treponemal Epidemiology" (1989) 30 Current Anthropology at 342-343; see also Stannard, *supra* note 142 at 123.

[800] Mackenzie, *supra* note 625.

[801] Bordewich, *supra* note 505 at 18-19.

[802] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press. 1990) at chapter 1.

[803] *Ibid.*

[804] I have substituted "nation" for "people" or "person."

[805] Minow, *supra* note 802 at chapter 2.

[806] *Ibid.* at 50-78.

[807] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) (as cited in Anghie, *supra* note 4 at 25).

[808] de Smith, *supra* note 116 at 348.

[809] Peter Linebaugh, "(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein" (1985) 60 N.Y.U. L. Rev. at 212.

[810] The Portuguese, in particular, encountered strong opposition to the construction of their first Gold Coast fort and were never welcome in the surrounding country; see Blake, *supra* note 29 at 43.

[811] Len Jeffries, text of a speech at the Empire State Black Arts and Cultural Festival in Albany, New York, July 20, 1991 <http://www.nbufront.org/html/MastersMuseums/LenJeffries/OurSacredMission.html>, accessed Nov 16, 2006.

[812] See generally, Norval Morris & David J. Rothman, eds., *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1995).

[813] See generally Stuart Macintyre, *A Concise History of Australia* (Cambridge: Cambridge University Press 2004); Eric Rolls, *Sojourners* (Brisbane: University of Queensland Press, 1992) at 11.

[814] Upton, *supra* note 430 at 150; D. Bartels, "Time Immemorial? A Research Note on Micmacs in Newfoundland" (1979) 75 Nfld. Quarterly at 6-9; see also Great Britain, Parliament, House of Commons, *Report from the Select Committee on Aborigines, 1837* (London: Parliamentary papers, No.425) at 6.

[815] GSA, Gs 75-103, series 2-14, box i9, A.Y. Blair to S.H. Blake, 27 March 1908; reproduced in Miller, *supra* note 512 at 212.

[816] Miller, *supra* note 512 at 103.

[817] *Ibid.*

[818] *Ibid.* at 103-104.

[819] John Heckewelder, "Indian Tradition of the First Arrival of the Dutch on Manhatten Island" (1841) 1 Collections of the New York Historical Society at 69-74.

[820] Oregon State University, online: Chapter XIII Of the Natural Condition of Mankind as Concerning Their Felicity and Misery <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html>, accessed April 1, 2009.

[821] E.A. Walker, *A History of Southern Africa*, 3d ed. (London: Longman, 1957) at 152.

[822] The treaty for the surrender of the Chippewa of Chenail Ecarte and St. Clair reserved only 23,054 acres out of the original 2.7 million acres. Hunting, fishing and trapping rights were not maintained out side the reservation; see *Indian Treaties and Surrenders from 1680-1902*, 3 vol., reprint ed. (Toronto: Coles, 1971) at vol. 1, 112-113.

[823] Indian lands were taken without surrender because "it is not right that the requirements of the expansion of white settlement should be ignored." Frank Oliver (M.P.), Canada, H.C. Debates, Vol. IV at 7826 (April 26, 1911). When the *Indian Act* was amended to authorize the removal of Indians from reserve lands in or adjacent to towns, a judge agreed and explained that "no one cares to live in the immediate vicinity of the Indians... the Reserve retards and is a clog in the development of the part of the city." *An Act to Amend the Indian Act*, S.C. 1911, c. 14; *Re. Indian Reserve, City of Sydney, Nova Scotia* (1916), 42 D.L.R. 314 (Ex. Ct.). For details see Bartlett, *supra* note 471.

[824] In 1837, the Select Committee of the British House of Commons on Aboriginees noted that the disparity of the negotiating parties and the ambiguity of the terms used in the negotiations invited disputes. They also observed the cupidity of the more powerful Europeans and the abuse of their superior sagacity in framing and interpreting the terms and in evading them. See United Kingdom, Parliament, House of Commons, *Report from the Select Committee on Aborigines, 1837* (London: Parliamentary papers, No.425) at 80.

[825] Anghie, *supra* note 4 at 70.

[826] James Youngblood Henderson, Marjorie L. Benson & Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, ON: Carswell, 2000) at 30.

[827] Lawrence states that "International Law regards states as political units possessed of proprietary rights over definite portions of the earth's surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organised and civilized, to come under its provisions" in Lawrence, *supra* note 96 at 136 (as quoted in Anghie, *supra* note 4 at 27).

[828] *Lone Wolf*, *supra* note 57 at 565.

[829] D.H. Getches, C. F. Wilkinson & R. A. Williams, *Cases and Materials on Federal Indian Law*, 4th ed. (St. Paul, Minn.: West Publishing Company, 1998) at 125.

[830] *Ibid.*

[831] Indian and Northern Affairs Canada, online: Robinson Treaties <www.ainc-inac.gc.ca/pr/trts/rbt2_e.html>, accessed June 27, 2006.

[832] This still seems to be the law – *Delgamuukw*, *supra* note 45. Indigenous people have to give up the land if they choose to use it in a way that is not consistent with their ancient way of life.

[833] *Canadian Charter of Rights and Freedoms,* s. 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[834] Lawrence argues that "Modern International law, being permeated throughout by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental." Lawrence, *supra* note 96 at 190. For the relationship of land to sovereignty, see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977) at 8.

[835] *Delgamuukw*, *supra* note 45.

[836] *Ibid.* at para. 128.

[837] For an examination of the basic elements of two competing theories of Aboriginal rights (the contingent right approach versus the inherent rights approach) and their relationship to subsection 35(1) of the *Constitution Act 1982*, see Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:2 Alberta Law Review at 498. For another example, see Bryan Schwartz, *First Principles, Second Thoughts. Aboriginal Peoples, Constitutional Reform and Canadian Statescraft* (Montreal: Institute for Research on Public Policy, 1986), which supports the view that there is no inherent right to self-government. See also Tom Isaac, "The Constitutionalization of Aboriginal Self-Government in Canada" (1991) 1 C.N.L.R. at 1.

[838] *Canadian Charter of Rights and Freedoms, supra* note 833.

[839] Plenary powers of Congress (USA) and s. 91(24) of the *Constitution Act*, 1867; *Sanderson, supra* note 6.

[840] Both ended up being British colonies. Both settlements originated from charters and both were to be governed by the Royal Proclamation of 1763.

[841] Interestingly, almost all cases that affected Indian culture, life and possession originated as land trials (the Marshall trilogy in the U.S., St. Catherine in Canada). Even those that did not originate as land trials (*Worcester*) ended up with ratios and dicta that involve land use. The American Revolution itself centred on land issues.

[842] Royal Proclamation, *supra* note 78.

[843] Blake, *supra* note 29.

[844] J.F. Ade Ajayi and I. Espie, *A Thousand Years of West African History* (Ibadan: Ibadan University Press, 1965) at 249-250.

[845] J. Mensah Sarbah, *Fanti National Constitution* (London: Cass, 1906) at 61-62.

[846] Pieter De Maress, *Description and Historical Account of the Gold Kingdom of Guinea 1602* (New York: Oxford University Press, 1987) at 98.

[847] *Stool of Abinabina* v. *Chief Kojo Enyimadu (on behalf of the Stool of Nkasawura)* West African Court of Appeal, [Judicial Committee] [1953] A.C. 207 Hearing date: January 12, 1953.

[848] These lawyers were instrumental in the formation of the United Gold Coast Convention (UGCC), which was founded in August 1947. It was the first nationalist movement with the immediate aim of self-government.

[849] Justice Coussey headed an all-African Committee on Constitutional Reform in 1950.

[850] *Leader Post,* November 29, 1938; see also University of Western Ontario, online: Western Law <http://www.law.uwo.ca/Programs/aboriginal.html>, accessed April 2, 2009.

[851] DigitalHistory, online: Native American Voices <http://www.digitalhistory.uh.edu/native_voices/voices_display.cfm?id=39>, accessed April 2, 2009.

[852] Francis Phelphs Weisenberger, *The Life of John McLean, A Politician On the United States Supreme Court* (Columbus, Ohio: The Ohio State University Press, 1937).

[853] John McLean studied law and was admitted to the bar in 1807, which means that James L. McDonald could not have been a lawyer prior to 1807. McLean served as United States Postmaster General from December 9, 1823, to March 7, 1829. That means that he became a Supreme Court Judge on or after 1829, which furthermore means that McDonald became a lawyer between 1807 and 1829; see Weisenberger, *supra* note 853.

[854] The All African Coussey Committee drafted the 1950 constitution; see de Smith, *supra* note 116 at 350.

[855] Lee, *supra* note 2

[856] *Ibid.*

[857] Plenary power of Congress (USA) and s. 91(24) of the *Constitution Act, 1867* (Canada).

[858] The Indigenous peoples' fate could not even have been discussed because independence was attained through war instead of through negotiation. Moreover, the British betrayed their Indigenous allies by not consulting them in the treaty that ensued after the war; see Theodore Draper, *A Struggle for Power: The American Revolution* (New York: Times Books, 1996).

[859] An excellent example is how Adam Thom used the court of Assiniboia to absorb the Indigenous people of Rupert's Land into the Canadian criminal system.

[860] The power to rule was over Hudson Bay employees, not the Indigenous people. See Dale Gibson & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1671-1970* (Winnipeg: Peguis Publishers, 1972); R. Smandych & R. Linden, "Co-existing Forms of Native and Private Justice: An Historical Study of the Canadian West" in K.M. Hazelhurst ed., *Legal Pluralism and the Colonial Legacy* (Westport, CT: Praeger Press, 1995); Russell Smandych & Rick Linden, "Company Discipline in the Hudson's Bay Company 1670-1770" (presentation to the Canadian Law and Society Association, Calgary, 13-15 June, 1994).

[861] The courts of Assiniboia serve as a monument in this regard.

[862] VictoriaTelecommunityNetwork, online: Charter of the Hudson Bay 2 May 1670 <http://victoria.tc.ca/history/etext/hudsons.bay.co.charter.html>, accessed April 2, 2009.

[863] Smandych, "Co-existing Forms of Native and Private Justice: An Historical Study of the Canadian West," *supra* note 860; Smandych, "Company Discipline in the Hudson's Bay Company 1670-1770," *supra* note 860 at 21; Russel Smandych and Karina Sacca, "The Development of Criminal Law Courts in Pre-1870 Manitoba" (1996) 24 Man. L. J. at 201.

[864] Gibson, *supra* note 860 at 3.

[865] Adam Thom was the clerk of the court of Assiniboia. In some instances he acted as both prosecutor and judge and, in one case, he acted as the prosecutor, witness and judge.

[866] Smandych, "The Development of Criminal Law Courts in Pre-1870 Manitoba," *supra* note 863.

[867] Gibson, *supra* note 860 at 4.

[868] The British East India Company is one example.

[869] The French sent troops to fight the Iroquois who were believed to be hampering the fur trade around Montreal between 1640-50; see Miller, *supra* note 512 at 43.

[870] Plenary power of Congress (USA) and s. 91(24) of the *Constitution Act, 1867* (Canada).

[871] It must be noted that even the American settlers, given charters to colonize, were to expand the trading empire of Britain.

[872] See Dike, *supra* note 681 at 6-7.

[873] See Appendix C under Forts and Castles of Ghana.

[874] Blake, *supra* note 29, vol. I at 43-44 (as quoted in Kimble, *supra* note 29 at 1).

[875] Kimble, *supra* note 29 at 3.

[876] Blake, *supra* note 29, vol. II at 343 refers to Richard Eden's writings on John Lok's voyage to Mina, 1554-1555; see also Kimble, *supra* note 29 at 3.

[877] "That is, not only were Gold Coast Africans experienced traders, but they had already brought gold dust, their most durable, portable, and universally acceptable commodity, into something approaching monetary use." See Kimble, *supra* note 29 at 3.

[878] Treaty of March 8, 1876, signed by King, Fetish Priest and Chiefs of "Crackey"; West African Treaties (London, 1892), African (West) No. 411, pt. iii, Gold Coast, no. 22 (ss cited in Kimble, *supra* note 29 at 11).

[879] Kimble, *supra* note 29 at 3.

[880] The British politicians had their hands full answering to the taxpayers in Britain. Lord Salisbury's outburst at the Foreign Office was not an exception. He complained that "Governor R has had no better occupation for his spare time than to annex some place with a forgettable name, near Dahomey on the lagoon. Really, these proconsuls are insupportable... I have implored the Colonial Office to recall Governor R." See Kimble, *supra* note 29 at 13.

[881] Even when Thomas Hughes of Cape Coast had his most modern mining equipment destroyed by the Chief of Wassaw, the British government did not come to his aid; see W. W. Claridge, *A History of the Gold Coast and Ashanti*, vol. I (London: John Murray, 1915) at 86-91.

[882] Miller, *supra* note 512 at 30.

[883] Dispatch no. 143 of September 29, 1877, from Freeling to Carnarvon; CO/96/121; as cited in Kimble, *supra* note 29 at 17.

[884] "There were merchant princes in those days, when such men as the Hon. Samuel Collins Brew, the Hon. George Blankson, the Hon. James Bannerman, Samuel Ferguson, Esq., the Smiths, the Hansens and others flourished.", see Hayford, *supra* note 9 at 95. He might also have mentioned R.J. Ghartey and F.C. Grant (as cited in Kimble, *supra* note 29 at 4-6).

[885] "The independent merchants – who might still be called upon to act as temporary officials and were frequently agitating for a greater voice in the Government – now included a few mulattoes and well-to-do-Africans"; see Kimble, *supra* note 29 at 4-6).

[886] The Company of Merchants Trading to Africa had received nearly £800,000 in subsidies between 1750 and 1807; see *Report from the Select Committee on Papers Relating to the African Forts* (London: 1816) at 109; see also E.C. Martin, *The British West African Settlements, 1750-1821* (London, New York: Longman's Green, 1927) at 150.

[887] A full account of this episode, drawn from Colonial Office correspondence, has been given by F. Wolfson, "A Price Agreement on the Gold Coast-the Krobo Oil Boycott, 1858-1866" (1953) 6 The Economic History Review at 1 (as cited in Kimble, *supra* note 29 at 6).

[888] H.T. Ussher was Lieutenant Governor of the Gold Coast and Lagos at the time, and his name may have been decorously concealed by a change of initial, or simply forgotten. The letter of 12 Nov. 1879,

from Salisbury to Lyons, is quoted by Lady G. Cecil, *Life of Robert Marquis of Salisbury*, vol. IV (London: Hodder and Stoughton, 1932) at 251 (as cited in Kimble, *supra* note 29 at 13).

[889] Kimble, *supra* note 29 at 13.

[890] B. Cruickshank, *Eighteen Years on the Gold Coast of Africa*, vol. II (London: Hurst and Brackett, Publishers, 1853) at 40-43 (as quoted in Kimble, *supra* note 29 at 5).

[891] See Kimble, *supra* note 29 at 10.

[892] Brandon, *supra* note 691 at 60; G.M. Asher, ed., *Henry Hudson the Navigator,* reprint ed. (New York: Burt Franklin, 1953; first published 1860), at 114-115

[893] He noted that he "swam out to receive us . . . with as much confidence as if we had been friends for years" in Miller, *supra* note 512 at 52.

[894] Brandon, *supra* note 691 at 60.

[895] Morgan, *supra* note 795 at 39.

[896] Asher, *supra* note 892 at 114-115.

[897] Morgan, *supra* note 795 at 40 (reproduced in Miller, *supra* note 512 at 53).

[898] Cartier's narrative of 1534, in Biggar, *supra* note 696 at 53; Miller, *supra* note 512 at 26.

[899] Craig Brown, ed., *The Illustrated History of Canada* (Toronto: Lester Publishing Ltd., 1991) at 74.

[900] The roles of the missionaries in West Africa and, in fact, around the world are very similar to the situation in Canada. For that reason this section is a modification of my previous published article: K. Baffoe, "Profile of the Sayisi Dene Nation of Tadoule Lake in Northern Manitoba" (2005) 5 Tribal L.J., online <http://tlj.unm.edu/tribal-law-journal/articles/volume_5/profile_of_the_sayisi_dene_nation_of_tadoule_lake_in_northern_manitoba/index.php>, accessed April 2, 2009.

[901] The Franciscans and the Jesuits accompanied the traders and their aim was to spread Christianity. They were generally not traders in their own right.

[902] For the role of the missionaries in Ghana, consult Kimble, *supra* note 29 at chapter 1.

[903] Miller, *supra* note 512 at 149-150.

[904] One of the reasons offered for the failure of the Coldwater-Narrows experiment at settlement of the Indians was denominational conflict between Methodists and Catholics.

[905] In Ghana, tuberculosis was prevalent in the mining communities such as Obuasi and Prestia.

[906] Kimble, *supra* note 29 at 42.

[907] This is similar in Canada; see Miller, *supra* note 512 at 53.

[908] Kimble, *supra* note 29 at 8.

[909] *Ibid.*

[910] T. West, ed., *The Life and Journals of the Rev. Daniel West* (London: Hamilton, Adams, and Co., 1857) at entry for Nov. 21, 1856 (as cited in Kimble, *supra* note 29 at 8).

[911] Young, *supra* note 82 at 2.

[912] *Ibid.*

[913] Class notes Carl Ridd, from a course titled *Modernity* (Fall 1996), University of Winnipeg, Manitoba.

[914] *Supra* note 884.

[915] Kimble, *supra* note 29 at 5.

[916] *The African Times* (February 22 and May 23, 1868) (as cited in Kimble, *supra* note 29 at 5).

[917] *Ibid.*

[918] *The Gold Coast Times* (April 22 and September 30, 1882) (as quoted in Kimble, *supra* note 29 at 22).

[919] E.L.R. Meyerowitz, *The Sacred State of the Akan* (London: Faber and Faber, 1951) at 197. Referring to the gold mines, W. Bosman stated that "the Negroes esteem them Sacred, and consequently take all possible care to keep us from them." *A New and Accurate Description of the Coast of Guinea* (London: Cass, 1967; reprint of 1705 edition) at 80 (as cited in Kimble, *supra* note 29 at 16).

[920] Claridge, *supra* note 881at 86-91 (as quoted in Kimble, *supra* note 29 at 16).

[921] *Ibid.*

[922] See Kimble, *supra* note 29 at 17-18.

[923] See generally, Bentsi-Enchill, Kwamena, *Ghana land law: An Exposition, Analysis and Critique* (London: Sweet & Maxwell; Lagos, African Universities Press, 1964) at 13-16.

[924] *Ngmati* v. *Adetsia & Ors.* [1959], G.L.R. 323, High Court (Lands Division), Accra, September 29, 1959; *Ohimen* v. *Adjei and Another*, [1957] 2 W.A.L.R. 275, Supreme Court of Ghana, Central Judicial Division, Land Court, Cape Coast (Ollennu J.), March 14, 1957.

[925] *Ohimen*, *supra* note 924; see also Bentsi-Enchill, Kwamena, *Ghana Land Law: An Exposition, Analysis and Critique* (London: Sweet & Maxwell; Lagos, African Universities Press, 1964).

[926] The Chief was referring to the land given to the Government for the development of the Ashanti Goldfields Corporation. The term given means leased but there is no Ashanti term for lease.

[927] *Belfield Report*, as quoted in Kimble, *supra* note 29 at 17-18.

[928] The terms "unoccupied" or "uncultivated land" are often used, but since such land might already "belong" to a family, "un-allotted" seems more appropriate here; see Kimble, *supra* note 29 at 18.

[929] Hayford, *supra* note 9 at 47 (as quoted in Kimble, *supra* note 29 at 18).

[930] Lord Hailey, *Native Administration in the British African Territories*, Part III (London: HMSO, 1951) at 253 (as quoted in Kimble, *supra* note 29 at 18).

[931] Cartier's narrative of 1534, in Biggar, *supra* note 696 at 64-65 (as cited in Miller, *supra* note 512 at 3.)

[932] *Golightly* v. *Ashirifi*, [1961] 1 G.L.R. 28. Judicial Committee of the Privy Council, December 19, 1960; the appellants lost partly because the chiefs involved did not act in concert. The text of the case can be found in Ibiblio, online: Cases in Ghanaian Land Law <www.ghanalandlaw.com>, accessed April 2, 2009.

[933] *Mansu* v. *Abboye and Another* [1982-83] G.L.R. 1313; see also *Lokko* v. *Konklofi* (1907), Ren. 450 (D.C. and F.C.).

[934] Most of the cases below are from the reading list for Professor Kwame Gyan's course, *Immovable Property I: Customary Land Law*, as taught during the Fall Semester of 2004 at the Law Faculty of the University of Ghana. It appears from the syllabus that Professor (and currently Dean) Nii Ashie Kotey was the original compilor of the list, which can be found in Ibiblio, online: Cases in Ghanaian Land Law <www.ghanalandlaw.com>, accessed April 2, 2009.

[935] *Golightly*, *supra* note 932.

[936] Coussey J.A. of the West Africa Court of Appeal is a Ghanaian native.

[937] *Belfield Report* (as quoted in Kimble, *supra* note 29 at 17-18).

[938] *Golightly*, *supra* note 932.

[939] *Ibid.*

[940] *Ibid.*

[941] *Ibid.*

[942] Sarbah, *supra* note 845 at 61-62 (as quoted in Kimble, *supra* note 29 at 19).

[943] Letters of 30 Nov. 1872, from Salmon to Harley, CO/96/94 (as cited in Kimble, *supra* note 29 at 19).

[944] For details consult Boahen, *supra* note 478 at 59-65, 125; Bourret, *supra* note 115 at 40-41 and 131; Hayford, *supra* note 9 at 111-112, 223-224 and 194-195; Kimble, *supra* note 29 at 20.

[945] See Kimble, *supra* note 29 at 21.

[946] For other dealings of African lawyers, see Kimble, *supra* note 29 at 21-22.

[947] By this is meant being represented by a lawyer of their kind.

[948] The British politicians had their hands full answering to the taxpayers in Britain. *Supra* note 88.

[949] The Indians fought on the side of the British, but usually against other European nations and not their own people.

[950] William Murray, TimePage.org, online: 13 Originals – Massachussets <http://www.timepage.org/spl/13colony.html>, accessed April 2, 2009.

[951] See generally R.D. Francis, R. Jones, D.B. Smith, *Journeys: A History of Canada*, rev. ed. (Toronto: Thomson Nelson, 2006); Bartlett, *supra* note 471.

[952] Francis, *supra* note 951at 51.

[953] Parkman, *supra* note 733 at part 3.

[954] The old term was "Minister of the Marine."

[955] For the population of New France, consult:
R.C. Harris, ed., *Historical Atlas of Canada, vol. 1, From the Beginning to 1800* (Toronto: University of Toronto Press, 1987).

[956] The *seigneurial* system in New France has been the subject of copious debate as to its oppressive nature. This debate is beyond the scope of this paper. The reader may consult the following texts for an overview: F. Ouellet, "The Formation of a New Society in the St. Lawrence Valley: From Classless Society to Class Conflict" in J.A. Barbier, ed. and trans., *Economy, Class and Nation in Quebec: Interpretive Essays* (Toronto: Copp Clark Pitman, 1991) at 30ff; R.C. Harris, "New Preface" in *The Seigneurial System in Early Canada: A Geographical Study*, 2nd ed. (Montreal; Kingston: McGill-Queen's University Press, 1984); W.J. Eccles, *The Canadian Frontier 1534-1760* (Toronto: Holt, Rinehart and Winston, 1969).

[957] This term is similar to "lords," "squires" or "gentry" in the English system.

[958] This term is similar to "peasants" in the English system, but whether their rights are the same is debatable. See G. Allan, *Peasant, Lord, and Merchant: Rural Society in Three Quebec Parishes, 1740-1840* (Toronto: University of Toronto Press, 1985).

[959] Francis, *supra* note 951 at 52.

[960] *Ibid.* at 56.

[961] Both the Governor General and the *intendant* were appointed by the king.

[962] Francis, *supra* note 951 at 56.

[963] *Ibid.* at 57.

[964] In English, the Custom of Paris; see also M. Trudel, *Introduction to New France* (Toronto: Holt, Rinehart and Winston, 1968).

[965] *Ibid.* at 156.

[966] *Ibid.*

[967] Francis, *supra* note 951 at 63.

[968] *Ibid.*

[969] *Ibid,* at 64.

[970] *Ibid.* at 63.

[971] D.P. MacLeod, *The Canadian Iroquois and the Seven Years' War* (Toronto: Dundurn Press, 1996).

[972] Francis, *supra* note 951 at 64.

[973] For the map of Canada as perceived by Europe in 1670, consult R.I. Ruggles, *A Country So Interesting: The Hudson's Bay Company and Two Centuries Of Mapping, 1670-1870* (Montreal/Kingston: McGill-Queen's University Press, 1991) at 27.

[974] Francis, *supra* note 951 at 75.

[975] Parkman, *supra* note 733 at Part 3.

[976] Francis, *supra* note 951 at 75.

[977] See generally White, *supra* note 748; G. Kearns, "The Virtuous Circle of Facts and Values in the New Western History" (1998) 88 Annals of the Association of American Geographers 3 at 377ff; Parkman, *supra* note 733.

[978] White, *supra* note 748. For the accomplishments of de La Salle, see Civilization.ca, The Virtual Museum of New-France, Cavelier de La Salle, online: <http://www.civilization.ca/cmc/explore/virtual-museum-of-new-france/explorers/the-virtual-museum-of-new-france-cavelier-de-la-salle2>, accessed April 2, 2009.

[979] White, *supra* note 948.

[980] *Ibid.*

[981] Bartlett, *supra* note 471 at 10; Francis, *supra* note 951 at 80.

[982] *Johnson, supra* note 281at 690.

[983] Francis, *supra* note 951 at 121.

[984] See Appendix F for essentials of the Act.

[985] Francis, *supra* note 951 at 121.

[986] See generally Francis, *supra* note 951.

[987] Archives of Ontario, online: Travels with Elizabeth Simcoe - John Graves Simcoe <http://www.archives.gov.on.ca/english/exhibits/simcoe/john.htm>, accessed March 2007.

[988] Francis, *supra* note 951 at 121.

[989] *Supra* note 987.

[990] Francis, *supra* note 951 at 121-123.

[991] The Avalon Project at Yale Law School, online: British-American Diplomacy: Treaty of Ghent 1814 <http://avalon.law.yale.edu/19th_century/ghent.asp>, accessed April 2, 2009.

[992] Francis, *supra* note 951 at 131.

[993] *Supra* note 987.

[994] See generally Francis, *supra* note 951 at 128-131.

[995] Bartlett, *supra* note 471 at 10.

[996] *Ibid.*

[997] Anghie, *supra* note 4 at 52.

[998] Bartlett, *supra* note 471 at 10; Francis, *supra* note 951 at 80.

[999] Francis, *supra* note 951 at 99; Bartlett, *supra* note 471 at 10.

[1000] See Richard H. Bartlett, *Indian Reserves in the Atlantic Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1986).

[1001] Francis, *supra* note 951 at 121.

[1002] United Kingdom, Parliament, House of Commons, *Report from the Select Committee on Aborigines, 1837* (London: Parliamentary papers, No. 425) at 80.

[1003] Miller, *supra* note 512 at 27.

[1004] For the friendliness of the Indigenous peoples of Canada, see Brandon, *supra* note 691 at 60; see also Asher, *supra* note 892 at 114-115.

[1005] Probing into the interior by Cartier did not go without protest from the Indigenous peoples of Stadacona. But, as usual, the Europeans ignored the protests and marched onward to the village that they called Hochelaga, or the city now known as Montreal; see Miller, *supra* note 512 at 27ff. It would have been more difficult, if not impossible, for the Europeans to have proceeded so easily in West Africa.

[1006] Francis, *supra* note 951 at 121-123.

[1007] *Ibid.* at 121.

[1008] Thus Lawrence states: "International Law regards states as political units possessed of proprietary rights over definite portions of the Earth's surface. Lawrence, *supra* note 96 at 136 (as quoted in Anghie, *supra* note 4 at 27).

[1009] W. Washburn, *Red Man's Land / White Man's Law: A Study of the Past and Present Status of the American Indian* (New York: Scribner's, 1971); M.H. Williamson, "Pocahontas and Captain John Smith: Examining an Historical Myth" (1992) 5 History and Anthropology 3-4 at 365-402; D. Richter, *Facing East from Indian Country: A Native History of Early America* (Cambridge: Harvard University Press, 2001); R. Slotkin, *Regeneration through Violence: The Mythology of the American Frontier, 1600-1860* (Norman: University of Oklahoma Press, 1973).

[1010] VictoriaTelecommunityNetwork, online: Charter of the Hudson Bay 2 May 1670 <http://victoria.tc.ca/history/etext/hudsons.bay.co.charter.html>, accessed April 2, 2009.

[1011] According to Marshall, "The charter granted to Sir Humphrey Gilbert, in 1518, authorizes him to discover and take possession of such remote, heathen and barbarous lands as were not actually possessed by any Christian prince or people." Marshall continues: "In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the 'Treasurer and Company of Adventurers of the city of London for the first Colony in Virginia,' in absolute property." (see *Johnson*, *supra* note 281).

[1012] D.B. Quinn, *Set Fair for Roanoke: Voyages and Colonies, 1584-1606* (Chapel Hill: University of North Carolina Press, 1985).

[1013] For full text go to Appendix H.

[1014] Peter Moogk, "'The Apples Do Not Fall Far from the Tree': The Legacy of New France in Modern Canada," in *La Nouvelle France: The Making of French Canada A Cultural History* (East Lansing: Michigan State University Press, 2000) at 265-281.

[1015] Eduspace, The History Companion: A People of the Nation, Chapter 2, page 34 <http://eduspace.hmco.com/>, accessed February 26, 2007.

[1016] *Ibid.*

[1017] See K.M. Narvey, "The Royal Proclamation of 1763, The Common Law, and Native Title to Land within the Territory Granted to the Hudson's Bay Company" (1974) 38 Sask. L. Rev. 123.

[1018] See generally: D.B. Quinn, ed., *The Roanoke Voyages, 1584-1590* (London: Cambridge University Press, 1955).

[1019] K.O. Kupperman, "Roanoke: Lost and Found" (1986) 14 American History at 55-60.

[1020] Virginia was the name chosen for the state or the area by the British in honour of the Virgin Queen – Elizabeth.

[1021] Thomas Harriot, "A Briefe and True Report of the New Found Land of Virginia," facsimile edition published in 1972 by Dover Publications; see The University of Virginia's facsimile and transcribed versions of both the 1588 and 1590 editions of Harriot's work, Thomas Harriot, Academic Affairs Library, UNC-CH, University of North Carolina at Chapel Hill, 2003, online: <http://docsouth.unc.edu/nc/hariot/hariot.html>, accessed April 2, 2009 (see appendix for hard copy of this electronic version).

[1022] Several theories have been proposed for the disappearance of the inhabitants but no one knows what actually happened to them.

[1023] See generally, *Johnson, supra* note 281; W. Murray, TimePage.org, online: "The Colonial Cycle in US History" <http://www.timepage.org/cyc/colo.html>, accessed April 2, 2009.

[1024] W. Murray, TimePage.org, online: 13 Originals – Virginia <http://www.timepage.org/spl/13colony.html>, accessed April 2, 2009.

[1025] E.M. Wingfield, "A Discourse on Virginia" in P. Barbour, *The Jamestown Voyages Under the First Charter 1606-1609*, Vol. 1 (Cambridge: Hakluyt Society at Cambridge University Press, 1969) at 213-234; for the text to *The First Charter of Virginia, 1606,* refer to Appendix I.

[1026] *Worcester, supra* note 55.

[1027] *Ibid.*

[1028] Murray, *supra* note 1024.

[1029] P. George, "Percy's Discourse of Virginia" in S. Purchas, *Hakluytus Posthumus or Purchas His Pilgrimes*, Vol. 18 (Glasgow: James Maclehose and Sons, 1905, reprint of the original 1625 version) at 403ff.

[1030] The state of Delaware and the numerous rivers and landmarks received their name from Lord Thomas de la Warr.

[1031] Captain Smith was an adventurer who had fought in France and Hungary. He was a prisoner of war and managed to escape. He escaped death once again when he was rescued by the famous Pocahontas. See Keely Susan Kuhlman, a dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, Washington State University, Department of English, May 2006, online: Trans-Atlantic Travel and Cultural Exchange in the Early Colonial Era: The Hybrid American Female and Her New World Colony <http://research.wsulibs.wsu.edu:8080/dspace/bitstream/2376/458/1/k_kuhlman_033106.pdf>, accessed April 8, 2009.

[1032] For the romantic story, see *ibid.*

[1033] There are numerous instances where individuals or groups of settlers purchased lands from the Indians. A typical example would be Peter Minuit's purchase (with other Dutch settlers) of the island of Manhattan from the local Indians for 60 guilders ($24) worth of goods. But, generally, these transactions were made long after the settlements had established roots.

[1034] Bartlett made that observation when he wrote: "The French established a trading post at the site of Quebec City in 1608. The development of the Colony afforded little regard for Indian traditional lands. The "first Indian reserves in Canada" were not established as part of a treaty." See Bartlett, *supra* note 471 at 10.

[1035] G.F.G. Stanley, "The First Indian 'Reserves' in Canada," Revue d'histoire de l'Amérique française 4, no. 2 (Sept. 1950) at 178ff.

[1036] See also Miller, *supra* note 512 at 37.

[1037] The Cape Coast chiefs claimed that the custom had been in existence since the coming of the first white men and there is no record of any specific objections made by the merchants until the late nineteenth century; see Sarbah, *supra* note 845.

[1038] See Hayford, *supra* note 9 at 49.

[1039] G. Balandier, "Social Changes and Social Problems in Negro Africa" in C.W. Stillman, *Africa in the Modern World* (Chicago, University of Chicago Press, 1955) at 67; see also G. Balandier, "The utilization of traditional models for new purposes" in C.W. Stillman, ed., *Africa in the Modern World* (Chicago: University of Chicago Press, 1955).

[1040] R.J.H. Pogucki, *Gold Coast Land Tenure*, Vol. II (Government Printer, 1955) at 18; E.V.O. Dankwa, "The End of Pledges in Ghana?" (1989) 33 Journal of African Law 2 at 185-191.

[1041] *Worcester, supra* note 55 at 495.

[1042] M.D. Walters, *The Continuity of Aboriginal Customs and Government Under British Imperial Constitutional Law As Applied in Colonial Canada, 1760-1860* (D.Phil. Thesis, Oxford University, 1995), parts reprinted as M.D. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1996) 33:4 Osgoode Hall Law Journal at 798, available at <http://www.ohlj.ca/archive/articles/33_4_walters.pdf>.

[1043] *Johnson*, *supra* note 281.

[1044] Duane A. Cline, RootsWeb, online: The Pilgrims and the Plymouth Colony: 1620 – Squanto <http://www.rootsweb.com/~mosmd/squanto.htm>, accessed March 31, 2009.

[1045] *Ibid.*

[1046] *Ibid.*

[1047] *Ibid.*

[1048] *Ibid.*

[1049] For details see C. Bartocci, "Puritans versus Pequots: Four Eye-Witness Reports of the First War in Colonial New England" (1987) 4 Storia Nordamericana at 71-92; H. Bradstreet, *The Story of the War with the Pequots, Re-Told* (New Haven: Yale University Press, 1933).

[1050] See generally A.H. Buffington, "The Puritan View of War" (1935) 28 Publications of the Colonial Society of Massachusetts at 67-86; see also, S.G. Drake, ed., *The Old French and Indian Wars, from 1689 to 1704* (Hartford: Silas Andrus & Son, 1854); W. Harris, *A Rhode Islander Reports on King Philip's War*, D.E. Leach, ed., (Providence: Rhode Island Historical Society, 1963).

[1051] As a percentage of total population.

[1052] J. Lepore, *The Name of War: King Philip's War and the Origins of American Identity* (New York: Vintage Books, 1999).

[1053] *Ibid.*

[1054] S. Saunders, Book Review of *The Name of War: King Philip's War and the Origins of American Identity by J. Lepore* (December 20, 1998) Chicago Tribune Book Review.

[1055] *Ibid.*

[1056] Swarthmore College, online: Edward Randolph's Description of King Philip's War (1685) <http://www.swarthmore.edu/SocSci/bdorsey1/41docs/45-ran.html>, accessed April 4, 2009.

[1057] Murray, *supra* note 1024.

[1058] *Ibid.*

[1059] For the life of this Minister see S. Bush, Jr., "Revising what we have done amisse: John Cotton and John Wheelwright, 1640" (1988) 45 The William and Mary Quarterly 4 at 733-750.

[1060] For details of the controversy, see L. Buchanan, "A Study of Maternal Rhetoric: Anne Hutchinson, Monsters, and the Antinomian Controversy" (2006) 25:3 Rhetoric Review 239.

[1061] Murray, *supra* note 1024.

[1062] Miller, *supra* note 505 at 42.

[1063] Federal Writers' Project, *The Swedes in New Jersey: Bulletin No. 1* (Works Progress Administration in New Jersey, 1938).

[1064] See generally T. Streissguth, *Maryland* (San Diego: Lucent Books Inc., 2002).

[1065] For a comprehensive history of Maryland, see Thomas Stresissguth, *Maryland* (San Diego, California: Lucent Books Inc., 2002); Robert J. Brugger, *Maryland: A Middle Temperament* (Baltimore: John Hopkins University Press, 1988).

[1066] The successors to King Necotowance "appointed or confirmed by the King's Governours," Act 1, 1646, W.W. Hening, ed., The Statutes at Large Being a Collection of all the Laws of Virginia, vol. 2 (New York: W. & G. Bartow, 1821-23) at 323 (as cited in Walters, *supra* note 1042 at 799-800).

[1067] See *A Complete Body of the Laws of Maryland* (Annapolis: Thomas Reading, 1700) at 34 for the act of 1669 for the continuance of peace with Indians in Choptanke River, describing the land granted to "Ababes Hatsawago and Toquassimo and the people under their government or charge and their heirs for ever," to be held for annual rent of six beaver skins; and the 1698 act for ascertaining the bounds of the Nanticoke Indians at 47 (as cited in Walters, *supra* note 1042 at 799).

[1068] Walters, *supra* note 1042 at 787.

[1069] J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950) at chapter 7 (as cited in Walters, *supra* note 1042 at 787).

[1070] J.W. de Forest, *History of the Indians of Connecticut from the Earliest Known Period to 1850* (Hartford: Wm. Jas. Hamersley, 1852) at 303-346 (as cited Walters, *supra* note 1042 at 787).

[1071] G.A. Washburne, *Imperial Control of the Administration of Justice in the 13 American Colonies, 1684-1776* (New York: Columbia University Press, 1923) at 103-106 (as cited in Walters, *supra* note 1042 at 787).

[1072] Sir W. Holdsworth, *A History of English Law*, vol. 11 (London: Methuen, 1926) at 99 (as cited in Walters, *supra* note 1042 at 787).

[1073] *Johnson*, *supra* note 281.

[1074] L. Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine" (1997) 13 J.L. & Politics at 755; Robertson, *supra* note 367 at Introduction.

[1075] *Ibid.*

[1076] *Ibid.*

[1077] *Ibid.*

[1078] *Johnson*, *supra* note 281 at 598.

[1079] Letter of W. Johnson to J.T. Kempe, Att. Gen. N.Y. (September 7, 1765) in W. Johnson, *The Papers of Sir William Johnson*, J. Sullivan, ed., vol. 11 (Albany: State University of New York, 1921) at 428 (as cited in Walters, *supra* note 1042 at 803).

[1080] Letter of Lt. Gov. W. Bull, S. Carolina to Board of Trade (December 24, 1764) in Colonial Office Records, Public Record Office (Kew), London, England 5/1269 at 90 (as cited in Walters, *supra* note 1042 at 803).

[1081] Case of the Appellants [Mohegan] (c. 1751), Treasury Solicitor Records, Public Record Office (Chancery Lane), London, England, 11/1006, f. 3888 at 2 (as cited in Walters, *supra* note 1042 at 804).

[1082] "Connecticut Charter" (May 10 1662) in *Collections of the Connecticut Historical Society*, Vol. 1 (Hartford: Connecticut Historical Society, 1907) at 52.

[1083] Walters, *supra* note 1042 at 804.

[1084] "A Map of ye Mohegan Sachims Hereditary Country" (August 1, 1705) in Map Collection, Public Record Office (Kew), London, England (as cited in Walters, *supra* note 1042 at 804).

[1085] "Defence of the Govr & Company" in Governour & Company of Connecticut & Mohegan Indians by their Guardians; Certifyed Copy of Book of Proceedings, before Commissrs. of Review, 1743, (as cited in note 74, Walters, *supra* note 1042 at 804).

[1086] "Articles of Agreement" (May 18, 1681) in Letter of Lt. Gov. W. Bull, S. Carolina to Board of Trade (December 24, 1764) in Colonial Office Records, Public Record Office (Kew), London, England 5/1269 at 93-94 (as cited in Walters, *supra* note 1042 in footnote 75 at 804).

[1087] Case of the Appellants [Mohegan] (c. 1751), Treasury Solicitor Records, Public Record Office (Chancery Lane), London, England, 11/1006, f. 3888 at 7; and "Defence of the Govr & Company" in Governour & Company of Connecticut & Mohegan Indians by their Guardians; Certifyed Copy of Book of Proceedings, before Commissrs. of Review, 1743 at 123-24 (as cited in Walters, *supra* note 1042 in footnote 76 at 804).

[1088] *Ibid.*

[1089] Walters, *supra* note 1042 at 805.

[1090] Letter of Commission to J. Dudley, Gov. Mass. & others (April 3, 1704) in Letter of Lt. Gov. W. Bull, S. Carolina to Board of Trade (December 24, 1764) in Colonial Office Records, Public Record Office (Kew), London, England 324/29 at 280-283 (as cited in Walters, *supra* note 1042 in footnote 81 at 805).

[1091] *Johnson*, *supra* note 281.

[1092] Walters, *supra* note 1042 at 806 and footnote 81.

[1093] *Ibid.* at 811.

[1094] *Ibid.*

[1095] Welsh culture not abrogated - Anon. (1579), 3 Dyer 363b at 363b (C.P.); Irish land systems remained in force - The case of Tanistry, (1608), Davis 28 at 30 (Ir. K.B.); other cases include: *Blankard* v. *Galdy* (1693), 2 Salk. 411, 4 Mod. 215 (K.B.) cited to 4 Mod. 215 at 225-226; Calvin's case, (1608), 7 Co. Rep. 1a at 19b. (Ex. Chamb.) at 17b; *Campbell* v. *Hall* (1774), Lofft 655 at 741-742 (K.B.); *Craw* v. *Ramsey* (1669), Vaugh 274 at 278 (C.P.); *Dawes* v. *Painter* (1674), 1 Freem. 175 at 176 (C.P.); *Dutton* v. *Howell* (1693), Show. 24 at 31 (H.L.); *Witrong* v. *Blany* (1674), 3 Keb. 401 at 402 (K.B.).

[1096] This Dutch term means "valley of swans."

[1097] State of Delaware, online: A Brief History <http://www.state.de.us/gic/facts/history/delhist.shtml>, accessed April 4, 2009.

[1098] *Ibid.*

[1099] *Ibid.*

[1100] *Ibid.*

[1101] *Ibid.* These deeds and leases are on display by the Delaware State Archives in the Hall of Records at Dover.

[1102] J.T. Mitchell, H. Flanders & J. W. Martin, eds., *Statutes at Large of Pennsylvania from 1682 to 1801*, Vol. 5 (Pennsylvania: Clarence M. Busch, 1911) at 215-219.

[1103] An Act Against Selling Rum ... To the Indians, 1701 in an Act for the Better Improving a Good Correspondence with the Indians, 1705-06 in Mitchell, *supra* note 1102 at vol. 1, 168.

[1104] H. Marbury & W. Crawford, eds., *Digest of the Laws of the State of Georgia, From its Settlement as a British Province, in 1755, To the Session of the General Assembly in 1800, Inclusive* (Savannah: Woolhopter & Stebbins, 1802) at 257.

[1105] Parkman, *supra* note 733 at part 1.

[1106] M. Conrad, A. Finkel & C. Jaenen, eds., *History of the Canadian Peoples – Beginnings to 1867* (Toronto: Copp Clark Pitman, 1993).

[1107] See generally White, *supra* note 748; Kearns, *supra* note 977 at 377ff; Parkman, *supra* note 733.

[1108] Parkman, *supra* note 733.

[1109] White, *supra* note 748.

[1110] *Ibid.*

[1111] *Ibid.*

[1112] D.P. MacLeod, *The Canadian Iroquois and the Seven Years War* (Toronto: Dundurn Press, 1996).

[1113] Francis, *supra* note 951 at 80.

[1114] Woolsey, *supra* note 35 at 34 (as cited in the *Black's Law Dictionary*).

[1115] It is obvious from the gross generalization that Queen Elizabeth, at the time of issuing the charter set out below, did not know much about the land or its people. Charter to Sir Walter Raleigh, 1584: "ELIZABETH by the Grace of God of England, Fraunce and Ireland Queene, defender of the faith, &c. To all people to whome these presents shall come, greeting. Knowe yee that of our especial grace, certaine science, and meere motion, we haue given and graunted, and by these presents for us, our heires and successors, we giue and graunt to our trustie and welbeloued seruant Walter Ralegh, Esquire, and to his heires and assignes for euer, free libertie and licence from time to time, and at all times for euer hereafter, to discouer, search, finde out, and view such remote, heathen and barbarous lands, countreis, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People..."

[1116] Compare that to the English, who used dubious means to dispossess the Indigenous king of his lands, which led to the King Philip's War. Swathmore College, online: Edward Randolph's Description of King Philip's War (1685) <http://www.swarthmore.edu/SocSci/bdorsey1/41docs/45-ran.html>, accessed April 4, 2009.

[1117] See generally, T. Draper, *A Struggle for Power: The American Revolution* (New York: Times Books, 1996); G. Gunderson, Book Review of *A Struggle for Power: The American Revolution* by T. Draper (1997) 1:4 The Independent Review, <http://www.independent.org/publications/tir/article.asp?a=435>, accessed April 4, 2009. This excellent review assisted greatly in this section.

[1118] Gunderson, *supra* note 1117.

[1119] Draper, *supra* note 1117 at 1-20.

[1120] *Ibid.*

[1121] American Revolution - The Making of America and Her Independence, online: Navigational Acts <http://www.americanrevolution.com/>, accessed Dec 29, 2006.

[1122] Draper, *supra* note 1117.

[1123] The American Revolution - The Making of America and Her Independence, online: <http://www.americanrevolution.com/>, accessed Dec 29, 2006.

[1124] For details, see generally B. Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: The Belknap Press of Harvard University Press, 1992).

[1125] Draper, *supra* note 1117 at Chapter 6.

[1126] See generally, P. Mackesy, *The War for America, 1775–1783* (Cambridge, MA: Harvard University Press, 1964).

[1127] See generally: J.C. Miller, *Origins of the American Revolution* (Boston: Little, Brown & Co, 1943).

[1128] J.P. Greene & J.R. Pole, eds., *The Blackwell Encyclopedia of the American Revolution*, rev. ed. (Oxford: Blackwell, 2004) at Ch. 23-24.

[1129] This means that, if the trap is too tight, it cuts off the leg of the animal, which is able to walk away on three legs; for full text of the *Navigation Act* of October 9, 1651, see Appendix L.

[1130] For details consult R.B. Sheridan, "The Molasses Act and the Market Strategy of the British Sugar Planters" (1957) 17:1 The Journal of Economic History at 62-83.

[1131] Greene, *supra* note 1128 at Chapter 11.

[1132] J.M. Burkoff, "A Flame of Fire: The Fourth Amendment in Perilous Times" (2004-2005) 74:2 Mississippi Law Journal 638.

[1133] E-referenceDesk, online: Virginia History <http://www.e-referencedesk.com/resources/state-history/virginia.html>, accessed April 21, 2009.

[1134] ZoomInfo, online: Thomas Hutchinson <http://partners.zoominfo.com/people/Hutchinson_Thomas_3330081.aspx>, accessed April 21, 2009.

[1135] Theodore Draper is one of these historians; see Draper, *supra* note 1117. For a contrary view, see T.H. Breen, "Ideology and Nationalism on the Eve of the American Revolution: Revisions Once More in Need of Revising" (1997) 84 The Journal of American History 1.

[1136] For the composition of the social groups that comprised the revolution, consult E. Countryman, *The American Revolution* (New York: Hill and Wang, 1985).

[1137] D.C. Scaggs, "Maryland's Impulse Toward Social Revolution: 1750-1776" (1968) 54 The Journal of American History 4 at 771-786.

[1138] R. Hoffman, *A Spirit of Dissension: Economics, Politics and the Revolution in Maryland* (Baltimore: The Johns Hopkins University Press, 1975).

[1139] *Worcester*, *supra* note 55 at 497. During the war of the Revolution, the Cherokees took part with the British.

[1140] *Ibid.* at 510.

[1141] *Ibid.* at 512-513.

[1142] S.A. de Smith, *The Vocabulary of Commonwealth Relations* (London: Athlone Press, I954) at 17-19.

[1143] *Statute of Westminster, 1931* (U.K.) 22 & 23 Geo. V, c. 4 (U.K. - preamble); for full text see Appendix G.

[1144] de Smith, *supra* note 116 at 347.

[1145] *Ibid.* at 352; see also C. Bélanger, Marianopolis College – Quebec History, online: The Statute of Westminster <http://www2.marianopolis.edu/quebechistory/federal/1931.htm>, accessed April 4, 2009.

[1146] de Smith, *supra* note 1142 at 17-19.

[1147] *Statute of Westminster*, *supra* note 1143.

[1148] *Ibid.* at s. 7(1).

[1149] Canada had not achieved independence, only control of the military.

[1150] *British North America Act, 1867* [now the *Constitution Act, 1867*] (U.K.), 30 & 31 Vict., c. 3, s. 101 [*B.N.A. Act*].

[1151] *British Coal Corporation* v. *R.*, [1935] A.C. 500.

[1152] Canada had a representation through the Governor General so this mission was more for trade and commerce as well as for lobbying the British Parliamentarians.

[1153] *British North America Act, 1867*, *supra* note 1150 at ss. 55-57.

[1154] Bélanger, *supra* note 1145.

[1155] *Ibid.*

[1156] *Ibid.*

[1157] "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of British North America Acts, 1967 to 1930 (now renamed Constitution Acts), or any order, rule or regulation made thereunder" in *Statute of Westminster*, *supra* note 1143, Art. 7.

[1158] Actually freedom from the protection of the British government, which is a loss (e.g. protection such as the Royal Proclamation).

[1159] That is, government composed entirely of expatriates.

[1160] See generally Matin Wight, *The Gold Coast Legislative Council* (London: Faber, 1947); F.M. Bourret, *The Gold Coast: A Survey of the Gold Coast and British Togoland 1919-1951* (London: OUP, 1952); Ajayi, *A Thousand Years*, *supra* note 844; F.K. Buah, *A History Of Ghana* (London: Macmillan Education Ltd, 1980); Claude Meillassoux, *The Development of Indigenous Trade and Markets in West Africa* (London: Oxford University Press, 1971).

[1161] de Smith, *supra* note 116 at 348.

[1162] For details see Bourret, *A Thousand Years*, *supra* note 844.

[1163] United Nations, cited in de Smith, *supra* note 116 at 355.

[1164] de Smith, *supra* note 116 at 348-350.

[1165] *The Ghana (Constitution) Order in Council, 1957* (S.I. 1957, No. 277; L.N. 47); for full text, see Appendix K.

[1166] Official Web Site for the Judicial Service of the Republic of Ghana, online: The Judicial System <http://www.judicial.gov.gh/history/history_dev_court_after/home.htm>, as retrieved on Dec 13, 2006.

[1167] de Smith, *supra* note 116 at 348-349.

[1168] *Ibid.* at 349.

[1169] "Osagyefo" is one of the titles bestowed on Kwame Nkrumah. It means saviour (during) war.

[1170] The agitators were mostly lawyers and were instrumental in the formation of the United Gold Coast Convention (UGCC), founded in August 1947. It was the first nationalist movement with the aim of achiving self-government "in the shortest possible time." Kwame Nkrumah was the secretary until he left and formed his own party, the Convention Peoples Party with the Motto "self Government now." See GuayanaUnderSeige, online: Kwame Nkrumah: The Fight for Independence <http://www.guyanaundersiege.com/Leaders/Nkrumah2.htm>, accessed on April 4, 2009.

[1171] *Ibid.*

[1172] The executive was comprised of E. Akufo Addo, A.G. Grant, William Ofori Atta, E. Obelsebi Lamptey and E. Ako Adjei.

[1173] The UGCC was founded on August 4, 1947.

[1174] GuayanaUnderSeige, *supra* note 1170.

[1175] *Ibid.*

[1176] Library of Congress Country Studies, online: Independent Ghana <http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+gh0023)>, accessed April 5, 2009.

[1177] GuayanaUnderSeige, *supra* note 1170.

[1178] The Committee on Youth Organization (CYO) was formed by Kwame Nkrumah on February 26, 1949, to mobilize the young people to participate in the political process.

[1179] GuayanaUnderSeige, *supra* note 1170.

[1180] de Smith, *supra* note 116 at 349.

[1181] *Ibid.*

[1182] *Supra* note 1176.

[1183] GuayanaUnderSeige, *supra* note 1170.

[1184] *Supra* note 1176.

[1185] E. Akufo Addo, William Ofori Atta, E. Obelsebi Lamptey and E. Ako Adjei

[1186] This is equivalent to the post of Prime Minister.

[1187] *Supra* note 1176.

[1188] de Smith, *supra* note 116 at 350.

[1189] *Gold Coast Constitution 1954*, S.I. 1954, No. 551.

[1190] de Smith, *supra* note 116 at 350.

[1191] *Supra* note 1176.

[1192] *Ibid.*

[1193] de Smith, *supra* note 116 at 351.

[1194] See *Commonwealth Survey*, cited in de Smith, *supra* note 116 at note 15.

[1195] Cited in de Smith, *supra* note 116 at 352.

[1196] *Ibid.*

[1197] *Ibid.* at 354.

[1198] *Ibid.* at note 34.

[1199] *The Ghana (Constitution) Order in Council, 1957* (S.I. 1957, No. 277; L.N. 47); for full text see Appendix K.

[1200] Lee, *supra* note 2.

[1201] Sir Keith Hancock, *Colonial Self-Government* (Nottingham: University of Nottingham, 1956) at 8 (as cited in de Smith, *supra* note 116 at 350).

[1202] de Smith, *supra* note 116 at 351.

[1203] Pursuant to s. 91(24) of the *Constitution Act, 1867*, legislative jurisdiction over "Indians, and Lands reserved for the Indians" is a federal responsibility.

[1204] When the Constitution says "we the people" or "the people," what is meant is we "the people of this land." Hence the first duty of the framers of the Ghanaian constitution was to define the parameters of Ghana.

[1205] Parliament of Ghana, online: The Constitution of the Republic of Ghana <http://www.parliament.gh/constitution_republic_ghana.html>, accessed April 5, 2009.

[1206] Cornell University Law School, online: United States Constitution - Preamble <http://www.law.cornell.edu/constitution/constitution.overview.html>, accessed April 5, 2009.

[1207] United States Department of Justice - Civil Rights Division, online: Introduction to Federal Voting Rights Laws <www.usdoj.gov/crt/voting/intro/intro.htm>, accessed April 5, 2009.

[1208] The 15th Amendment, ratified in 1870, said that no citizen's vote could be taken away because of his race or colour or because he was once a slave.

[1209] The 19th Amendment, ratified in 1920, allowed all women in the U.S. to vote.

[1210] *Supra* note 1208.

[1211] The 26th Amendment, passed in 1971, gave people aged 18 to 20 the right to vote.

[1212] Danna Jackson, "Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights" (2004) 65 Mont. L. Rev. 269.

[1213] For an overview of Indian voting rights, see Kenneth W. Johnson, "Sovereignty, Citizenship, and the Indian" (1973) 15 Arizona Law Review at 976-985.

[1214] As late as 1968, Idaho, Maine, Mississippi, New Mexico and Washington barred "Indians not taxed" from voting, even though they granted voting rights to non-taxed whites. Idaho Const. Art. VI, 3 (1890, amended 1950); N.M. Const. Art. XII, 1; Wash. Const. Art. VI, 1; Miss. Const. Art. 12 241 (1890, amended 1968).

[1215] Jeanette Wofley, "Jim Crow, Indian Style: The Disenfranchisement of Native Americans" (1991) 16 Am. Indian L. Rev. at 167.

[1216] Despite the 1881 Supreme Court decision to the contrary, Utah disenfranchised Indian voters by claiming that Indians residing on reservations were not residents of the state. This statute stood until 1957 when the state legislature abolished it under pressure from the Supreme Court.

The Minnesota Supreme Court defined its constitutional provision of "civilized" Indians as those who had taken up their "abode outside the reservations and there pursuing the customs and habits of civilization." Minn. Const. art. VII, 1, cl. 4 (1857, repealed 1960), in re. Liquor Election in Beltrami Country, 138 Minn. 42, 163 N.W. 988 (1917).

North Dakota's constitution contained a provision that extended the vote only to "civilized persons of Indian descent who shall have severed their tribal relations." N.D. Const. Art. V, 121 (1889, repealed 1922).

South Dakota prohibited Indians from voting or holding office "while maintaining tribal relations." S.D. Codified Laws Ann. 92 (1929, repealed 1951).

In Arizona, the state Supreme Court construed guardianship to be synonymous with "persons under disability," and disqualified Indians from voting because they were under "federal guardianship." That decision stood until the court reversed itself in 1948 in *Harrison* v. *Laveen*.

[1217] *Indian Citizenship Act*, 43 Stat. 253 (1924).

[1218] June 2, 1924. [H. R. 6355.] [Public, No. 175.] Sixty-eighth Congress Sess. I. CHS. 233. 1924. (codified in the United States Code at Title 8, Sec. 1401(a)(2)).

[1219] One active assimilation proponent, Dr. Joseph K. Dixon, wrote: "The Indian, though a man without a country, the Indian who has suffered a thousand wrongs considered the white man's burden and from mountains, plains and divides, the Indian threw himself into the struggle to help throttle the unthinkable tyranny of the Hun. The Indian helped to free Belgium, helped to free all the small nations, helped to give victory to the Stars and Stripes. The Indian went to France to help avenge the ravages of autocracy. Now, shall we not redeem ourselves by redeeming all the tribes?" See NebraskaStudies.org, online: Native American Citizenship – 1924 Indian Citizenship Act

<http://www.nebraskastudies.org/0700/frameset_reset.html?http://www.nebraskastudies.org/0700/stories/0701_0146.html>, accessed April 21, 2009.

[1220] The *Termination Acts*; see HistoryCentral.com, online: Indian Termination Act <www.hitorycentral.com/Indians/TerminAct.html>, accessed March 19, 2008; Milwakee Public Museum, online: Menominee Termination and Restoration – Indian Country Wisconsin <http://www.mpm.edu/wirp/ICW-97.html>, accessed April 15, 2009.

[1221] Marshall in *Cherokee*, *supra* note 90 and the two cases in the Marshall trilogy, especially *Worcester*, *supra* note 55.

[1222] The Minnesota Supreme Court defined its constitutional provision of "civilized" Indians as those who had taken up their "abode outside the reservations and there pursuing the customs and habits of civilization." Minn. Const. art. VII, 1, cl. 4 (1857, repealed 1960), in re. Liquor Election in Beltrami Country, 138 Minn. 42, 163 N.W. 988 (1917). North Dakota's constitution contained a provision that extended the vote only to "civilized persons of Indian descent who shall have severed their tribal relations." N.D. Const. Art. V, 121 (1889, repealed 1922). South Dakota prohibited Indians from voting or holding office "while maintaining tribal relations." S.D. Codified Laws Ann. 92 (1929, repealed 1951).

[1223] In Arizona, the state Supreme Court construed guardianship to be synonymous with "persons under disability" and disqualified Indians from voting because they were under "federal guardianship." That decision stood until the court reversed itself in 1948 in *Harrison* v. *Laveen*.

[1224] Living in a country and obeying laws made by others makes Indians subordinates.

[1225] Union - ss. 3-8 - part of the act deals with the union of the original provinces.

[1226] *BNA Act, supra* note 1150.

[1227] Royal Proclamation, *supra* note 78.

[1228] Canada, *supra* note 79; see also *Sioui*, *supra* note 65 at para. 69.

[1229] CBC Digital Archives, online: Voting in Canada: How a Privilege Became a Right <http://archives.cbc.ca/IDD-1-73-1450/politics_economy/voting_rights/>, accessed April 5, 2009.

[1230] Mentally disabled Canadians obtained the right to vote in 1988 and prisoners in 2002.

[1231] *BNA Act, supra* note 1150 at s. 101.

[1232] CBC Digital Archives, online: Voting in Canada: How a Privilege Became a Right <http://archives.cbc.ca/IDD-1-73-1450/politics_economy/voting_rights/>, accessed April 5, 2009.

[1233] Canada, *supra* note 79; see also *Sioui*, *supra* note 65 at para. 69.

[1234] Parliament of Ghana, *supra* note 1205.

[1235] *Ibid.*

[1236] The Minnesota Supreme Court defined its constitutional provision of "civilized" Indians as those who had taken up their "abode outside the reservations and there pursuing the customs and habits of civilization." Minn. Const. art. VII, 1, cl. 4 (1857, repealed 1960), in re. Liquor Election in Beltrami County, 138 Minn. 42, 163 N.W. 988 (1917).

[1237] No-strings voting right for the Aboriginal peoples was granted in 1960 in Canada and even later due to disenfranchised tactics in the United states even though the Indian citizens Act was enacted in 1924. For instance, The Minnesota Supreme Court defined its constitutional provision of "civilized" Indians as those who had taken up their "abode outside the reservations and there pursuing the customs and habits of civilization." Minn. Const. art. VII, 1, cl. 4 (1857, repealed 1960), in re. Liquor Election in Beltrami County, 138 Minn. 42, 163 N.W. 988 (1917). Of course, "uncivilized" people could not vote. That is three years after Ghana gained independence.

[1238] Many voting requirements prevent legitimate people from voting. These include but are not limited to requirements pertaining to residency (exclusion of homeless people), permanent address, identification cards such as a driver's licence (exclusion of the blind, who cannot obtain such documents) and so on.

[1239] For details of the effects of the chartered companies on the government of the United States consult Samuel M. Bemiss, ed., *The Three Charters of the Virginia Company of London: With Seven Related Documents 1606-1621* (Williamsburg: Virginia 350th Anniversary Celebration Corporation, 1957).

[1240] *Ibid.* at v.

[1241] Hobbes, *supra* note 70 at 111-112. See Williams Jr., *supra* note 161 at 410.

[1242] For details see Bemiss, *supra* note 1239.

[1243] For giving satisfaction to the King of Spain.

[1244] Bemiss, *supra* note 1239 at 27.

[1245] Matthew 6:28-31, The New Intenational Bible.

[1246] Hobbes, *supra* note 70 at 111-112. See Williams Jr., *supra* note 161 at 410.

[1247] Bemiss, *supra* note 1239 at vi.

[1248] *Wheeler-Howard Act* or *Indian Reorganization Act,* 25 U.S.C. 476, 48 Stat. 987 (1934).

[1249] Milwaukee Public Museum, online: Menomee Termination and Restoration <http://www.mpm.edu/wirp/ICW-97.html>, accessed April 5, 2009.

[1250] *Indian Reorganization Act, supra* note 1248.

[1251] Milwaukee Public Museum, online: Menomee Termination and Restoration <http://www.mpm.edu/wirp/ICW-97.html>, accessed April 5, 2009.

[1252] *Ibid.*

[1253] *Ibid.*

[1254] *Menominee Restoration Act*, 87 Stat. 771 (1973).

[1255] The American Presidency Project, online: Richard Nixon <www.presidency.ucsb.edu/ws/index.php?pid=4084 - 34k ->, accessed April 5, 2009.

[1256] *Ibid.*

[1257] This Constitution and Bylaws were actually adopted pursuant to section 16 of the *Indian Reorganization Act, supra* note 1248; for the full text of the Constitution, see Appendix E.

[1258] Parliament of Ghana, *supra* note 1205.

[1259] Menominee Constitution, Article I, ss. 5(b) of the *Menominee Restoration Act, supra* note 1254.

[1260] Menominee Constitution, *supra* note 1259.

[1261] *Ibid.*, Article IX.

[1262] *Ibid.*, Article X, section 1.

[1263] *Ibid.*, Article XIV.

[1264] *Ibid.*, Article V, section 3.

[1265] *Ibid.*, Article V, section 2.

[1266] Ibid., Article XIX.

[1267] Two Amendments to the Menominee Constitution and Bylaws (of 1977), were approved on May 24, 1990 and January 30, 1991. The twenty amendments are on record in the Office of the Menominee Tribal Chairperson.

[1268] See generally Cherokee.org, online: The 1999 Constitution of the Cherokee Nation, A Review and Comparison Between the 1976 and 1999 Constitutions of the Cherokee Nation in Preparation for the Ratification Vote <http://www.cherokee.org/TribalGovernment/Executive/CCC/ccc1999Changes.pdf>, accessed April 5, 2009.

[1269] *Ibid.* at 1.

[1270] Cf, Article I. (Federal Regulations) Menominee Constitution, 1977.

[1271] Cherokee.org, online: The 1999 Constitution of the Cherokee Nation, A Review and Comparison Between the 1976 and 1999 Constitutions of the Cherokee Nation in Preparation for the Ratification Vote <http://www.cherokee.org/TribalGovernment/Executive/CCC/ccc1999Changes.pdf> at 3, accessed April 5, 2009.

[1272] Cherokee.org, online: Constitution of the Cherokee Nation 1999, Article II <http://www.cherokee.org/Docs/TribalGovernment/Executive/CCC/2003_CN_CONSTITUTION.pdf>, accessed April 5, 2009.

[1273] Cherokee.org, online: The 1999 Constitution of the Cherokee Nation, A Review and Comparison Between the 1976 and 1999 Constitutions of the Cherokee Nation in Preparation for the Ratification Vote <http://www.cherokee.org/TribalGovernment/Executive/CCC/ccc1999Changes.pdf> at 4, Edited and finalized by the Convention Style Committee on July 30, 1999, accessed April 5, 2009.

[1274] Constitution of the Cherokee Nation 1999, *supra* note 1272, article V, section 9.

[1275] *Ibid.*, Article VI, section 12.

[1276] *Ibid.*, Article VII, section 14.

[1277] *Ibid.*, Article VIII.

[1278] *Ibid.*, Article XV, section 4.

[1279] See generally Indian and Northern Affairs Canada, online: Nisga'a Treaty <http://www.ainc-inac.gc.ca/pr/info/nit_e.html>, accessed Apr 16, 2008.

[1280] *Calder et al.* v. *Attorney General of British Columbia* (1973), 34 D.L.R. (3d) 145 (S.C.C.).

[1281] BCLaws, online: Nisga'a Final Agreement Act [SBC 1999] Chapter 2

<http://www.bclaws.ca/Recon/document/freeside/--%20N%20--/Nisga%27a%20Final%20Agreement%20Act%20%20SBC%201999%20%20c.%202/00_99002_01.xml>, accessed April 6, 2009.

[1282] *Ibid.* at section 1.

[1283] "Ayuukhl Nisga'a" and "Ayuuk" mean the traditional laws and practices of the Nisga'a Nation. See Nisga'a Final Agreement, *supra* note 1281 at section 1.

[1284] The general governing body.

[1285] See generally, *Campbell*, *supra* note 66 which also lists the villages below.

[1286] The "others" do not have elected representatives of their own in the national boddy.

[1287] See *Campbell*, *supra* note 66 at paras. 50-51.

[1288] *Campbell*, *supra* note 66 at para. 51.

[1289] *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821.

[1290] Anghie, *supra* note 4 at 70.

[1291] Nisga'a Final Agreement, *supra* note 1281.

[1292] *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 A.C. 46 (P.C.).

[1293] *Pamajewon*, *supra* note 1289.

[1294] The Canadian courts, for instance, have imported the usufructuary concept of Indigenous title to strip the Indigenous peoples of their lands but have abandoned the residual concept of sovereignty which stemmed from the same Marshall trilogy.

[1295] For details, see Reid Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stan. L. Rev. at 1215-46.

[1296] *Cherokee*, *supra* note 90.

[1297] *Ibid.* at 181.

[1298] *Ibid.*

[1299] The state Supreme Court in Arizona equated guardianship with disability and disqualified Indians from voting because they were under "federal guardianship." That decision stood until 1948 when the court reversed itself in *Harrison* v. *Laveen*.

[1300] *Kagama*, *supra* note 61 at 382.

[1301] *Sandoval*, *supra* note 122 at 40-41.

[1302] *Ibid.*

[1303] *Seminole Nation* v. *United States*, 316 U.S. 286 (1942).

[1304] *Ibid.* at 296-297.

[1305] *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 at 377 (1975).

[1306] *Guerin*, *supra* note 7.

[1307] See Bartlett, *supra* note 471 at 367.

[1308] Royal Proclamation, *supra* note 78.

[1309] *Indian Act*, S.C. 1876, c.18.

[1310] Bartlett, *supra* note 471 at 19.

[1311] *Ibid.*

[1312] *Ibid.*

[1313] *Ibid.*

[1314] *Guerin*, *supra* note 7.

[1315] Bartlett, *supra* note 471 at 19.

[1316] *Guerin*, *supra* note 7.

[1317] *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344.

[1318] Bartlett, *supra* note 471 at 19.

[1319] The fiduciary concept is like jello. It slips through the fingers no matter how one handles it. It is controlled by grace and not the law as in the case of trust.

[1320] Christopher D. Jenkins, "John Marshall's Aboriginal Rights Theory and its Treatment in Canadian Jurisprudence" (2001) 35 U.B.C. L. Rev. 1.

[1321] It may be argued that there are no "natives" in the Caribbean. The slaves and the endentured workers came to possess lands but the plenary power was not extended over them.

[1322] *Johnson*, *supra* note 281.

[1323] Important Canadian cases citing *Johnson*, *supra* note 281include: *St. Catherine's Milling*, *supra* note 1292 at 48 and *Calder*, *supra* note 1280, as per Judson J. at 151 and Hall J. at 169 (S.C.C.) and *Guerin* v. *The Queen* (1984), 13 D.L.R. (4th) 321at 335 as per Dickson J. (S.C.C.) and a lower-court decision and appeal dismissed by the Supreme Court in agreement, *R.* v. *White and Bob* (1961), 50 D.L.R. (2nd) 613 (B.C.C.A.) at pp. 630 and ff. See also: Bartlett, *supra* note 471 at 27, footnote 97; see also J. Dekinson, "Marshall's Aboriginal Rights and its Treatment in Canadian Jurisprudence" (2001) 35 U.B.C. L. Rev. 1 at 3.

[1324] An Indian proverb.

[1325] *Cherokee*, *supra* note 90 at 31.

[1326] Indian tribes are "distinct political communities" with their own mores and laws, *Worcester*, *supra* note 55 at 557.

[1327] *United States* v. *Wheeler*, 435 U.S. 313 at 322-326 (1978).

[1328] *Kagama*, *supra* note 61 at 381.

[1329] For evidence see Robertson, *supra* note 367.

[1330] Royal Proclamation, *supra* note 78.

[1331] TheOtherMetis, online: Chapter 3 – Aboriginal Treaty Rights and Claims of Metis <http://www.othermetis.net/Papers/CircleTxt/CrcPrt3.html>, accessed April 6, 2009.

[1332] *Ibid.*

[1333] *Johnson, supra* note 281 at 688.

[1334] Despite the numerous citations in this section, Marshall did not furnish the source of this condition.

[1335] *Johnson, surpa* note 281 at 689.

[1336] *Johnson, supra* note 281.

[1337] *Kagama*, *supra* note 61 at 382.

[1338] *Ibid.*

[1339] Please note that we have restricted our comments to Supreme Court judgments. In this section, it would be impossible to cover the statutes and special agreements between the federal government and individual Indian nations.

[1340] *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

[1341] *McGee Corp.* v. *Farley*, 115 F.3d 1498 (10th Cir. 1997).

[1342] *Strate*, *supra* note 1340.

[1343] *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978).

[1344] *Duro* v *Reina*, 495 U.S. 676 (1990).

[1345] "Indian country" includes all lands within the limits of any Indian reservation under federal and tribal jurisdiction. 18 U.S.C.A. § 1151

[1346] *New Mexico*, *supra* note 62.

[1347] *California*, *supra* note 63.

[1348] *Montana* v. *United States*, 450 U.S. 544 (1981).

[1349] *Oliphant*, *supra* note 1343.

[1350] *Lone Wolf*, *supra* note 57 at 565.

[1351] Getches, *supra* note 81 at 125.

[1352] *Ibid.*

[1353] *Montana*, *supra* note 1348.

[1354] *Strate*, *supra* note 1342.

[1355] *Nevada* v. *Hicks*, 533 U.S. 353 (2001).

[1356] *Supra* note 1273.

[1357] *Wheeler*, *supra* note 1327 at 322-326.

[1358] "Dependent" refers to the power of another nation to unilaterally vary the powers of a (supposedly) sovereign nation. It does not refer to protection.

[1359] *Lone Wolf*, *supra* note 57 at 565.

[1360] *Wheeler*, *supra* note 1327.

[1361] The act of March 3, 1871 embodied in section 2079 of the Revised Statutes, cited in *Kagama*, *supra* note 61 at 483.

[1362] *Worcester*, *supra* note 55 at 498.

[1363] *Oneida*, *supra* note 61.

[1364] *Kagama*, *supra* note 61 at 382.

[1365] *Lone Wolf*, *supra* note 57 at 565.
[1366] *Worcester*, *supra* note 55 at 498.
[1367] *Cherokee*, *supra* note 90.
[1368] *United States* v. *Crow Dog*, 109 U.S. 556 (1883).
[1369] *Lone Wolf*, *supra* note 57.
[1370] The act of March 3, 1871 embodied in section 2079 of the Revised Statutes, cited in *Kagama*, *supra* note 61 at 483.
[1371] Apart from Kent McNeil, "Judicial Approaches to Self-Government since Calder: Searching for Doctrinal Coherence," in Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, forthcoming, UBC Press, Vancouver, other scholars include Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. at 1011; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 American Indian Law Review at 37; Doug Moodie, "Thinking Outside the 20th Century Box: Revisiting Mitchell - Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government" (2003-2004) 35 Ottawa Law Review at 1; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. at 993; Catherine Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Canadian Bar Review 36 at 44-50.
[1372] K. McNeil, *Speaking Notes*, prepared for the Hul'qumi'num Treaty Group and National Centre for First Nations Governance, Governance Development Forum, Parksville, B.C., October 3, 2006. The foregoing piece on inherent self-government is modified from these notes. See online: What is the Inherent Right of Self-Government? <http://www.fngovernance.org/pdf/HulquminumSpeakingNotes.pdf>, accessed April 15, 2009.
[1373] *Pamajewon*, *supra* note 1289.
[1374] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (S.C.C.).
[1375] *R.* v. *Marshall*, [1999] 3 S.C.R. 533.
[1376] *Ibid.*
[1377] McNeil, *supra* note 1365 at 8.
[1378] *Pamajewon*, *supra* note 1289.
[1379] *Ibid.* at 4.
[1380] *Delgamuukw*, *supra* note 45 at 1114.
[1381] *Pamajewon*, *supra* note 1289.
[1382] *Campbell*, *supra* note 66 at paras. 130-131 as per Williamson J.
[1383] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911.
[1384] McNeil, *supra* note 1372 at 4.
[1385] *Delgamuukw*, *supra* note 45.
[1386] *Marshall*, *supra* note 1375.
[1387] *Ibid.*
[1388] *Campbell*, *supra* note 66 at para. 114; McNeil, *supra* note 1372 at 3.
[1389] *Haida Nation* v. *British Columbia* (Minister of Forests), [2004] 3 S.C.R. 51.
[1390] That is land not created by statute or treaty.
[1391] McNeil, *supra* note 1372 at 5.
[1392] *Haida*, *supra* note 1389.
[1393] *Van der Peet*, *supra* note 1374; *Guerin*, *supra* note 7.
[1394] *Haida*, *supra* note 1389 at 3 of the SSC WEB version.
[1395] *Ibid.* at 4 of the SSC WEB version.
[1396] McNeil, *supra* note 1372 at 5; see also Morse, *supra* note 1371 at 1011; Borrows, *supra* note 1371 at 37; Moodie, *supra* note 1371at 1.
[1397] *Cherokee*, *supra* note 90.
[1398] *Worcester*, *supra* note 55.
[1399] *Calder*, *supra* note 1280.
[1400] *Campbell*, *supra* note 66 at para. 77, citing the Supreme Court reference regarding Quebec secession, [1998] 2 S.C.R. 217 at 244-245.
[1401] As per Watson J. in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*,[1892] A.C. 437 at 441-442; *Campbell*, *supra* note 66 at para. 75.

[1402] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] 2 All E.R. 118; *Campbell*, *supra* note 66 at para. 75.

[1403] *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.) at 108-109.

[1404] From *Sioui*, *supra* note 65 at para. 68; W. Johnson, *The Papers of Sir William Johnson*, J. Sullivan, ed., vol. 1 (Albany: State University of New York, 1921) at 1053-1054.

[1405] From *Sioui*, *supra* note 65 at para. 69; Johnson, *supra* note 1404 at 157-158.

[1406] *Worcester*, *supra* note 55 at 548-549 (as quoted by Lamer J. in *Sioui*, *supra* note 65 at para. 70).

[1407] See McNeil, *supra* note 1372 at 7.

[1408] *Mitchell*, *supra* note 1383.

[1409] *Ibid.*; see also McNeil, *supra* note 1372 at 7.

[1410] Per Major J. in *Mitchell*, *supra* note 1383; see also McNeil, *supra* note 1372 at 7.

[1411] As per Major and Binnie JJ. in *Mitchell*, *supra* note 1383.

[1412] The expression "domestic dependent nation" was introduced by Marshall C.J. in *Cherokee*, *supra* note 90 at 17.

[1413] The powers of Indian tribes are, in general, "...inherent powers of a limited sovereignty which has never been extinguished." *Wheeler*, *supra* note 1327 at 222-226, as per Stewart J.

[1414] The history of *Marshall* No. 2 will bear this out: *Marshall v. Canada*, (sub nom. *R. v. Marshall*) [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513, (sub nom. *R. v. Marshall*) N.S.R. (2d) 201, (sub nom. *R. v. Marshall*) 549 A.P.R.-201 (S.C.C.), per Binnie J., motion for rehearing and stay dismissed (sub nom. *R. v. Marshall*) [1999] 3 S.C.R. 533, (sub nom. *R. v. Marshall*) 149 D.L.R. (4th) 193, (sub nom. *R. v. Marshall*) 179 N.S.R. (2d) 1, (sub nom. *R. v. Marshall*) 553 A.P.R. 1 (S.C.C.). The revisiting of the case by the Supreme Court is the result of public outcry over the correctly decided Marshall No. 1.

[1415] *Kruger v. The Queen*, [1978] 1 S.C.R. 104 at 109.

[1416] *Calder*, *supra* note 1280.

[1417] F.B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Bolt, J.A. Long & L.L. Littlebear, eds., *The Quest For Justice* (Toronto: University of Toronto Press, 1985) at 116.

[1418] *Mabo* v. *Queensland* (1992), 107 A.L.R. 1.

[1419] Lawrence, *supra* note 96 at 136 (as quoted in Anghie, *supra* note 4 at 27).

[1420] This piece is an excerpt from my paper: Baffoe, *supra* note 511.

[1421] Excerpts from Robertson, "John Marshall as Colonial Historian," *supra* note 1074 at 759. Lecture notes from Professor B.W. Morse, DCL 5125/CML 4162 - Issues In Aboriginal Law, University of Ottawa, 2002.

[1422] *Worcester*, *supra* note 55 at 484.

[1423] *Supra* note 1421.

[1424] *Ibid.*

[1425] *Ibid.*

[1426] See also H. Fisher, ed., *The Collected Papers of Frederic William Maitland*, vol. 1 (Cambridge: Cambridge University Press, 1911) at 491. For a critique of Maitland's despairing view, see D.J. Guth, "Archives, Historicism, and Empiricism: Searching the Past for Proof or Discovery" (paper presented to the "Law, State and Society in History Conference" at Osgoode Hall, Toronto, May 1992), obtainted from Prof. Guth at the University of Manitoba's Faculty of Law in November 1999.

[1427] Robertson, *Conquest by Law*, *supra* note 367.

[1428] Royal Proclamation, *supra* note 78.

[1429] *Johnson*, *supra* note 281.

[1430] *The Wichita & Affiliated Bands of Indians* v. *United States*, 89 Ct. Cl. 378 (1939).

[1431] The word "purchase" was used with respect to Indian land in the Royal Proclamation.

[1432] The word "ceded" was used with respect to Indian land in the Royal Proclamation.

[1433] Excerpts from Robertson, "John Marshall as Colonial Historian," *supra* note 1074; B.W. Morse, *supra* note 1421.

[1434] The Supreme Court cases from *Sparrow* to *Marshall* all stress the honour of the Crown.

[1435] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 410; affirmed in *Sioui*, *supra* note 65 at para. 17.

[1436] *Johnson*, *supra* note 281.

[1437] *Cherokee*, *supra* note 90.

[1438] *Worcester*, *supra* note 55.

[1439] See the Island of Palma's case, in *Reports of International Arbitral Awards* (The Hague, 1928), where the court made possession for a long time the criterion for title. In 1832, the Marshall court of the United States, in *Worcester*, *supra* note 55, gave credence to the international Indian treaties and stated that "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial" (see *Worcester*, *supra* note 55 at 486).

[1440] *Worcester*, *supra* note 55 at 486.

[1441] *Ibid.* at 496.

[1442] The sixteenth-century Spanish scholar Francisco de Vitoria (or Franciscus de Victoria) vehemently rejected the doctrine as early as the sixteenth century; J. Burrows & L. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary* (Toronto: Butterworths Canada Ltd., 1998) at 6.

[1443] *Johnson*, *supra* note 281 at 692.

[1444] *Ibid.* at 693.

[1445] The fact that the policy of Apartheid is repulsive is immaterial. It is part and parcel of the system that has become the law of the country. Some of the Indian policies in the Americas are also repulsive but have remained part of the laws of the respective countries.

[1446] *Johnson*, *supra* note 281at 689.

[1447] Anghie, *supra* note 4 at 56.

[1448] *Worcester*, *supra* note 55 at 496.

[1449] As cited by Marshall C.J. in *ibid.* at 496.

[1450] *Ibid.* at 485.

[1451] *Ibid.* at 496.

[1452] Royal Proclamation, *supra* note 78. See also Marshall's judgment in *Worcester*, *supra* note 55 at 496.

[1453] *Worcester*, *supra* note 55 496.

[1454] *Johnson*, *supra* note 281 at 693.

[1455] Conquest does not strip the conquered of their land or culture. *United States* v. *Perchman*, 7 Peters 51at 86 (1833) (U.S.S.C.).

[1456] *Johnson, supra* note 281.

[1457] *Ibid.* at 692.

[1458] *Ibid.* at 693.

[1459] *Ibid.* at 692.

[1460] That statement turned out to be hot air. Competition among the Europeans forced the Europeans into treaties with the Indigenous peoples of Africa.

[1461] Governor Hilt to Sir J. Pakington, October 3, 1853, "1852-53 (703) Despatches from Governor of Gold Coast on late Warfare between Chiefs and Forces of Fantees and Ashantees," House of Commons Parliamentary Papers Online, accessed with ProQuest through the Brian Dickson Library.

[1462] *Johnson*, *supra* note 281 at 693.

[1463] *Perchman*, *supra* note 1455 at 86.

[1464] *Le case de Tanistry* (1608), Davis 28 at 51 [80 E.R. 516]; 4th ed. Dublin (1762), English translation 78.

[1465] Letter of Board of Trade to Sir W. Johnson on July 10, 1764 in Office Records, Public Record Office (Kew), London, England 324/17 at 409, quoted in M.D. Walters, *The Continuity of Aboriginal Customs and Government Under British ImperialConstitutional Law As Applied in Colonial Canada, 1760-1860* (D.Phil. Thesis, Oxford University, 1995), parts reprinted in (1995) 33:4 Osgoode Hall L.J. 787 at 798; available online: <http://www.ohlj.ca/archive/articles/33_4_walters.pdf>.

[1466] *Sioui*, *supra* note 65.

[1467] Walters, *supra* note 1042 at 798.

[1468] *Wall* v. *Williamson*, 8 Ala. 48 (1845).

[1469] *Perchman*, *supra* note 1455 at 86.

[1470] F. Cohen, *Handbook of Federal Indian Law* (Washington: Department of the Interior, 1945) at 122; see also N. Margold, "Int. Dept. Sol., 25 Oct. 1934" in *U.S. Department of the Interior, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974*, vol. 1 (Washington: Government Printing Office, 1974) at 448.

[1471] The introductory part of this section was modified from Baffoe, *supra* note 511.

[1472] L.N. McAlister, *Spain & Portugal in the New World 1492-1700* (Oxford: Oxford University Press, 1984) at 25.

[1473] H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard Univesity Press, 1983) 200 at 221-224.

[1474] J. Muldoon, "Papal Responsibility for the Infidel: Another Look at Alexander VI's Inter Caetera" (1978) 64 Catholic Hist. Rev. at 170; Fr. M.J. Stogre, S.J., M.D., "The Development of Papal Teaching on Aboriginal Rights: 500 Years of Catholic Social Teaching" (1991) 3-7 at 14-20 [unpublished manuscript, kindly furnished by Fr. Stogre].

[1475] D. Juneau, "The Light of Dead Stars" (1983) 11 Am. Indian L.Rev. at 11, at n. 55. Both Muldoon and Stogre question the "donation" issue, as did Victoria in his lectures. Compare Muldoon, *supra* note 1474 at 170; Stogre, *supra* note 1474 at 14-20.

[1476] F.S. Cohen, "The Spanish Origin," *supra* note 279 at 11-12; Stogre, *supra* note 1474 at 21-27.

[1477] Cohen, *supra* note 1476 at 12. Cohen asserts that the words of the Bull are restated in the Northwest Ordinance of 1787 in its "utmost good faith" toward the Indians.

[1478] *Campbell* v. *Hall* (1774), 1 Cowp. 204 [98 E.R. 1045].

[1479] *Freeman* v. *Fairlee* (1828), 1 Moo. I.A. 305 [18 E.R. 1 17]. See also *Mabo*, *supra* note 1418.

[1480] *Mabo*, *supra* note 1418 at para. 42.

[1481] *Freeman*, *supra* note 1479 at 789 (as cited in *Mabo*, *supra* note 1418 at para. 42).

[1482] *Calder*, *supra* note 1280.

[1483] *Perchman*, *supra* note 1455.

[1484] *Ibid.* at 86.

[1485] "Despatch from Governor Hill to The Right Honourable Sir John Palington, Bart., t.P. Cape Coast Castle, 23 October 1852" in *1852-53 (703) Despatches from Governor of Gold Coast on late Warfare between Chiefs and Forces of Fantees and Ashantees*, House of Commons Parliamentary Papers Online, accessed with ProQuest through the Brian Dickson Library.

[1486] *Ibid.*

[1487] In *Total Oil Products, Ltd.* v. *Obeng*, [1962] 1 G.L.R. 229, the court vehemently rejected the British system of fee simple as part of Ghanaian customary land tenure.

[1488] Lord Hailey, "Native Administration in the British African Territories, Part 3" (1951) 52 Afr. Aff. at 253 (as quoted in Kimble, *supra* note 29 at 18).

[1489] *Golightly*, *supra* note 932.

[1490] *Ibid.*

[1491] A Russian proverb.

[1492] Chief of war, or the clan leader, as opposed to the head of the tribe or nation.

[1493] Macklem, *supra* note 388

[1494] P. Amoss, *Coast Salish Spirit Dancing* (Washington: University of Washington Press, 1978).

[1495] *Norris* v. *Thomas*, [1992] 2 C.N.L.R. 139 (B.C.S.C.). For an illuminating discussion of the case, see C. Denis, *We Are Not You: First Nations and Canadian Modernity* (Peterborough: Broadview Press, 1997); Macklem, *supra* note 388 at 49-51.

[1496] Macklem, *supra* note 388 at 49-51.

[1497] This idea originated from J. Borrows and L. Rotman, "The Sui Generis Nature of Aboriginal Rights: Does It Make A Difference?" (1997) 36 Alta. L. Rev at 9. The authors trace the development of the use of the term *sui generis* to characterize Aboriginal legal rights, noting that this is not in fact a recent phenomenon. They explain the doctrine as a balance between common law and Aboriginal conceptions. They concluded by quoting Lambert: "In short, it is not only aboriginal title to land that is *sui generis*, all aboriginal rights are *sui generis*." They went on to show how the common law had adopted Aboriginal civil law and then listed numerous cases that are cited in this paper. Anyone reading that article is bound to ask why Aboriginal property laws are receiving differential treatment. This was a hot topic in all my Aboriginal classes from 1998 to 2002.

[1498] *Sioui*, *supra* note 65.

[1499] *R. v. Baby* (1855), 12 U.C.Q.B. 346. For the origin of comparing the treatment of Aboriginal title to Aboriginal civil law, see note 1497 above citing Burrows & Rotman, "Sui Generis." See also Christine Scotnicki of V. Starr & Associates, *Aboriginal Civil Jurisdiction in Canada*, commissioned by the Canadian Bar Association pursuant to a grant provided by the Royal Commission on Aboriginal Peoples under their Intervenor Participation Program, December 1993.

[1500] See for example: *Connolly* v. *Woolrich and Johnson* (1867), 17 R.J.R.Q. 75 (Que. S.C.), affirmed (*sub nom. Johnstone* v. *Connolly*) (1869), 17 R.J.R.Q. 266 (Que. C.A.) [validity of Cree customary marriage]; *R.* v. *Nan-E-Quis-A-Ka* (1899), 1 Terr. L.R. 211 (N.W.T.S.C.) [validity of polygamous Indian marriage]; *The Queen* v. *Bear's Shin Bone* (1899), 4 Terr. L.R. 173 (N.W.T.S.C.) [validity of polygamous Indian marriage for purposes of criminal prosecution]; *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T.T.C.) [validity of traditional Inuit adoption]; *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T.T.C.) [validity of traditional Inuit adoption]; *Re Tucktoo and Kitchooalik* (1972), 27 D.L.R. (3d) 225 (N.W.T.T.C.) [validity of traditional Inuit adoption]; *Re Wah-Shee* (1975), 57D.L.R. (3d) 743 (N.W.T.S.C.) [validity of traditional Indian adoption]; *Re Tagornak*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.) [validity of traditional Inuit adoption involving a Caucasian adoptive father and an Inuit adoptive mother]; *Wilson* v. *Wilson* (B.C.S.C.), unreported, June 6, 1991 [application of Nisga'a customary law of child guardianship]. See also N. K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada" (1984) 4 C.N.L.R. 1.

[1501] *The Queen* v. *Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 at 212-213; Wetmore J.'s reasoning was consistent with that of Lord Mansfield in *Campbell*, *supra* note 1478.

[1502] *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T.T.C.).

[1503] *Ibid.* at 195.

[1504] *Norris*, *supra* note 1495.

[1505] *R.* v. *Van der Peet*, *supra* note 1374 at para. 30. For other causes supporting Justice Lamer's view, see Kent McNeil, National Centre for First Nations Governance, online: The Jurisdiction of Inherent Right Aboriginal Governments <http://www.fngovernance.org/pdf/Jurisdiction_of_Inherent_Rights.pdf> at 5, accessed April 15, 2009.

[1506] *Norris*, *supra* note 1495

[1507] S. James Anaya, "On Justifying Special Ethnic Rights: Comments on Pogge" in I. Shapiro and W. Kymlicka, eds., *Ethnicity and Group Rights* (New York: New York University Press, 1997) 222 at 226.

[1508] Macklem, *supra* note 388 at 51 for more authorities.

[1509] A good example is found in *Pamajewon*, *supra* note 1289, where the tribe had to prove the existence of the right to gamble in order to acquire the power to govern that right.

[1510] This section is modified from the author's published article – see Baffoe, *supra* note 900.

[1511] From class notes from a lecture of Prof. Ridd in the course *Modernity* (Fall 1996), University of Winnipeg, Manitoba.

[1512] R. George, *The Indigenous Law of Aboriginal People: Restoring the Foundation of Justice* (Thesis, University of Ottawa, 2001).

[1513] Ryan, *supra* note 561.

[1514] *Ibid.* The elders who remembered them could not write and I did not want to reinvent the wheel since the elders understood what Ryan's terms mean.

[1515] For a good review, see D. Kinsley, *Ecology and Religion: Ecological Spirituality in Cross-Cultural Perspective* (New Jersey: Prentice Hall, 1995).

[1516] Ryan, *supra* note 561.

[1517] Elders of Tadoule Lake, *supra* note 559.

[1518] Ghanaian proverb.

[1519] I first heard this wise saying from my daughter. It originated from a political activist named Audre Lorde from the United States.

[1520] *St. Catherine's*, *supra* note 1292, *White and Bob*, *supra* note 1323 at 630ff and *Calder*, *supra* note 1280 are just few important cases citing *Johnson* v. *McIntosh* from the United States.

[1521] *Marshall* (No. 2), the first case to be re-visited by the Supreme Court, was the result of public pressure.

[1522] F.E. LaViolette, citing Mr. Williams when he appeared as a witness before the Joint Committee [in Ottawa] on May 2, 1847 in "The Struggle for Survival Indian Cultures & the Protestant Ethic in B.C." at 182, from Minutes, No. 17, May 2, 1847 at 831- in Janice G.A.E. Switlo, Turtle Island Native Network News, online: "Modern Day Colonialism in Canada - Canada's continued attempts to conquer Aboriginal Peoples" <http://www.turtleisland.org/news/janice.pdf>, accessed April 7, 2009.

[1523] Including Australia, New Zealand and the United States. For detailed analysis, see Williams & Henderson, "Toward a Critical Examination of Third World Legal Issues" (1982) 3 B.C. Third World L.J. 1, 1-2 at 28-34.

[1524] G. La Forest, *Report on Administrative Processes for the Resolution of Specific Indian Claims* (Ottawa: DIAND, 1979), unpublished, at 17 and 64.

[1525] In 1981, the federal government released *In All Fairness: A Native Claims Policy – Comprehensive Claims* followed by *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982). Neither dealt with the central issue of impartiality.

[1526] The *Penner Report: Report of the House of Commons Special Committee on Indian Self-Government*, Minutes of Proceedings, Issue No. 40, October 12 and 20, 1983 at 115.

[1527] *Report of the House of Commons Standing Committee on Aboriginal Affairs - Unfinished Business: An Agenda for All Canadians in the 1990's*, Minutes of Proceedings and Evidence, Issue No. 20, 31 January – February 21, 1990 at 3.

[1528] Assembly of First Nations, Chiefs Committee on Claims, First Nations Submission on Claims, Ottawa, December 14, 1990.

[1529] Library of Parliament, Legislative Summaries, online: Bill C-6: The Specific Claims Resolution Act <http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c6&source=library_prb&Parl=37&Ses=2> accessed April 7, 2009.

[1530] ICC was established under Part I of the *Inquiries Act* by Order in Council, P.C. 1991-1329, as amended by P.C. 1992-1730.

[1531] See *Comprehensive Claims Settled between 1973 and 1996* in Appendix A.

[1532] *Indian Claims Commission, Annual Report 2000-2001* (Ottawa: Minister of Public Works and Government Services Canada, 2001).

[1533] *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, Restructuring the Relationship, Part Two, Chapter 4, "Lands and Resources" at 591ff.

[1534] The Joint First Nations-Canada Task Force on Specific Claims Policy Reform (Ottawa, 1998) at 9-10.

[1535] Evidence, Meeting No. 18, May 29, 2001.

[1536] L.N. Chartrand, *A Section 35 Watchdog: Furthering Accountability of Federal, Provincial and Territorial Governments to Aboriginal Peoples,* Governance, Self-Government, and Legal Pluralism Conference (Hull, Quebec, April 23-24, 2003).

[1537] Library of Parliament, *supra* note 1529.

[1538] Office of the Prime Minister, online: PM Harper Announces Major Reforms to Address the Backlog of Aboriginal Treaty Claims <http://pm.gc.ca/eng/media.asp?id=1695>, accessed April 7, 2009.

[1539] House of Commons of Canada, online: Bill C-30 <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3141843&Language=e&Mode=1&File=29#1>, accessed April 21, 2009.

[1540] Chartrand, *supra* note 1536.

[1541] *Ibid.* at 2.

[1542] 1996 JTF Draft, subsections 5(3)-(4) (1998).

[1543] Library of Parliament, Legislative Summaries, Bill C-6, *The Specific Claims Resolutions Act,* new clause 77.1, online: <http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c6&source=library_prb&Parl=37&Ses=2>, accessed April 7, 2009.

[1544] Library of Parliament, Legislative Summaries, Bill C-6, SCRA clause 76.1, online <http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c6&source=library_prb&Parl=37&Ses=2>, accessed April 7, 2009.

[1545] JTF Report, Library of Parliament, Legislative Summaries, online: Bill C-6: The Specific Claims Resolution Act <http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c6&source=library_prb&Parl=37&Ses=2>, accessed April 7, 2009.

[1546] *Ibid.* at 11.

[1547] *Ibid.*

[1548] *Federal Courts Act*, R.S.C. 1985, c. F-7, (cl. 84).

[1549] Strangely, section 45 of the JTF draft legislation recommended that the Federal Court of Appeal be the reviewing Court, which would not have solved the problem. But, at the same time, subsection 35(1) had proposed "privative" provision that would have made panel decisions "final and binding for all purposes."

[1550] See JTF Draft, s. 41.

[1551] Library of Parliament, Legislative Summaries, Bill C-6, SCRA clause 76.1, online <http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c6&source=library_prb&Parl=37&Ses=2>, accessed April 7, 2009.

[1552] Judicial Service of Ghana, online: Constitution 1992, Chapter 022 <http://www.judicial.gov.gh/constitution/chapter/chap_22.htm>, accessed April 7, 2009.

[1553] A. C. Hamilton & C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People,* Vol. 1 (Winnipeg: Queen's Printer, 1991) at 25.

[1554] *Ibid.*

[1555] *Public Interest* v. *Aysassooquun[?]* (20 February 1845) GQCA, PAM, MG2 B41, bk. 1. (The question mark is in the original text; my scanned version did not have page numbers.)

[1556] *Ibid.*

[1557] Clause 77 Bill C-6: The Specific Claims Resolution Act (LS-431E), Library of Parliament, Legislative Summaries, online <http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c6&source=library_prb&Parl=37&Ses=2>, accessed April 7, 2009.

[1558] D. Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 23.

[1559] *Calder*, *supra* note 1280.

[1560] Robertson, *Conquest by Law*, *supra* note 367.

[1561] *Johnson*, *supra* note 281 at 596.

[1562] Also reproduced for the same reason in *White and Bob*, *supra* note 1323 at 632-633.

[1563] *Worcester*, *supra* note 55 at 484.

[1564] *Johnson*, *supra* note 281.

[1565] Switlo, *supra* note 1522.

[1566] *White and Bob*, *supra* note 1323.

[1567] Arthur S. Morton, *A History of the Canadian West to 1870-71* (London: Thomas Nelson & Sons, 1939) at 257-259.

[1568] *White and Bob*, *supra* note 1323 at 636-637.

[1569] Switlo, *supra* note 1522 at 3.

[1570] Since these theorists tend to group the Indigenous peoples with the beasts of the field, it is only a matter of time before these beasts awaken to their rights.

[1571] Royal Proclamation, *supra* note 78.

[1572] *Worcester*, *supra* note 55 at 485.

[1573] This thesis is putting considerable weight on Switlo because she is an Indigenous writer and scholar. Considering the very limited number of articles by Indigenous writers, her work has considerable impact on Indigenous consciousness.

[1574] Compare his view with Judson J. in *Calder*, *supra* note 1280 at 328, who stated that Aboriginal title in British Colombia did not stem from the Royal Proclamation of 1763.

[1575] Switlo, *supra* note 1522 at 3.

[1576] Q.C. Binnie used this Corinthian simile in the article, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217 at 218. Then, as Binnie J., writing the majority decision in *R.* v. *Marshall* (1999), leave to appeal to H.L. refused at 465, he returned to the phrase: "From this distance, across more than two centuries, events are necessarily seen 'as through a glass, darkly.'" (as cited by B. Olthuis, "Defrosting Delgamuukw or How to Reject a Frozen Rights Interpretation of Aboriginal Title in Canada" (2001) 12 N.J.C.L. 385 at 402).

[1577] Conrad, *supra* note 1106 at headnote, Chapter 1.

[1578] Calder, *supra* note 1280 as per Judson J. at 328.

[1579] Indian and Northern Affairs, online: Specific Claims Act – Bill C-6 <http://www.ainc-inac.gc.ca/pr/info/trty_e.html>, accessed 15 Feb 2008.

[1580] For more information see Indian and Northern Affairs, online: Specific Claims Act – Bill C-6 <http://www.ainc-inac.gc.ca/pr/info/trty_e.html>, accessed 15 Feb 2008.

[1581] *Ibid.*

[1582] *Ibid.*

[1583] CBCNews.ca, online: Harper Promises Bill to "Revolutionize" Land Claims Process <http://www.cbc.ca/canada/story/2007/06/12/claims.html>, accessed April 7, 2009.

[1584] *Ibid.*

[1585] *Ibid.*

[1586] Office of the Auditor General of Canada, online: Chapter 14 – Indian and Northern Affairs Canada – Comprehensive Land Claims <http://www.oag-bvg.gc.ca/internet/English/parl_oag_199809_14_e_9320.html>, accessed April 19, 2009.

[1587] *Delgamuukw*, *supra* note 45 at para. 207.

[1588] *R.* v. *Marshall* [No. 2] [1999] S.C.J. No. 66 November 17, 1999.

[1589] *R.* v. *Powley* (2003), 230 D.L.R. (4th) 1, 308 N.R. 201.

[1590] *Ibid.* at para. 49.

[1591] *Guerin*, *supra* note 7 at 108-109.

[1592] From *Sioui*, *supra* note 65 at para. 69; J. Sullivan & A. Flick, eds., *The Papers of Sir William Johnson*, vol. 5. (Albany: State University of New York Press, 1921-1933) at 157-158.

[1593] *Guerin*, *supra* note 7 at 108-109.

[1594] Bill C-31 reinstated Indian status to Aboriginal women (and their offspring) who married Europeans.

[1595] Native Women's Association of Canada, online: Aboriginal Women and Bill C-31 <http://www.nwac-hq.org/en/documents/nwac.billc-31.jun2007.pdf>, accessed April 7, 2009.

[1596] University of British Columbia Faculty of Law, online: *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)* <http://faculty.law.ubc.ca/boyd/pdf/307/corbieredecision.pdf>, accessed April 7, 2009.

[1597] International Work Group for Indigenous Affairs, online: Plain language version of the Declaration <http://www.iwgia.org/sw1592.asp>, accessed April 19, 2009.

[1598] *Ibid.*

[1599] *Ibid.*

Appendix A:

Comprehensive Claims Settled

Ten comprehensive claims agreements have been settled since 1973 when the federal government's policy was announced.

List of seven of these items:

• The James Bay and Northern Quebec Agreement (JBNQA) signed in 1975 was the first comprehensive claim to be settled followed by the Northeastern Quebec Agreement (NEQA) signed in 1978. Together, these agreements gave the 19,000 Cree, Inuit and Naskapi of northern Quebec over $230 million in compensation, ownership over 14,000 square kilometres of territory and exclusive hunting and trapping rights over another 150,000 square kilometres.

• The Inuvialuit Final Agreement with 2,500 Inuvialuit in the western Arctic was signed in 1984. The settlement provided them with 91,000 square kilometres of land, $45 million to be paid over 13 years, guaranteed hunting and trapping rights, and equal participation in the management of wildlife, conservation and the environment, a $10 million Economic Enhancement Fund and a $7.5 million Social Development Fund.

• The Gwich'in Agreement signed in 1992 provided the Gwich'in with approximately 24,000 square kilometres of land in the northwestern portion of the Northwest Territories and 1,554 square kilometres of land in the Yukon. In addition to these lands they will receive a non-taxable payment of $75 million to be paid over 15 years, a share of resource royalties from the Mackenzie Valley, subsurface rights, hunting rights and a greater role in the management of wildlife, land and the environment.

• The Nunavut Land Claims Agreement reached in 1993 with the Tungavik Federation of Nunavut is the largest comprehensive claim in Canada. The agreement will provide some 17,500 Inuit of the eastern Arctic with 350 000 square kilometres of land, financial compensation of $1.17 billion over 14 years, the right to share in resource royalties, hunting rights and a greater role in the management of land and the environment. The final agreement committed the federal government to a process which divides the Northwest Territories and creates the new territory of Nunavut by 1999.

• The Council for Yukon Indians representing 14 Yukon First Nations signed an Umbrella Final Agreement with the Government of Canada and the Yukon Territorial Government in 1993. The agreement sets out the terms for the final land claim settlements in the territory. Final land claim agreements were also reached with four of the First Nations: the Vuntut Gwitchin First Nation, the Champagne and Aishihik First Nations, the Teslin Tlingit Council and the First Nation of Na-cho Ny'a'k Dun. These agreements provide the four Yukon First Nations with financial benefits of $79,895,515,

a land settlement of 17,235 square kilometres and participation in wildlife and other management boards. In addition to their land claim, the four First Nations also negotiated self-government agreements which give them more control over land use on settlement lands and greater authority in areas such as language, health care, social services and education.

• The Sahtu Dene and Metis Agreement came into effect in 1994. The settlement provided the Sahtu Dene and Metis with 41 437 square kilometres of land (of which 1,813 square kilometres will include mineral rights), a share of resource royalties from the Mackenzie Valley, guaranteed wildlife harvesting rights, participation in decision-making bodies dealing with renewable resources, land-use planning, environmental impact assessment and review, land- and water-use regulations, and $75 million over 15 years.

• The Nisga'a Agreement-in-Principle initialled February 15, 1996 calls for a $190 million cash settlement and the establishment of a Nisga'a Central Government with ownership of and self-government over 1 900 square kilometres of land in the Nass River Valley. It also outlines the Nisga'a ownership of surface and subsurface resources on Nisga'a lands and their entitlements to Nass River salmon stocks and wildlife harvests.

Source:
Public Enquiries Kiosk
Department of Indian Affairs
and Northern Development
Ottawa, Ontario
K1A 0H4
Telephone: (819) 997-0380

Appendix B:

Curtailment of Jurisdiction of Tribal Courts Criminal Cases

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Anne E. Knickerbocker, J.D.

Each of the following states has jurisdiction over offenses committed by or against Indians in the listed areas of Indian country to the same extent that the state has jurisdiction over offenses committed elsewhere in the state, and the criminal laws of the state have the same force and effect within Indian country as they have elsewhere in the state:

(1) California, Nebraska, and Wisconsin -- all Indian country within the state.

(2) Minnesota -- all Indian country within the state, except the Red Lake Reservation.

(3) Oregon -- all Indian country within the state, except the Warm Springs Reservation.

(4) Alaska -- all Indian country within the state, except that on the Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by tribes in Indian country over which state jurisdiction has not been extended.n5

(5) Texas -- all trust land of the Texas Band of Kickapoo Indians, as if the state had assumed jurisdiction.n6 In addition, subject to certain exceptions and limitations, jurisdiction is ceded to Maine.n7

In connection with the statutory provision ceding jurisdiction to the states over offenses committed by or against Indians in the listed areas of Indian country, Indian country within the state generally includes Indian country in existence when the statute was enacted, as well as after-created Indian country.n8

Observation: The statute ceding jurisdiction to specified states over offenses committed by or against Indians in the listed areas of Indian country was designed to curtail the problem of lawlessness on many reservations which had developed due to inadequate Indian institutions for law enforcement, and was enacted at a time when Congress favored assimilation of Indian culture with American culture. More recently, however, the federal policy of Indian self-government rather than assimilation is dominant, and there have appeared judicially-created restrictions on state jurisdiction.n10

The grant of jurisdiction to the states is exclusive with respect to federal statutes relating to governing lawn11 and major crimes,n12 as they do not apply within the listed areas of Indian country.n13 However, if there is a conflict between Indian law and the state law, the state law is unenforceable on the Indian land.n14

Practice guide: If the statute has not withdrawn federal jurisdiction over criminal offenses within specified reservations, the courts of the state, including juvenile courts, do not thereby have jurisdiction over any proceeding to which Indians domiciled on such reservations are parties.n15

FOOTNOTES:

n5 18 USCA @ 1162(a).

The trial court erred in setting aside an information charging an Indian with arson committed on Indian land on the ground that California courts have no jurisdiction under such circumstances, since by virtue of 18 USCA @ 1162, the provision of 18 USCA @ 1153, for exclusive federal jurisdiction of the prosecution of arson committed by an Indian on Indian land, is inapplicable in California, and this state has jurisdiction

over offenses committed by or against Indians in all Indian country within the state to the same extent that it has jurisdiction over offenses committed elsewhere within the state.

People v Miranda (4th Dist) 106 Cal App 3d 504, 165 Cal Rptr 154.

n6 25 USCA @ 1300b-15.

n7 25 USCA @ 1725.

n8 United States v Hoodie (CA9 Or) 588 F2d 292.

n9 18 USCA @ 1162.

n10 Duluth Lumber & Plywood Co. v Delta Development, Inc. (Minn) 281 NW2d 377.

n11 18 USCA @ 1152.

n12 18 USCA @ 1153.

n13 18 USCA @ 1162(c).

n14 Quechan Tribe of Indians v Rowe (SD Cal) 350 F Supp 106.

n15 United States v K. (DC Or) 471 F Supp 924, 4 Fed Rules Evid Serv 926, holding that juvenile court of state of Oregon does not have jurisdiction over any juvenile proceeding to which Warm Springs Indian, domiciled upon reservation, is party, since Congress has not withdrawn federal jurisdiction over criminal offenses within Warm Springs Reservation.

REFERENCE: 18 USCA @@ 1161 et seq.;
25 USCA @@ 88, 183, 194, 199a, 201, 232, 233, 766, 1302, 1303, 1321-1326, 1725;
28 USCA @@ 1345, 1360-1362
A.L.R. Digest: Indians @ 1
A.L.R. Index: Criminal Law;
A.L.R. Index: District Courts;
A.L.R. Index: Habeas Corpus;
A.L.R. Index: Indians;
A.L.R. Index: Intoxication;
A.L.R. Index: Jurisdiction;
A.L.R. Index: Removal of Cause
7 Federal Procedural Forms, L. Ed., Criminal Procedure @@ 20:1 et seq.;
11 Federal Procedural Forms, L. Ed., Indians and Indian Affairs @ 41:135
Preparation and Trial of Federal Class Actions, 21 Am. Jur. Trials 625
Federal Habeas Corpus Practice, 20 Am. Jur. Trials 1 @ 16;
Preparation and Trial of Arson Case, 19 Am. Jur. Trials 685;
Pretrial Procedures and Motions in Criminal Cases, 5 Am. Jur. Trials 27;
Investigating the Criminal Case, 1 Am. Jur. Trials 481;
General Principles, 1 Am. Jur. Trials 481;
Locating and Preserving Evidence in Criminal Cases, 1 Am. Jur. Trials 555;

Appendix C:

Forts and Castles of Ghana

LIST OF ALL 32 FORTS AND CASTLES OF GHANA

1. ANKOBRA – Fort Eliza Cathargo
Built by the Dutch in 1702; only traces of ruins are now visible.

2. AXIM – Fort San Antonio
Portuguese trading post, in 1502. Destroyed by the townspeople in 1514. Second fort built by the Portuguese on present site in 1515. Taken in 1642 by the Dutch who subsequently rebuilt the internal structure. Captured by the English in 1664. Recaptured by the Dutch in 1665. Ceded to Britain in 1872. Restored in 1951-56.

3. BEYIN – Fort Appolonia
Dutch lodge in 1660. First English trading post in 1691. British fort built between 1750 and 1770. Abandoned in 1820, but re-occupied by Governor Maclean's expeditionary force in 1836 (to facilitate confrontation with King Kweku Ackah of Nzima, who was renowned for his stubborn opposition to increasing British intervention). Transferred to Dutch in 1868. Renamed Fort William III for King William III and occupied by the Dutch until 1872. Transferred to the English in 1872. Bombarded by the British in 1873. After the fort was abandoned, it fell into ruins. Reconstructed between 1962 and 1968.

4. PRINCESSTOWN – Groot-Friedrichsburg or Fort Hollandia
Danish lodge in 1658, fort built in 1682. Fort re-built in 1683, abandoned in 1716 and shortly afterwards occupied by local chief, John Conny, in 1717, who remained in occupation until 1725 when it was captured by the Dutch and renamed Fort Hollandia. It remained in the possession of the Dutch until 1872 when it was ceded to Britain.

5. TAKRAMA – Fort Sophie Louise
Lodge built by Brandenburgers in 1690. English fort in 1691. Abandoned in 1708, and sold to the Dutch in 1717.

6. AKWIDA – Fort Dorothea
Built by Brandenburgers, in 1685. Temporarily in Dutch hands in 1687-90. Given back to Brandenburgers, in 1698. Abandoned about 1709. In the hands of the Dutch, in 1712. Relinquished to the Brandenburgers in 1712. Sold to the Dutch, in 1718.

7. DIXCOVE – Fort Metal Cross
The fort on the bay (Dick's or Dickies Cove). Work commenced in 1683, but progress was impaired by continuous disputes between the English and the Brandenburgers. Building completed by the English, in 1691-97, possibly on the site of an earlier post. Besieged, in 1748-56 and abandoned, in 1826. Re-occupied in 1830. Transferred to the

Dutch and renamed Metalen Kruis, in 1868. Ceded to Britain, in 1872. Restored in 1954-56.

8. BUTRI – Fort Batensteyn
Swedish post in 1650-52. Dutch fort built in 1656. Taken by the English, in 1665, abandoned in 1818-27, rebuilt by the Dutch, in 1828, relinquished by treaty and remained a Dutch possession until 1872, when it was transferred to the British.

9. SEKONDI – Fort Orange
Built by the Dutch probably in 1640. Seized by the Ahantas in 1694. Abandoned in 1840, but later re-occupied and rebuilt by the Dutch. The fort was ceded to the British in 1872.

10. SHAMA – Fort St. Sebastian
Built as a Dutch lodge in 1526. Portuguese fort built in 1590. Abandoned in 1600. Restored and altered by the Dutch in 1638, enlarged in 1640-42. Attacked by the English under Captain Robert Holme. Temporally in English hands, in 1664-65. The Dutch struck back under de Ruyter, re-occupied it the same year and rebuilt it in 1666. Abandoned it before 1870. Ceded to Britain in 1872. Restored in 1954-57.

11. KOMENDA – Fort Vredenburg
English trading post in 1663. Abandoned because of local hostilities. Built as a fort by the Dutch in 1688-89. Attacked by Komendas, in 1695. Taken and destroyed by the British, in 1782. Restored by the British in 1688-90. The Dutch, in 1785. Ceded to Britain, in 1872.

12. ELMINA – Fort St. Jorge
Elmina Castle
Just 10km west of Cape Coast is the township of Elmina, the first point of contact between the Europeans and the inhabitants of Ghana. A visit to Elmina Castle is both memorable and moving, for within these walls significant events took place which contributed to the shaping of the history of the world.

In 1471, a Portuguese expedition arrived, led by Don Diego d' Azambuja. Because of the vast amount of gold and ivory, they found here, they called the area "Mina de Ouro" – the gold mine. Elmina soon became the centre of a thriving trade in gold, ivory and slaves, which were exchanged for cloth, beads, brass bracelets and other goods brought by the Portuguese.

In 1482, the Portuguese built St. George's Castle (Elmina Castle). This vast rectangular 97,000sq ft fortification is the earliest known European structure in the tropics.

As the immensely profitable trade in gold and slaves at Elmina increased, it began to attract the attention of other European nations, and a struggle for control of the Castle ensued. Finally, in 1637, after two previously unsuccessful attempts, the Dutch captured Elmina Castle and remained in control for the next 274 years.

A guided tour is offered daily. Admission fee is charged. The Castle also has a gift shop for the sale of books and souvenirs on the history of the castle.

Fort St. Jago is within walking distance of Elmina Castle. It is from this vantage point that the Dutch launched their successful land attack on Elmina Castle. Unlike other area forts, St. Jago was not used for trading activities. Its primary purpose was to provide military protection to the Castle and to serve as a disciplinary institution for European convicts and malcontents.

Bring your camera along, for this little Fort and the hill on which it stands also provides an excellent view of Elmina township and the Castle.

Portuguese reached Elmina (Del Mina) in 1471. Built by Portuguese, in 1482. First European fort on the Gold Coast, improved before 1500. Temporary French occupation in 1582. Exterior rebuilt between 1580 and 1589. Dutch attempt to capture the castle failed in 1625. Taken by the Dutch, in 1637, and thereafter remained their headquarters on the Gold Coast. Internal rebuilding done. Besieged twice and assaulted by local people in 1680-81. Bombarded by the English in 1781. Ceded to Britain, in 1872.

13. ELMINA – Fort St. Jago (Cobnraadsburg)
Chapel built between 1555 and 1558 by the Portuguese. Turned into a lodge and watch tower. Hill taken by the Dutch and converted into a lodge built in 1637. Built into a fort in 1652-62 by the Dutch when they took Elmina Castle. Enlarged in 1671. Besieged by the local people for ten months in 1681. Attacked by the English in 1781, ceded to Britain, in 1872. Restored in 1956-60.

14. ELMINA – Watchtower
Presumably Dutch but of unknown date, restored in 1956

15. CAPE COAST – Cape Coast Castle
Most historians believe that Cape Coast Castle was originally built as a small trading lodge which was subsequently added to and enlarged until it became a fortification. In 1637 the lodge was occupied by the Dutch. Then, in 1652, it was captured by the Swedes, who name it Fort Carolusburg. For a time, both the local people and various European powers fought for and gained possession of the fort. Finally, in 1664, after a four-day battle, the fort was captured by the British and re-named Cape Coast Castle. The Castle served as the seat of the British administration in the then Gold Coast (Ghana) until the administration was moved to Christianborg Castle in Accra on March 19,1877.

Like most ancient fortifications in Ghana, Cape Coast Castle played a significant role in the gold and slave trades. Also, as a result of the European influence here, two significant contributions were made that a re still evident today: the arrival of Christianity in the country, and the establishment of the first formal education system through Castle Schools.

A guided tour of the Cape Coast Castle will acquaint you with its many interesting features including Dalzel Tower, the graves of Governor George Maclean and his wife Leticia Landon, the slave dungeons, Palaver Hall, and the cannons and mortars used in the Castle's defence.

Guided tours of Cape Coast Castle are available from 8:30am - 4:30pm daily. The general admission fee includes a guided tour. There is also a nominal charge for taking photographs or for using a video camera.

West African Historical Museum
The Museum is located inside Cape Coast Castle and contains a growing collection of art and cultural objects from various parts of West Africa, for example ceremonial drums, old muskets, shackles from the slave trade and ancient pottery. The price of admission is included in your castle entry fee.

Built as a lodge by the Dutch in 1630 on an abandoned lodge built earlier by the Portuguese. Abandoned by the Dutch and occupied by Swedes. English trading post by 1649. Swedes began to build the castle (Carolsburg) in 1652, taken over by the Danes in 1657. Occupied by "Dey" of Fetu between 1660 and 1663. Re-occupied by Swedes in 1663; in Dutch hands by 1664-65. Captured by the English in 1665 and remained their headquarters on the coast until 1877. Strengthened and greatly enlarged by English in 1673-1694. Attacked by French in 1703 and 1757. Extensively rebuilt before 1757-80.

16. CAPE COAST – Fort Victoria
Built by the English in 1702 and known as Phipp's Tower from 1711. Rebuilt in 1837 and renamed Fort Victoria.

17. CAPE COAST – Fort William
Built by the British in 1819-20, and called Smith's Tower. Rebuilt in 1830-31 and renamed Fort William. Lighthouse installed in 1835.

18. CAPE COAST – Fort McCarthy
Built by the British in 1822.

19. CAPE COAST – Morie Fort Nassau
Dutch post, in 1598. Dutch fort built in 1612, enlarged in 1620s and 1630s. Name conferred, in 1637. Temporarily in English hands in 1664-45. Re-captured by the Dutch, in 1665. Captured by the English again in 1782. Returned to the Dutch by treaty, in 1785. Transferred to Britain, in 1868. Lodge successively occupied by the Dutch, Swedes, Danes, Dutch (again), English and Dutch 1782 (again), in 1640-65.

20. ANOMABU – Fort William

Built by the Dutch in 1640. Captured by the Swedes in the early 1650s. Captured by the Danes under Sir Henry Carlof, in 1657. Recaptured by the Dutch in 1660. Capitulated to the Dutch under De Ruyter in 1665. Rebuilt by the English as Fort Charles in 1679. Occupied by the Anomabus, in 1701. Abandoned by the English in 1730. Present fort (now wrongly called Fort William) built by the British, in 1753-56. Bombarded by French in 1794. Attacked by the Anomabus in 1801. Attacked by Ashantis on 15th June 1806. Purchased by the English in 1872. Restored in 1954.

21. KORMANTSE – Fort Amsterdam
Dutch trading post in 1598. Dutch post established by 1618 and abandoned later. Dutch lodge built in 1631, fort rebuilt by the English in 1638-45. Taken by Dutch and named Fort Amsterdam, in 1665. Enlarged and improved, in 1681-82. Temporarily in British hands in 1782-5. Restored to the Dutch in 1782. Taken and plundered by Ashantis in 1806. Attacked and destroyed by Anomabus, in 1811. Reoccupied by Dutch for ten years. Transferred to Britain in 1868.

22. AMOKU – (Near Ankafal, Saltpond)
French post built in 1786. Abandoned in 1801.

23. TANTUM
English post intermittently occupied from 1662. English Fort built in 1724. Abandoned in 1820. Rebuilt in 1843 but shortly afterwards abandoned.

24. APAM – Fort Leydsaemheyt (Fort Patience)
Built by the Dutch in 1697-1702. Temporarily in British hands in 1782-5. Restored to the Dutch in 1785. Occupied by Akim, in 1811. Transferred to Britain, in 1868.

25. SENYA BERAKU – Fort Goedehoop (Good Hope)
Dutch Fort established in 1667. English post in 1704. Dutch began to build fort, in 1706. Temporarily in British hands in 1782-85. Dutch regained it by treaty in 1785-1805. Transferred to Britain, in 1868.

26. ACCRA – Fort James
It is likely that there was a Portuguese lodge in the middle of the 16th century (probably by 1576). First English post in 1650-53. English post re-established, in 1672. Raised to status of fort, in 1679. Damaged by earthquake, in 1862.

27. ACCRA – Fort Crevecoer (Ussher Fort)
Dutch post built in 1642. Enlarged and named Fort Crevecoeur, in 1652. Temporarily in British hands, in 1782. Returned to the Dutch in 1785. Abandoned in 1816. Damaged by earthquake, in 1862. Transferred to British, rebuilt and renamed Ussher Fort, in 1868.

28. ACCRA – Christianborg Castle
A Portuguese fortified house, in 1500. Taken by Swedes in 1645. Swedish lodge built in 1652. Taken by Danes in 1657. Enlarged and named Christianborg afte King Christian V

of Denmark, in 1659. Temporarily in Dutch hands in 1660. Site ceded to Danes by King of Accra, in 1661. Temporarily in Portuguese hands and called S. Francis Xavier, in 1679-83. Reoccupied by Danes, in 1683. Taken by the Akwamus, in 1693. Redeemed by the Danes for □600, in 1694. Enlarged between 1730 and 1780. Bought by Britain in 1850. Damaged by earthquake in 1862 after which it was used as a lunatic asylum. Rebuilt and used as residence of the British Governor of Gold Coast, in 1877-1957. Residence of Prime Minister of Ghana and renamed Government House, Osu, in 1957. Became the official residence of Dr. Kwame Nkrumah, First President of Ghana in 1960 and has since remained the Seat of Government. Frequently rebuilt with additions in recent years. Not open to the public.

29. TESHIE – Fort Augustaborg
Dutch post in 1730-1740s. Danish small fort in 1787. Bought by Britain, in 1850.

30. PRAMPRAM – Fort Yernon
British post in 1740, but later ruined by Danes and abandoned. British fort built in 1806. Abandoned, in 1820. Reoccupied in 1831-44.

31. ADA – Fort Kongesten
Portuguese trading place, in the 16th century. Danish post, in 1650. Present fort begun to be built in 1784. Fort taken by Ashantis, in 1811.

32. KETA – Fort Prinsenstein
Danish post established in 1714. Dutch post established, in 1719, about 200-300 yards from the sea. Dutch post backed by the Akwamus, in 1731. Abandoned shortly afterwards. Taken by the Dutch in 1734. Dutch fort attacked by Dahomeans and blown up by Dutch, in 1737. Danish post re-established in 1737. Danes began to build present fort, in 1784. Bought by Britain in 1850.

Modified from a document provided by the Embassy of Ghana in Japan.

Appendix D:

Charter of the Hudson Bay's Company

Hudson's Bay Company archives library.ref. fc3207.4 h8
CHARTERS, STATUTES, ORDERS IN COUNCIL
RELATING TO THE HUDSON'S BAY COMPANY
LONDON, HUDSON'S BAY COMPANY, 1931

CHARTER OF THE HUDSON'S BAY COMPANY, 1670

THE ROYAL CHARTER for incorporating The Hudson's Bay Company, A.D. 1670.

CHARLES THE SECOND By the grace of God King of England Scotland-France and Ireland defender of the faith &c To ALL to whome these presentes shall come greeting WHEREAS Our Deare and entirely Beloved Cousin Prince Rupert Count Palatyne of the Rhyne Duke of Bavaria and Cumberland &c Christopher Duke of Albemarle William Earle of Craven Henry Lord Arlington Anthony Lord Ashley Sir John Robinson and Sir Robert Vyner Knightes and Baronettes Sir, Peter Colliton Baronett Sir Edward Hungerford Knight ' of the Bath Sir Paul Neele Knight Sir John Griffith and Sir Phillipp Carteret Knightes James Hayes John Kirke Francis Millington William, Prettyman John Fenn Esquires and John Portman Cittizen and Goldsmith of London have at theire owne great cost and charge undertaken an Expedicion for Hudsons Bay in the North west part of America for the discovery of a new Passage into the South Sea and for the finding some Trade for Furrs Mineralls and other considerable commodityes and by such theire

undertakeing have already made such discoveryes as doe encourage them to proceed further in pursuance of theire said designe by meanes whereof there may probably arise very great advantage to us and our Kingdome AND WHEREAS the said undertakers for theire further encouragement in the said designe have humbly besought us to Incorporate them and grant unto them and theire successors the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that Iye within the entrance of the Streightes commonly called Hudsons Streightes together with all the Landes Countryes and Territories upon the Coastes and Confynes of the Seas Streightes Bayes Lakes Rivers Creekes and Soundes aforesaid which are not now actually possessed by any of our Subjectes or by the

Subjectes of any other Christian Prince or State Now KNOW YEE that Wee being desirous to promote all Endeavours tending to the publique good of our people and to encourage the said undertakeing HAVE of our especial! grace certaine knowledge and meere mocion Given granted ratifyed and confirmed And by these Presentes for us our heires and Successors DOE give grant ratifie and confirme unto our said Cousin Prince Rupert Christopher Duke of Albemarle William Earle of Craven Henry Lord Arlington Anthony Lord Ashley Sir John Robinson Sir Robert Vyner Sir Peter Colleton Sir Edward Hungerford Sir Paul Neile Sir John Griffith and Sir Phillipp Carterett James' Hayes John Kirke Francis Millington William Prettyman John Fenn and John Portman That they and such others as shall bee admitted into the said Society as is hereafter expressed shall bee one Body Corporate and Politique in deed and in name by the name of the Governor and Company of Adventurers of England tradeing into Hudsons Bay and them by the name of the Governor and Company of Adventurers of England tradeing into Hudsons Bay one Body Corporate and Politique in deede and in name really and fully for ever for us our heirs and successors WEE DOE make ordeyne constitute establish confirme and declare by these Presentes and that by the same name of Governor & Company of Adventurers of England Tradeing into Hudsons Bay they shall have perpetual! succession And that they and theire successors by the name of the Governor and Company of Adventurers of England tradeing into Hudsons Bay bee and at all tymes hereafter shall bee persons able and capable in Law to have purchase

receive possesse enjoy and reteyne Landes Rentes priviledges libertyes Jurisdiccions Franchnses and hereditary menses of what kinde nature and quality soever they bee to them and theire Successors And alsoe to give grant demise alien assigne and dispose Landes Tenementes and hereditarnentes and to doe and execute all and singuler other thinges by the same name that to them shall or may apperteyne to doe And that they and theire Successors by the name of the Governor and Company of Adventurers of England Tradeing into Hudsons Bay may pleade and bee impleaded answeare and bee answeared defend and bee defended in whatsoever Courtes and places before whatsoever Judges and Justices and other persons and Officers in all and singuler Accions Pleas Suits Quarrells causes and demandes whatsoever of whatsoever kinde nature or sort in such manner and forme as any other our Liege people of this our Realme of England being persons able and capable in Lawe may or can have purchase receive possesse enjoy reteyne give grant demise alien assigne dispose pleade defend and

bee defended doe permits and execute And that the said Governor and Company. of -Adventurers of England Tradeing into Hudsons Bay and theire successors may have a Common Seale to serve for all the causes and busnesses of them and theire Successors and that it shall and may bee lawfull to the said Governor and Company and theire Successors the same Seal from tyme to tyme at theire will and pleasure to breake change and to Make a new or alter as to them shall seeme expedient AND FURTHER WEE WILL And by, these presentes for us our Heires and successors WEE DOE

ordeyne that there shall bee from henceforth one of the same Company to bee elected and appointed in such forme as hereafter in these presentes is expressed which shall be called The Governor of the said Company And that the said Governor and Company shall or may elect Seaven of theire number in such forme as hereafter in these presentes is expressed which shall bee called the Comittee of the said Company which Comittee of seaven or any three of them together with the Governor or Deputy Governor of the said Company for the tyme being shall have the direccion of the Voyages of and for the said Company and the Provision of the Shipping and Merchandizes thereunto belonging and alsoe the sale of all merchandises Goodes and other thinges returned in all or any the Voyages or Shippes of or for the said Company an] the mannageing and handleing of all other busnes affaires and thinges belonging to the said Company AND WEE WILL ordeyne and Grant by these presentes for us our heires and successors unto the said Governor and Company and theire successors that they the said Governor and Company and theire successors shall from henceforth for ever bee ruled ordered and governed according to such manner and forme as is hereafter in these presentes expressed and not otherwise And that they shall have hold reteyne and enjoy the Grantes Libertyes Priviledges Jurisdiccions and Immunityes only hereafter in these presentes granted and expressed and noe other And for the better execucion of our will and Grant in this behalfe Wee HAVE assigned nominated constituted and made And by these presentes for us our heires and successors WEE DOE assigne nominate constitute and make our said Cousin PRINCE RUPERT to bee the first and present Governor of the said Company

and to continue in the said Office from the date of these presentes untill the tenth of November then next following if tree the said Prince Rupert shall soe long live and soe untill a new Governor bee chosen by the said Company in forme hereafter expressed AND ALSOE WEE HAVE assigned nominated and appointed And

by these presentes for us our heires and Successors WEE DOE assigne nominate and constitute the said Sir John Robinson Sir Robert Vyner Sir Peter Colleton James Hayes John Kirke Francis Millington and John Portman to bee the seaven first and present Committees of the said Company from the date of these presentes untill the said tenth Day of November then alsoe next following and soe untill new Committees shall bee chosen in forme hereafter expressed AND

FURTHER WEE WILE and grant by these presentes for us our heires and Successors unto the said Governor and Company and theire successors that IT shall and may bee lawfull to and for the said Governor and Company for the tyme being or the greater part of them present at any publique Assembly commonly called the Court Generall to bee holden for the said Company the Governor of the said Company being alwayes one from tyme to tyme to elect nominate and appoint one of the said Company to bee Deputy to the said Governor which Deputy shall take a corporal! Oath before the Governor and three or more of the Committee of the said Company for the tyme being well truely and faithfully to execute his said Office of Deputy to the Governor of the said Company and after his Oath soe taken shall and may from tyme to tyme in the absence of the said Governor exercize and execute the Office of Governor of the said Company in such sort as the said Governor ought to doe AND FURTHER WEE will

and Grant and by these presentes for us our heires and Successors unto the said Governor and Company of Adventurers of England tradeing into Hudsons Bay and theire Successors That they or the greater part of them whereof the Governor for-the Tyme being or his Deputy to bee one from tyme to tyme and at all tymes hereafter shall and may have authority and power yearely and every yeare betweene the first and last day of November to assemble and meete together in some convenient place to bee appointed from tyme to tyme by the Governor or in his absence by the Deputy of the said Governor for the tyme being And that they being soe assembled it shall and may bee lawfull to and for the said Governor or Deputy of the said Governor and the said Company for the tyme being or the greater part of them which then shall happen to bee Present whereof the Governor of the said Company or his Deputy for the tyme being to bee one to elect and nominate one of the said Company which shall bee Governor of the same Company for one whole yeare then next following which person being soe elected and nominated to bee Governor of the said Company as is aforesaid before tree bee admitted to the Execucion

of the said Office shall take a Corporall Oath before the last Governour being his Predecessor or his Deputy and any three or more of the Committee of the said Company for the tyme being that tree shall from tyme to tyme well and truely execute the Office of Governour of the said Company in all thinges concerneing the same and that Imediately after the same Oath soe taken tree shall and may execute and use the said Office of Governor of the said Company for one whole yeare from thence next following and in like sort Wee will and grant that as well every one of the above named to bee of the said Company or fellowshipp as all other hereafter to bee admitted or free of the said Company shall take a Corporall Oath before the Governor of the said Company or his Deputy for the tyme being to such effect as by the said Governor and Company or the greater part of them in any publick Court to bee held for the said Company shall bee in reasonable and legall manner sett downs and devised before they shall bee allowed or admitted to Trade or traffique as a freeman of the said Company AND further WEE will and grant by these presentes for us our heires and successors unto the said Governor and Company and theire successors that the said Governor or Deputy Governor and the rest of the said Company and theire successors for the tyme being or the greater part of them whereof the Governor or the Deputy Governor from tyme to tyme to bee one shall and may from tyme to tyme and at all tymes hereafter have power and authority yearely and every yeare betweene the first and last day of November to assemble and meete together in some convenient place from tyme to tyme to be appointed by the said Governour of the said Company or in his absence by his Deputy and that they being soe assembled it shall and may bee lawfull to and for the said Governor or his Deputy and the Company for the tyme being or the greater part of them which then shall happen to bee present whereof the Governor of the said Companyor his Deputy for the tyme being to bee one to elect and nominate seaven of the said Company which shall bee a Committee of the said Company for one whole yeare from thence next ensueing which persons being soe elected and nominated to bee a Committee of the said Company as aforesaid before they bee admitted to the execucion of theire Office shall take a Corporall Oath before the Governor or his Deputy and any three or more of the said committee of the said Company being theire last Predecessors that they and every of them shall well and faithfully performe theire said Office of Committees in all thinges concerneing the same And that imediately after the said Oath soe taken they shall and may

execute and use theire said Office of Committees of the said Company for one whole yeare from thence next following AND MOREOVER Our will and pleasure is And by these presentes for us our heires and successors WEE DOE GRANT unto the said Governor and Company and theire successors that when and as often as it shall happen the Governor or Deputy Governor of the said Company for the tyme being at any tyme within one yeare after that tree shall bee nominated elected and sworne to the Office of the Governor of the said Company as is aforesaid to dye or to bee removed from the said Office which Governor or Deputy Governor not demeaneing himselfe well in his said Office WEE WILL to bee removeable at the Pleasure of the rest of the said Company or the greater part of them which shall bee present at theire publick assemblies commonly called theire Generall Courtes holden for the said Company that then and soe often it shall and may be, lawfull to and for the Residue of the said Company for the tyme being or the greater part of them within convenient tyme after the death or removeing of any such Governor or Deputy Governor to assemble themselves in such convenient place as they shall thinke fit for the eleccion of the Governor or Deputy Governor of the said Company and that the said Company or the greater part of them being then and there present shall and may then and there before theire departure from the said place elect and nominate one other of the said Company to bee Governour or Deputy Governor for the said Company in the place and stead of him that soe dyed or was removed which person being soe elected and nominated to the Office of Governor or Deputy Governor of the said Company shall have and exercize the said Office for and dureing the residue of the said yeare takeing first a Corporall Oath as is aforesaid for the due execucion thereof And this to bee done from tyme to tyme soe often as the case shall soe require AND ALSOE Our Will and Pleasure is and by these presentes for us our heires and successors WEE DOE grant unto the said Governor and Company that when and as often as it shall happen any person or persons of the Comittee of the said Company for the tyme being at any tyme within one yeare next after that they or any of them shall bee nominated elected and sworne to the Office of Comittee of the said Company as is aforesaid to dye or to be removed from the said Office which Committees not demeaneing themselves well in theire said Office Wee will to be removeable at the pleasure of the said Governor and [Company or the greater part of them whereof the Governor of the said Company for the tyme being or his Deputy to bee one that then and soe often it shall and may bee lawfull to and for the said Governor and the rest of the Company for the tyme being or the greater part of them whereof

the Governor for the tyme being or his Deputy to bee one within convenient tyme after the death or removeing of any of the said Committee to assemble themselves in such convenient place as is or shall bee usuall and accustomed for the eleccion of the Governor of the said Company or where else the Governor of the said Company for the tyme being or his Deputy shall appoint And that the said Governor and Company or the greater part of them whereof the Governor for the tyme being or his Deputy to bee one being then and there present shall and may then and there before theire Departure from the said place elect and nominate one or more of the said Company to bee of

the Committee of the said Company in the place and stead of him or them that soe died or were or was soe removed which person or persons soe elected and nominated to the Office of Committee of the said Company shall have and exercize the said Office for and dureing the residue of the said yeare takeing first a Corporall Oath as is aforesaid for the due execucion thereof and this to bee done from tyme to tyme soe often as the case shall require And to the end the said Governor and Company of Adventurers of England Tradeing into Hudsons Bay may bee encouraged to undertake and effectually to prosecute the said designe of our more, especial grace certaine knowledge and meere Mocion WEE HAVE given granted and confirmed And by these presentes for us our heires and successors DOE give grant and Confirme unto the said Governor and Company and theire successors the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lie within the entrance of the Streightes commonly called Hudsons Streightes together with all the Landes and Territoryes upon the Countryes Coastes and confynes of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid that are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State with the Fishing of all Sortes of Fish Whales sturgions and all other Royall Fishes in the Seas Bayes Islets and Rivers. within the premisses and the Fish therein taken together with the Royalty of the Sea upon/the Coastes within the Lvmittes aforesaid and all Mynes Royall aswell discovered as not discovered of Gold Silver Gemms and pretious Stones to bee found or discovered within the Territoryes Lymittes and Places aforesaid And that the said Land bee from henceforth reckoned and reputed as one of our Plantacions or Colonyes in America called Ruperts Land AND FURTHER WEE DOE by these presentes for us our heires and successors make create and constitute the said Governor and Company for the tyme being and

theire successors

the true and absolute Lordes and Proprietors of the same Territory Iymittes and places aforesaid And of all other the premisses saving ALWAYES the faith Allegiance and Soveraigne Dominion due to us our heires and successors for the same To HAVE Hold possesse and enjoy the said Territory lymittes and places and all and singuler other the premisses hereby granted as aforesaid with theire and every of their Rightes Members Jurisdiccions Prerogatives Royaltyes and Appurtenances whatsoever to them the said Governor and Company and theire Successors for ever TO BEE holden of us our heires and successors as of our Mannor of East Greenwich in our County of Kent in free and common Soccage and not in Capite or by Knightes Service yeilding AND PAYING yearely to us our heires and Successors for the same two Elkes and two Black beavers whensoever and as often as Wee our heires and successors shall happen to enter into the said Countryes Territoryes and Regions hereby granted AND FURTHER our will and pleasure is And by these presentes for us our heires and successors WEE DOE grant unto the said Governor and Company and to their successors that it shall and may be lawfull to and for the said Governor and Company and theire successors from tyme to tyme to assemble themselves for or about any the matters causes affaires or buisnesses of the said Trade in any place or places for the same convenient within our Dominions or elsewhere and there to hold Court for the said Company and the affaires thereof And that alsoe it shall and may bee lawfull to and for them and the greater part of them being soe assembled 'end that shall then and there bee present in any such place or places whereof the Governor or his Deputy for the tyme being to bee one to make ordeyne and' constitute such and soe many reasonable Lawes Constitucions Orders and Ordinances as to them or the greater part of them being then and there present shall seeme necessary and convenient for the good Government of the said Company and of all Governors of Colonyes Fort and Plantacions Factors Masters

Mariners and other Officers employed or to bee employed in any of the Territories and Landes aforesaid and in any of theire Voyages and for the better advancement and continuance of the said Trade or Traffic and Plantacions and the same Lawes Constitucions Orders and Ordinances soe made to putt in use and execute accordingly and at theire pleasure to revoake and alter the same or any of them as the occasion shall require And that the said Governor and Company soe often as they shall make ordeyne or establish any such Lawes Constitucions Orders and Ordinances in

such forme as aforesaid shall and may lawfully impose ordeyne limits and provide such paines penaltyes and punishmentes upon all Offenders contrary to such Lawes Constitucions Orders and Ordinances or any of them as to the said Governor and -Company for the tyme being or the greater part of them then and there being present the said Governor or his Deputy being alwayes one shall seeme necessary requisite or convenient for the observacion of the same Lawes Constitucions Orders and Ordinances And the same Fynes and' Amerciamentes shall and' may by their Officers and Servantes from tyme to tyme to bee appointed for that purpose levy take and have to the use of the said Governor and Company and theire successors without the impediment of us our heires or successors or of any the Officers or Ministers of us our heires or successors and without any accompt therefore to us our heires or successors to bee made All and singuler which Lawes Constitutions Orders and Ordinances soe as aforesaid to bee made WEE will to bee duely observed and kept under the paines and penaltyes therein to bee conteyned soe alwayes as the said Lawes Constitucions Orders and Ordinances Fynes and Amerciamentes bee reasonable and not contrary or repugnant but as neare as may bee agreeable to the Lawes Statutes or Customes of this our Realme AND FURTHERMORE of our ample and abundant grace certaine knowledge and meere mocion WEE HAVE granted and by

these presentes for us our heires and successors doe errant unto the said Governor and Company and theire Successors That they and theire Successors and theire Factors Servantes and Agentes for them and on theire behalfe and not otherwise shall for ever hereafter have use and enjoy not only the whole Entire and only Trade and Traffick and the whole entire and only liberty use and priviledge of tradeing and Trafficking to and from the Territory Lymittes and places aforesaid but alsoe the whole and entire Trade and Traffick to and from all Havens Bayes Creekes Rivers Lakes and Seas into which they shall find entrance or passage by water or Land out of the Territoryes Lymittes or places aforesaid and to and with all the Natives and People Inhabiting or which shall inhabit within the Territoryes Lymittes and places aforesaid and to and with all other Nacions Inhabiting any the Coaste adjacent to the said Territoryes Lymittes and places which are not already possessed as aforesaid or whereof the sole liberty or priviledge of Trade and Trafficke is not granted to any other of our Subjectes AND WEE of our further Royall favour And of our more especial! grace certaine knowledge and meere Mocion HAVE granted and by these presentes for us our heires and Successors DOE grant to the said Governor and Company and to

theire Successors That neither the said Territoryes Lymittes and places hereby Granted as aforesaid nor any part thereof nor the islandes Havens Portes Cittyes Townes or places thereof or therein conteyned shall bee visited frequented or haunted by any of the Subjectes of us our heires or successors contrary to the true meaneing of these presentes and by vertue of our Prerogative Royall which wee will not have in that behalfe argued or brought into Question WEE STREIGHTLY Charge Command and prohibit us our heires and Successors all the subjectes of us our heires and Successors of what degree or Quality soever they bee that none of them directly or indirectly doe visit haunt frequent or Trade Trafficke or Adventure by way of Merchandize into or from any the said Territoryes Lymittes or Places hereby granted or any or either of them other then the said Governor and Company and such perticuler persons as now bee or hereafter shall bee of that Company theire Agentes Factors and Assignes unlesse it bee by the Lycence and agreement of the said Governor and Company in writing first had and obteyned under theire Common Seale to bee granted upon Paine that every such person or persons that shall Trade or Trafficke into or from any the Countryes Territoryes or Lymittes aforesaid other then the said Governor and Company and theire Successors shall incurr our Indignacion and the forfeiture and the losse of the Goodes Merchandizes and other thinges whatsoever which soe shall bee brought into this Realme of England or any the Dominions of the same contrary to our said Prohibicion or the purport or true meaneing of these presentes for which the said Governor and Company shall finde take and seize in other places out of our Dominions where the said Company theire Agentes Factors or Ministers shall Trade Traffick inhabit by vertue of these our Letters Patente AS alsoe the Shipp and Shippes with the Furniture thereof wherein such goodes Merchandizes and other thinges shall bee brought or found the one halfe of all the said Forfeitures to bee to us our heires and successors and the other halfe thereof WEE DOE by these Presentes cleerely and wholly for us our heires and Successors Give and Grant unto the said Gvernor and Company and theire Successors - AND FURTHER all and every the said Offenders for theire said contempt to suffer such other punishment as to us our heires or Successors for soe high a contempt shall seeme meete and convenient and not to bee in any wise delivered untill they and every of them shall become bound unto the said Governor for the tyme being in the summe of one thousand Poundes at the least at noe tyme then after -to Trade or Traffick into any of the said places Seas streightes Bayes Portes Havens or Territoryes aforesaid

contrary to our Expresse Commandment in that behalfe herein sett downe and published AND FURTHER of our ore especiall grace WEE HAVE condiscended and granted

And by these presentes for us our heires and Successors DOE grant unto the said Governor and Company and theire successors That Wee our heires and Successors will not Grant liberty lycence or power to any person or persons whatsoever contrary to the tenour of these our Letters Patente to Trade trafficke or inhabit unto or upon any the Territoryes lymittes or places afore specifyed contrary to the true meaneing of these presentes without the consent of the said Governor and Company or the most part of them AND OF our more abundant grace and favour to the said Governor and Company WEE DOE hereby declare our will and pleasure to bee that if it shall soe happen that any of the persons free or to bee free of the said Company of Adventurers of England Tradeing into Hudsons Bay who shall before the goeing forth of any Shipp or Shippes appointed for A VOYAGE or otherwise promise or agree by Writeing under his or theire handes to adventure any summe or Sumes of money towardes the furnishing any provision or maintainance of any -voyage or voyages sett forth or to bee sett forth or intended or meant to bee sett forth by the said Governor and Company or the more part of them present at any Publick Assembly commonly called theire Generall Court shall not within the Space of twenty Dayes next after Warneign given to him or them by the said Governor or Company or theire knowne Officer or Minister bring in and deliver to the Treasurer or Treasurers appointed for the Company such summes of money as shall have beene expressed and sett downe in writeing by the said Person or Persons subscribed with the name of the said Adventurer or Adventurers that then and at all Tymes after it shall and may bee lawfull to and for the said Governor and Company or the more part of them present WHEREOF the said Governor or his Deputy to bee one at any of theire Generall Courtes or Generall Assemblyes to remove and disfranchise him or them and every such person and persons at their wills and pleasures and tree or they soe removed and disfranchised not to bee permitted to trade into the Countryes

territoryes and Lvmittes aforesaid or any part thereof nor to have :my Adventure or Stock goeing or remaineing with or amongst the said Company without the special!

of the said Governor and Company or the more part of them present at any Generall Court first had and obteyned in that behalfe Any thing before in these presentes to the contrary thereof in any

wise notwithstanding AND OUR Will E AND Pleasure is And hereby wee doe alsoe ordeyne that it shall and may bee lawfull to and for the said Governor and Company or the greater part of them whereof the Governor for the tyme being or his Deputy to bee one to admits into and to bee of the said Company all such Servantes or Factors of or for the said Company and all such others as to them or the most part 'of them present at any Court held for the said Company the Governor or his Deputy being one shall bee thought fit and agreeable with the Orders and Ordinances made and to bee made for the Government of the said Company AND FURTHER Our will and pleasure is And by these presentes for us our heires and Successors, WEE DOE grant unto the said Governor and Company and to theire Successors that it shall and may bee lawtull in all Elections and Bye-Lawes to bee made by the Generall Court of the Adventurers of the said Company that every person shall have a number of votes according to his Stock that is to say for every hundred pounces by him subscribed or brought into the,present Stock one vote and that any of these that- have Subscribed lesse then one hundred pounces may joyne theire respective summes to make up one hundred pounces and have one vote;joyntly for the same and not otherwise AND further of our especial! grace certaine knowledge and meere mocion WEE DOE for us our heires and successors grant to and with the said Governor and Company of Adventurers of England Tradeing into Hudsons Bay that all Landes Islandes ,,Territoryes Plantacions Fortes Fortificacions Factoryes or Colonyes where the said Companyes Factoryes and Trade are or shall bee within any the Portes and places afore

lymitted shall bee ymediately and from henceforth under the power and command of the said Governor and company theire Successors and Assignes saving the faith and Allegiance due to bee performed to us our heires and successors as aforesaid and that the said Governor and Company shall have liberty full Power and authority to appoint and establish Governors and all other Officers to governe them And that the Governor and his Councill of the several! and respective places where the said Company shall have Plantacions Fortes factoryes Colonyes or Places of Trade within any the Countryes Landes or Territoryes hereby granted may have power to judge all persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civill or Criminall according to the Lawes of this, Kingdome and to execute Justice accordingly And in case any crime or misdemeanor shall bee committed in any of the said Companyes Plantacions Fortes Factoryes or Places of Trade within the

Lymittes aforesaid where Judicature cannot bee executed for want of a Governor and Councill there then in such case it shall' and may bee lawfull for the chiefe Factor of that place and his Councill to transmitt the party together with the offence to such other Plantacion Factory or Fort where there shall bee a Governor and Councill where Justice may bee executed or into this Kingdome of England as shall bee thought most convenient there to receive such punishment as the nature of his offence shall deserve AND MOREOVER Our will and pleasure is And by these presentes for us our heires and Successors WEE DOE GIVE and grant unto the said Governor and Company and theire Successors free Liberty and Lycence in case they conceive it necessary to send either Shippes of War Men or Amunicion unto any theire Plantacions Fortes Factoryes or Places of Trade aforesaid for the security and defence of the same and to choose Commanders and Officers over them and to give them power and authority by Commission under theire Common Seale or otherwise to continue or make peace

or Warre with any Prince or People whatsoever that are

not Christians in any places where the said Company shall have any Plantacions Fortes or Factoryes or adjacent thereunto as shall bee most for the advantage and benefit of the said Governor and Company and of theire Trade and alsoe to right and recompence themselves upon the Goodes Estates or people of those parses by whome the said Governor and Company shall susteyne any injury losse or damrnage or upon any other People whatsoever that shall any way contrary to the intent of these presentes interrupt wrong or injure them in theire said Trade within the' said places Territoryes and Lymittes granted 'by this Charter and that it shall and may bee lawfull to and for the said Governor and Company and theire Successors from tyme to tyme and at all tymes from henceforth to Erect and build such Castles Fortificacions Fortes Garrisons Colonyes or Plantacions Townes or Villages in any parses or places within the Lymittes and Boundes . granted before in these presentes unto the said Governor and Company as they in theire Discrecions shall thinke fit and requisite and for the supply of such as shall bee needefull and convenient to keepe and bee in the same to send out of this Kingdome to the said Castles forts Fortificacions Garrisons Colonyes Plantacions Townes or Villages all Kindes of Cloathing Provision of victuals Ammunicion and ' Implements necessary for such

purpose paying the Dutyes and Customes for the same
As alsoe to transport and carry over such number of Men
being willing thereunto or not prohibited as they shall
- thinke fit and alsoe to governe them in such legall and
:reasonable manner as the said Governor and Company
.thinke best and to inflict punishment for misdemeanors or
impose such Fynes upon them for breach of
ire Orders as in these Presentes are formerly expressed
D further Our will and pleasure is And by these
presentes for us our heires and Successors WEE DOE grant
unto the said Governor and Company and to theire
Successors full Power and lawfull authority to seize upon
the Persons of all such English or any other our Subjectes which
shall saile Hudsons Bay or Inhabit in any of the Countryes
Islandes or Territoryes hereby Granted to the said Governor and
Company without theire leave and Licence in that Behalfe first
had and obteyned or that shall Contemne or disobey theire Orders
and send them to England and that all and every Person and
Persons being our Subjectes any wayes imployed by the said
Governor and Company within any the Partes places and Lymittes
aforesaid shall bee lyable unto and suffer such punnishment for
any Offences by them committed in the Partes aforesaid as the
President and Councill for the said Governor and Company there
shall thinke fitt and the merits of the offence shall require as
aforesaid And in case any Person or Persons being convicted and
Sentenced by the President and Councill of the said Governor and
Company in the Countryes Landes or Lymittes aforesaid theire
Factors or Agentes there for any Offence by them done shall
appeale from the same That then and in such Case it shall and may
be lawfull to and for the said President and Councill Factors or
Agentes to seize upon him or them and to carry him or them home
Prisoners into England to the said Governor and Company there to
receive such condigne punnishment as his Cause shall require and
the Law of this Nacion allow of and for the better discovery of
abuses and injuryes to bee done unto the said Governor and
Company or theire Successors by any Servant by them to bee
imployed in the said Voyages and Plantacions it shall and may be
lawfull to and for the said Governor and Company and theire
respective Presidentes Chiefe Agent or Governor in the partes
aforesaid to upon Oath all Factors Masters Pursers Supra Cargoes
Commanders of Castles Fortes Fortificacions Plantacions or
Colonyes or other Persons touching or concerneing any matter or
thing in which by Law or usage an Oath may bee administred soe as
the said Oath and the matter therein conteyned bee not repugnant
but agreeable to the Lawes of this Realme AND WEE DOE hereby

straightly charge and Command all and singuler our Admiralls Vice-Admiralls Justices Mayors Sherriffs Constables Bayliffes and all and singuler other our Officers Ministers Liege Men and Subjectes whatsoever to bee ayding favouring helping and assisting to the said Governor kind Company and to theire Successors and to theire Deputyes Officers Factors Servantes Assignes and Ministers and every of them in executeing and enjoying the premisses as well on Land as on Sea from tyme to tyme when any of you shall thereunto bee required ANY STATUTE Act Ordinance Proviso Proclamacion or restraint geretofore had made sett forth ordeyned or -provided or any other matter cause or thing whatsoever to the contrary in any wise notwithstanding IN witnes WHEREOF wee have caused these our Letters to bee made Patentes WITNES Ourself at Westminster the second' day of May in the two and twentieth yeare of our Raigne

By Writt of Privy Seale

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Appendix E:

Menominee Tribe Constitution

ARTICLE I – JURISDICTION

The governmental powers of the Menominee Indian Tribe of Wisconsin, a federally recognized sovereign Indian Tribe, shall consistent with applicable Federal law extend to all persons, and subjects, to all lands and other property including natural resources, and to all waters and air space, within the exterior boundaries of the Menominee Indian Reservation, including any land which may hereafter be added to the Reservation under any law of the United States. The governmental powers of the Menominee Indian Tribe shall, consistent with applicable Federal law, also extend outside the exterior boundaries of the Reservation to any persons, subjects, or real property which are, or may hereafter be, included within the jurisdiction of the Tribe under any law of the United States or of the Tribe.

ARTICLE II – TRIBAL MEMBERSHIP

Section 1. Requirements
Membership in the Menominee Indian Tribe shall consist of the following persons:

(a) Those persons of one-quarter (1/4) degree Menominee Indian blood whose names appear on the tribal roll compiled pursuant to subsection 4(c) of the Menominee Restoration Act (87 Stat. 771), and

(b) Those persons who possess at least one-quarter (1/4) degree Menominee Indian blood, and who are descendants of persons enrolled on the tribal membership roll compiled pursuant to subsection 4(c) of the Menominee Restoration Act (87 Stat. 771), and who are enrolled on the official tribal membership roll in accordance with procedures established by the Tribal legislature by ordinance.

(c) A person shall be removed from the tribal membership roll only in accordance with the procedures set forth in Section 5 of this Article.

Section 2. Ineligibility for Membership or Automatic Forfeiture of Membership

No person shall be eligible to be a member of the Menominee Indian Tribe if that person is enrolled in another Indian Tribe. Any member of the Menominee Indian Tribe who applies to be and is accepted as a member of another Indian Tribe shall thereby automatically forfeit membership in the Menominee Indian Tribe and all rights and benefits to which tribal members are entitled by virtue of their membership.

Section 3. Enrollment Committee

(a) An Enrollment Committee composed of five (5) eligible tribal voters shall be elected or appointed, beginning 1992 and every three years thereafter, at the Annual General Council meeting in accordance with Bylaw 111, Section 4, of this Constitution and Bylaws. The members of the Enrollment Committee shall be subject to the supervision of the Tribal Legislature. If the Enrollment Committee is appointed, the Tribal Legislature, by majority vote, shall have the power to terminate any such appointment for good cause, and to make a new appointment. If the Enrollment Committee is elected, the members of the committee shall be subject to the terms of Article VII of this Constitution, including the provisions of Section 2, which shall govern the manner in which the Tribal Legislature may expel or suspend a member of the Enrollment Committee from office. In the event of any vacancy, the Legislature, by majority vote, shall within sixty days appoint a replacement for the remainder of the term.

(b) The Enrollment Committee shall have the authority and duty to maintain a current and accurate official, tribal membership roll in accordance with the provisions of this Article. The Enrollment Committee shall report at least four (4) times a year to the Tribal Legislature as to the current status of the roll. The Committee shall have the authority to investigate suspected errors in the roll, and where it deems appropriate in view of evidence, shall recommend changes in the roll to the Tribal legislature.

Section 4. Appeal From Denial of Membership Application

Any person whose application for membership in the Menominee Indian Tribe is denied shall have the right to appeal such adverse decision to the Tribal Judiciary, but only after exhausting all remedies available within the Tribal Legislature.

Section 5. Removal From Membership Roll by Tribal Legislature

If, upon the report and recommendations of the Enrollment Committee, the Tribal Legislature determines that any person lacks a required membership qualification, proceedings shall be instituted against such person in Tribal Court to remove such person from the tribal membership roll. Only after a final decision is rendered in favor of the Tribal Legislature shall the affected person's name be removed from the tribal membership roll.

Section 6. Voluntary Relinquishment of Membership

Members of the Menominee Indian Tribe may relinquish membership in the Tribe in accordance with procedures established by the Tribal Legislature. However, any member of the Tribe who relinquishes membership voluntarily, or who forfeits membership by enrolling in another Indian Tribe, shall not again be eligible to enroll as a member of the Menominee Indian Tribe.

Section 7. Enforcement

The Tribal Legislature shall enforce this Article by ordinance, provided that, the Tribal Legislature shall have no power to establish substantive requirements for membership in addition to those established in Section I of this Article, nor to waive any of these requirements.

ARTICLE III – POWERS OF THE TRIBAL GOVERNMENT

Section 1. Powers of the Tribal Legislature

The Tribal Legislature, as established in Article IV of this Constitution, shall be vested with all executive and legislative powers of the Tribe including the power to make and to enforce laws, and including such powers as may in the future be restored or granted to the Tribe by any law of the United States, or other authority. The powers of the Tribal Legislature shall include those powers vested in the Tribe by Section 16 of the Indian Reorganization Act (48 Stat. 987), namely, to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the Tribe; and to negotiate with the Federal, State and local governments. This Constitution and Bylaws and ordinances of the Tribal Legislature adopted pursuant to this Constitution shall be the supreme- law of the Menominee Indian Tribe and all persons subject to its jurisdiction. However, the Tribal Legislature shall exercise its powers consistent with the limitations imposed by this Constitution and Bylaws.

Section 2. Powers of the Tribal Judiciary

The Tribal Judiciary, as established in Article V of this Constitution, shall be vested with all judicial powers of the Tribe including the following powers: to resolve controversies between and among persons where such controversies arise under this Constitution and Bylaws, tribal ordinances, the Constitution and laws of the United States, or the Constitution and laws of any state or Indian Tribe, and to decide cases in which a person is accused by the Tribe of committing an offense against the laws of the Tribe. The powers granted to the Tribal Judiciary by this Section shall include such judicial powers as may in the future be restored or granted to the Tribe by any law of the United States, or other authority. Decisions of the Tribal Judiciary shall be binding upon all persons within the jurisdiction of the Tribe. The Supreme Court of the Tribe shall be the final and supreme interpreter of this Constitution and Bylaws, and all tribal ordinances. However, the Tribal Judiciary shall exercise its powers consistent with the limitations imposed by this Constitution and Bylaws.

Section 3. Separation of Powers

The Tribal Legislature and the Tribal Judiciary shall be separate and equal branches of the Tribal Government. Neither branch shall exercise the powers of the other, nor shall either branch have authority over the other branch except as may be granted by this Constitution and Bylaws.

ARTICLE IV – THE TRIBAL LEGISLATURE

Section 1. Composition, Terms of Office, and Classes

(a) The Tribal Legislature of the Menominee Indian Tribe of Wisconsin shall be composed of nine (9) members of the Tribe, elected at large by the eligible voters of the Tribe. Seven (7) of the offices shall be filled by tribal members who are residents on the Reservation. There shall be no residency requirement for the remaining two (2) offices.

(b) Tribal Legislators shall serve terms of office of three (3) years. The nine (9) Tribal Legislators shall be divided into three (3) classes for the purpose of staggering terms of office. Each class shall be composed of three (3) Legislators. The terms of office of Tribal Legislators shall be staggered as follows:

> (1) The term of office of the first class of Legislators shall expire upon assumption of office by the newly elected Legislators three (3) years following the first election of Legislators held pursuant to Section 5(c) of the Menominee Restoration Act (87 Stat. 772), and every third year thereafter.
>
> (2) The term of office of the second class of Legislators shall expire upon assumption of office by the newly elected Legislators two (2) years following the first election of legislators held pursuant to Section 5(c) of the Menominee Restoration Act (87 Stat. 772), and every third year thereafter.
>
> (3) The term of office of the third class of Legislators shall expire upon assumption of office by the newly elected Legislators one (1) year following the first election of Legislators held pursuant to Section 5(c) of the Menominee Restoration Act (87 Stat. 772), and every third year thereafter.

Section 2. Initial Division of Tribal Legislature Into Classes

The Tribal Legislators elected at the first election of the Tribal Legislature, hold pursuant to Section 5(c) of the Menominee Restoration Act (87 Stat. 770) shall be initially divided into the three (3) classes as follows:

The three candidates receiving the highest number of votes shall be the first class; the three candidates receiving the highest number of votes after the first class shall be the second class; and the three candidates receiving the highest number of votes after the second class shall be the third class, provided that, if more than two (2) nonresident candidates are among the nine candidates receiving the highest number of votes, only the

two nonresident candidates receiving the highest number of votes of the nonresident candidates shall take office; the other seven (7) offices shall be filled with the seven (7) resident candidates receiving the highest number of votes of the resident candidates, in accordance with Section l(a) of this Article.

Section 3. Election of Tribal Legislatures

(a) Any tribal member who satisfies the requirements of Section 4 of this Article may become a candidate for the office of Tribal Legislator by filing a nominating petition which shall comply with requirements as established by the Tribal legislature by ordinance, and by complying with such other procedural requirements as may be established by the Tribal Legislature by ordinance.

(b) The Tribal Legislature shall by ordinance set the date on which elections to fill offices of the Tribal Legislature shall be held.

(c) With candidates placed in order of number of votes received from the highest to the lowest, offices shall be filled beginning with the candidate who received the highest number of' votes, and proceeding down the order, provided that, no more than two (2) offices of the Tribal Legislature shall be filled by nonresident tribal members, in accordance with Section l(a) of this Article.

(d) If in any election to fill an office or offices, the number of candidates running exceeds three (3) per office, the Election Commission shall hold a primary election to select those candidates who shall run for office in the main election. The number of candidates to be selected in such primary election shall be determined by multiplying the number of offices to be filled by two (2).

Section 4. Requirements for Candidates For Election To The Tribal Legislature And For Tribal Legislators

(a) To be eligible to be a candidate for election to the Tribal Legislature, a person must be a member of the Tribe, at least twenty-five years of age as of the date on which the election is held. No person shall be eligible to be a candidate for election to the Tribal Legislature who has been convicted of a major crime as defined in Bylaw V of this Constitution and Bylaws, unless the Tribal Judiciary, In accordance with such rules as it may establish, certifies that the person in question is rehabilitated. Such certificate of rehabilitation shall be based upon the person's record of behavior since the conviction.

(b) In any election in which it is necessary to fill all open offices with residents on the Reservation in order that seven (7) offices will be filled by residents on the Reservation, in accordance with Section l(a) of this Article, only persons who are residents on the Reservations shall be eligible to be candidates for election to the Tribal Legislature.

(c) Tribal Legislators while holding office shall be members of the Menominee Indian Tribe. Any Tribal Legislator elected while a resident on the Reservation shall maintain residence on the Reservation while holding office. If any Tribal Legislator ceases to be a member of the Tribe, or if any Tribal Legislator elected while a resident on the Reservation ceases to maintain residence on the Reservation, the affected Legislator shall be expelled In accordance with Section 2 of Article VII of this Constitution. In addition, if any Tribal Legislator is convicted while holding office of a major crime as defined in Bylaw V of this Constitution and Bylaws, the office of the affected Legislator shall be deemed vacant In accordance with Section 3 of Article VII of this Constitution.

Section 5. Consecutive and Simultaneous Terms of Office

No person shall be eligible to be elected to more than three (3) consecutive terms of office of Tribal Legislator, nor shall any person serve more than one term of office at the same time.

Section 6. Community Committees of The Tribal Legislature

The Tribal Legislature shall establish standing committees each of which shall be composed of three legislators. Each such standing committee shall be assigned to a community on the Reservation as defined by the Tribal Legislature. It shall be the duty of each standing committee to maintain constant communication with the community to which it is assigned for the purpose of determining the needs and concerns of that community. It also shall be the duty of each community committee to hold quarterly community meetings and to inform the Tribal Legislature of any needs or concerns of that community.

Section 7. Administration of Tribal Government

The Tribal Legislature shall by ordinance establish a plan for the administration for the government of the Tribe; provided that, this Section shall not be construed to include the administration of the Tribal Judiciary.

Section 8. Powers and Duties

The powers and duties of the officers of the Tribal Legislature are set forth In the Bylaws of this Constitution.

ARTICLE V – THE TRIBAL JUDICIARY

Section 1. Structure

(a) The Tribal Judiciary shall be composed of one Supreme Court and of such lower courts as are designated to be established in this Article, and as may be established by

ordinance by the Tribal Legislature as it deems appropriate to meet the needs of the Tribe.

(b) The Supreme Court of the Tribe shall have Jurisdiction over appeals from all final decisions of the lower courts of the Tribe. The Supreme Court shall be composed of three (3) Judges. Supreme Court Judges may, if necessary and if so instructed by the Tribal Legislature, also serve as Judges of the lower courts; however, in such a situation, the Supreme Court Judge shall be disqualified from participating in a review of any decision entered by him or her while sitting as a lower court judge.

(c) The Tribal Legislature shall, promptly after the adoption of this Constitution and Bylaws, determine and establish the number of lower-trial courts necessary to serve the judicial needs of the Tribe. Such trial courts shall have general and original jurisdiction over all cases and controversies of a civil or criminal nature. Each trial court shall be presided over by one Judge.

(d) If the Tribal Legislature establishes special kinds of lower courts with original jurisdiction over specified subject areas, the Tribal Legislature shall specify whether such jurisdiction is exclusive or concurrent with the jurisdiction of the trial courts established in subsection (c) of this Section.

(e) If the Tribal Legislature establishes an intermediate level of courts to hear appeals from all final decisions of the lower courts, the Supreme Court shall hear appeals only from decisions of the intermediate courts of appeals. In addition, the Tribal Legislature may authorize the Supreme Court to exercise its discretion in all or designated kinds of cases in deciding whether to hear an appeal in any particular case.

Section 2. Appointment and Term of Office

(a) The Tribal Legislature shall by ordinance, establish a procedure for selection of judges.

(b) Tribal Judges shall be appointed by six (6) or more votes of the Tribal Legislature.

(c) Lower Court Judges shall be appointed to a term of three (3) years.

(d) Supreme Court Judges shall be appointed to a term of four (4) years.

Section 3. Compensation

Tribal Judges shall receive for their services a reasonable compensation, as fixed from time to time by the Tribal Legislature. The Tribal Legislature shall not diminish the compensation of a Tribal Judge during his or her term of office.

Section 4. Qualifications and Disqualifications

(a) To hold the office of Tribal Judge, a person shall be a member of the Tribe, a resident on the Reservation during his/her term of office, at least thirty-five (35) years of age, having a minimum education of a high school graduate or a General Education Diploma (G.E.D.), and shall demonstrate fitness and competency for the office by taking appropriate examinations, relevant to demonstrate competence for the office of Tribal Judge.

(b) No person shall be eligible to be appointed to the office of Tribal Judge who has been convicted of a major crime as defined by Bylaw V of this Constitution and Bylaws, unless the Tribal Judiciary, in accordance with such rules as it may establish, certifies that the person in question is rehabilitated. Such certificate of rehabilitation shall be based upon the person's record of behavior since the conviction. No Tribal Judge who is convicted of a major crime as defined in Bylaw V of this Constitution and Bylaws shall continue to hold office.

Section 5. Removal From Office By Tribal Legislature and Automatic Vacancies

(a) Tribal Judges may be removed from office by the Tribal Legislature by the Legislature by the affirmative vote of at least seven-ninths (7/9) of the entire legislature, but only upon grounds of inability to carry out the duties of the office; failure to carry out the duties of the office; or lack of a requisite qualification for serving as a Tribal Judge. The Tribal Legislature shall notify the Tribal Judge in question and the Supreme Court, in writing, not less than twenty (20) days prior to the meeting at which the Judge's removal is to be considered and voted upon. The notice shall specify the charge or charges and shall state the facts in support thereof. The Tribal Judge in question shall have full opportunity at the meeting at which his or her removal is to be considered and decided upon to examine all witnesses against him or her and to have his or her own witnesses to testify in his or her behalf. The decision of the Tribal Legislature shall be final and not appealable to the Tribal Judiciary. The Supreme Court, may upon receipt of notice of the removal charges, suspend the Tribal Judge in question from office with or without compensation pending final action of the Tribal Legislature at the meeting.

(b) The office of any Tribal Judge who is convicted of a major crime as defined In Bylaw V of this Constitution and Bylaws, who dies, or who resigns shall be deemed to be automatically vacant. Resignation from office shall be written and shall be deemed to be effective as of the date tendered unless otherwise designated in the resignation document.

Section 6. Rules of Tribal Courts

The Supreme Court shall by order establish written rules of procedure and ethics for all Tribal Courts. Such rules may from time to time be amended as deemed necessary or appropriate by the Supreme Court. The Supreme Court shall consult with the Judges of the lower courts in establishing rules of procedure for the lower courts.

Section 7. Records and Court Clerk

The Supreme Court shall implement the system of keeping records of proceedings of the Tribal Judiciary in accordance with Section 3(b) of Bylaw II of this Constitution and Bylaws. The Supreme Court shall appoint a court clerk which shall be responsible for keeping the records of the Judiciary and generally for administering the daily business of the Judiciary.

Section 8. Appropriations

The Tribal Legislature shall give priority for appropriations of such funds as may be necessary to enable the Tribal Judiciary to carry out the provisions of this Article.

Section 9. Enforcement

In implementing this Article, the Tribal Legislature shall act by ordinance.

ARTICLE VI – TRIBAL ELECTIONS

Section 1. Voter Requirements

Any member of the Menominee Indian Tribe who is eighteen (18) years of age or older on the date of the tribal election in question shall be eligible to vote in tribal elections.

Section 2. Voting

Except as may be otherwise specified in this Constitution, voting in tribal elections shall be by secret ballot cast at polls established on the Reservation. Absentee voting and write-in voting shall be permitted in accordance with such procedures as shall be established by the Tribal Legislature. Proxy voting and cumulative voting shall not be permitted in tribal elections.

Section 3. Action By The Tribe: Approval - Disapproval. Consent - Rejection

Except as may be otherwise specified in this Constitution, the vote of a majority of the eligible tribal voters voting in a tribal election shall constitute action by the Tribe, including tribal approval or disapproval, and tribal consent or rejection.

Section 4. Regular and Special Election

The Tribal Legislature shall provide for the holding of regular elections, including establishing dates, times and places for holding such elections. The Tribal Legislature shall also provide for the holding of special elections by establishing the procedure by which such elections may be called and held with adequate notice provided to Tribal voters.

Section 5. Tribal Election Commission

(a) A Tribal Election Commission composed of three (3) eligible voters of the Menominee Indian Tribe shall be appointed and supervised by the Tribal Judiciary.

(b) The Tribal Election Commission shall be responsible for enforcing tribal election laws subject to the supervision of the Tribal Judiciary. The duties of the Tribal Election Commission shall include but not be limited to the following:

(1) Maintain a current list of eligible voters of the Menominee Indian Tribe.
(2) Conduct tribal elections; and
(3) Certify the results of tribal elections

(c) The Tribal Election Commission shall perform such other duties as may be delegated to the Commission by this Constitution, by ordinance, or by the Tribal Judiciary.

(d) The Tribal Election Commission may be authorized to issue such rules as may be necessary to carry out tribal election ordinances.

Section 6. Elections Which Result in Ties

In any tribal election which results in a tie between two or more candidates, the tie shall be broken by some means of chance agreed upon by the candidates involved. In any tribal election which results in a tie as to the approval or disapproval of an issue, the issue shall be determined defeated.

Section 7. Disputed Elections

Any eligible voter or group of eligible voters of the Menominee Indian Tribe may challenge the validity of the results of any tribal election on the ground that such election was conducted in violation of this Constitution and Bylaws, or of tribal ordinance or of any provision of the Indian Civil Rights Act (25 U.S.C. s.1301 1302). Such challenge shall be commenced within ten (10) days after the Tribal Election Commission certifies the results of the election by a written complaint filed in a Trial Court of the Tribe. The complaint shall

(1) specifically charge the person or persons alleged to have violated the law with having committed an offense against this Constitution and Bylaws, or tribal ordinance or a provision of the Indian Civil Rights Act (25 U. S. C. s. 1301 and 1302), and

(2) specify the constitutional provision or provisions, or the tribal ordinance or the provision of the Indian Civil Rights Act alleged to have been violated, and

(3) state the facts alleged to have been violated, and

(4) state the facts alleged to support such charge or charges. Upon filing of such complaint, the Trial Court shall promptly hold an initial hearing at which evidence is received from the complainant or complainants in support of the charges in the complaint. Any person or persons charged in the complaint shall have full opportunity to respond at the hearing to the charges and evidence offered in support of the complaint. At the conclusion of the initial hearing the Court may make a final decision in the case either dismissing the complaint or granting the relief sought; or the Court may order interim relief pending further investigation and hearings in the case. If the disputed election involves the filling of a tribal office, and the Court decides that further investigation and hearings are necessary, the Court shall, at the conclusion of the initial hearing, specifically grant or deny permission to fill the office pursuant to the election results pending further investigation and hearing and a final decision on the charges.

The Court may at the conclusion of the initial hearing and in the interests of justice, appoint an unbiased commission to investigate the charges further and to present any evidence gathered to the Court at a hearing at which both sides in the case have opportunity to be heard, to present evidence and to question the commission. At the conclusion of all hearings, the Court shall decide whether the charges have been proven. If the Court determines one or more of the charges have been proven, the Court shall provide such relief as is appropriate, which may include invalidating the tribal election in question and ordering a new election to be held.

Section 8. Duty To Enforce This Article

(a) The Tribal Legislature shall enforce Sections 1 through 4 of this Article by ordinance, provided that, the Tribal Legislature shall not establish substantive requirements for voting eligibility in addition to those established in Section 1 of this Article.

(b) The Supreme Court of the Tribe shall implement Sections 5 through 7 of this Article by appropriate Court Order.

ARTICLE VII – REMOVAL OF ELECTED OFFICIALS FROM OFFICE, AUTOMATIC VACANCY, AND THE FILLING OF VACANCIES

Section 1. Recall

(a) Any elected official of the Menominee Indian Tribe of Wisconsin may be recalled from office at any time after holding office for one (1) year, by the eligible voters of the Tribe in accordance -with the procedure set forth in subsection(b) of this Section; provided that, recall shall not be a remedy against alleged action by a tribal official which

may constitute a crime against the ordinances of the Tribe or the laws of the United States.

(b) The procedure by which an elected official may be recalled shall be as follows:

(1) Petitioners' Committee. Any one hundred (100) eligible voters of the Tribe may commence recall proceedings by filing with the Tribal Election Commission an affidavit stating their names, and addresses, the names and addresses of three (3) representatives of the petitioners' committee, and the address to which all notices, regarding the petition are to be sent; and stating that they will constitute the petitioners' committee and be responsible for circulating the petition and filing it in proper form; and naming the tribal official sought to be recalled; and stating in not more than one hundred (100) words the specific reasons upon which it s alleged that the named tribal official should be recalled. If more than one official is sought to be recalled, there shall be separate affidavits of charges filed for each such official. The Tribal Election Commission shall promptly thereafter serve a copy of the affidavit of the petitioner's committee upon the named official in person or by registered mail. The named official shall have fifteen (15) days after receipt of service of the affidavit of charges to file an affidavit in defense with the Tribal Election Commission answering the charges made against him or her in not more than one hundred (100) words.

(2) Issuance of Petition Forms. The Tribal Election Commission shall within five (5) work days after the filing of the affidavit in defense by the named tribal official, prepare a recall petition form consisting of the affidavit of charges, the affidavit in defense, and spaces for signature and addresses. The Tribal Election Commission shall certify and
issue to the petitioners committee an appropriate number of such recall petition forms. If more than one tribal official is sought to be recalled, separate recall petition forms shall be prepared, certified and issued for each such official.

(3) Circulation of Petitions. The recall petition may be circulated for signature for thirty (30) days following its issuance by the Tribal Election Commission. The petition must be signed by at least twenty-five percent (25%) of the total number of voters eligible to vote in the election in which the official sought to be recalled was elected. Each recall petition shall be the responsibility of one person who shall, upon filing the completed petition, attach his or her personal affidavit to the petition stating that he or she personally witnessed the signing of each signature and corresponding address contained in the petition, and that he or she believes each signature and corresponding address to be the name and address of the person who signed them, and that each person who signed the petition read or had explained to him or her the full text of the petition and the purpose of the petition. The recall petition with the requisite number of signatures shall be filed with the Tribal Election Commission. Within five (5) work days after the filing of 'the recall petition, the Tribal Election Commission shall certify whether the recall

petition contains the requisite number of valid signatures, and is otherwise sufficient.

(4) Certificate of Sufficiency.

(a) If the petition is certified insufficient because of a lack of the requisite number of signatures, the petitioners' committee shall be promptly notified, and they shall have ten (10) days after receipt of notification to supplement the petition with additional signatures on certified recall petitions issued by the Tribal Election Commission, and to file such supplemental petition with the Commission. The Tribal Election Commission shall within two (2) work days after the filing of the supplemental petition certify as to the sufficiency of the recall petition as supplemented. If the petition is again certified insufficient, the petitioners' committee shall be notified and may appeal such decision to the Tribal Judiciary in accordance with the rules of the court procedure. Pending a final decision by the Tribal Judiciary, a new recall petition against the same official shall not be commenced for the same cause.

(b) If the recall petition is certified sufficient, the Tribal Election Commission shall, within ten (10) work days after it certifies the validity of the recall petition, set a date for a recall election to be held. Such recall election shall be held within thirty (30) days after the filing of the recall petition with the Commission and shall provide notice of such election date by posting notices at public places on the Reservation and in appropriate urban areas, and publishing a notice in at least one newspaper with a wide circulation among eligible tribal voters on the Reservation.

(5) Recall Election

(a) The ballot for the recall election shall, for each official sought to be recalled, if more than one, state the grounds set forth in the recall petition for demanding such recall as well as the answer of the official sought to be recalled in his defense; and the ballot shall set forth the following question: Shall (name of the official sought to be recalled) be recalled from the office (title of office)? Following such question shall be two choices of words, "yes" or "no", on separate lines with the blank space to the right of each in which the voter shall indicate by marking a cross (x), his vote for or against recall.

(b) The affirmative vote of sixty percent (60%) of those voting at the recall election shall be sufficient to effect a recall of the official from office, provided that, at least thirty percent (30%) of the total number of eligible voters vote in the recall election. In the event the official is

recalled, the office shall be deemed vacant and shall be filled in accordance with Section 4 of this Article.

Section 2. Expulsion and Suspension of Tribal Legislators

(a) The Tribal Legislature shall by affirmative vote of two-thirds (2/3) of the entire Legislature expel a member of the Legislature from office on grounds of failure to attend three (3) successive regular meetings of the Tribal Legislature in a given Legislative year, without good reason as determined by the Tribal Legislature lack of a required qualification for holding office, occurrence of a disqualification for office, or misuse of funds.

(b) The Legislator sought to be expelled shall be notified in person or by registered mail at least ten (10) days before the holding of any meeting at which the Legislator's expulsion from office is to be considered. The notice shall set forth the alleged grounds for expulsion with specificity. The Legislator in question shall be given full opportunity to be heard at such meeting and to confront any and all witnesses against him/her. If the Tribal Legislature votes to expel the Legislator in question, the grounds for removal shall be set forth with specificity in the minutes of the meeting, and the Legislature's decision shall be subject to prompt review by the Tribal Judiciary at the request of the expelled Legislator.

(c) In the event the decision of the Tribal Legislature to expel the Legislator in question is upheld by the Tribal Judiciary, the office shall be deemed vacant and shall be filled in accordance with Section 4 of this Article.

(d) A Tribal Legislator may be suspended from office pending the appeal of the Legislator's conviction of a major crime by the vote of a majority of the total number of Tribal Legislators.

Section 3. Automatic Vacancies

(a) The office of any elected tribal official who dies or resigns, who is convicted of a major crime, as defined In Bylaw V of this Constitution and Bylaws, shall be deemed to be automatically vacant. Resignation of office shall be written and shall be deemed to be effective as of the date tendered unless otherwise designated in the resignation document.

(b) Any vacancy in office which occurs under this section shall be filled in accordance with Section 4 of this Article.

Section 4. The Filling of Vacancies In Office

(a) Any vacancy in the office of an elected tribal official shall be filled as follows:

(1) If the term of the office in question has more than one (1) year to run from the date of vacancy, the Tribal Legislature shall appoint within sixty (60) days an eligible Tribal member to fill such vacancy until the next tribal election; provided that, the Tribal Legislature shall exercise this right of appointment only once in any Legislative year. If any additional vacancies occur in the same year, they shall be filled by a special election.

(2) If the term of the office in question has one (1) year to run, the Tribal Legislature shall within two (2) months appoint by a majority vote of the total number of Legislators, an eligible tribal member to fill the office; provided that, if a special election is required to fill one or more other vacancies pursuant to subsection (a)(1) of this Section. The Tribal legislature shall submit all vacancies to election.

(b) Any special election required to be held under this Article shall be conducted in accordance with applicable provisions of this Constitution and Bylaws and with applicable tribal ordinance. If a regular election is scheduled to be held within the time permitted to hold a special election, all issues shall be submitted to vote at the regular election.

(c) Any tribal official who, by operation this Article, vacates his office shall not be eligible to succeed himself in that office.

(d) If, by reason of vacancies in office, the remaining members of the Tribal Legislature constitute less than five (5), the Election Commission shall cause all vacant offices to be filled by special election held in accordance with applicable provisions of this Constitution and Bylaws and applicable tribal ordinance.

(e) Any tribal member appointed to office under the provisions of this section shall be deemed to be subject to all provisions of this Article, and other Articles and Bylaws of this Constitution and Bylaws, and to other tribal ordinances generally applicable to elected tribal officials, and to his or her particular office.

Section 5. Tribal Judiciary Excluded

This Article shall not be applicable to the removal of Tribal Judges, nor to the filling of any vacancies in the office of Tribal Judge.

ARTICLE VIII – INITIATIVE AND REFERENDUM

Section 1. General Authority Section

(a) Initiative. Eligible voters of the Tribe may propose any ordinance to the Tribal Legislature for consideration, in accordance with the procedures set forth in this Article, except ordinances concerning the budget of the tribal government, appropriations of

funds, levy of taxes, salaries of tribal officials, employees or appointees, or ordinances establishing tribal businesses. If the Tribal legislature votes not to enact the proposed ordinance, or if the Tribal Legislature votes to enact the proposed ordinance with substantive amendments, the proposed ordinance, in the original form and in the amended form if any, shall be submitted to the eligible voters of the Tribe at a tribal election for their approval or rejection in accordance with Section 5 of this Article.

(b) Referendum

(1) By action of eligible voters. Eligible voters of the Tribe may require the Tribal Legislature to consider the repeal of any ordinance, in accordance with the procedure set forth in this Article, except ordinances concerning the budget of the tribal government, appropriations of funds, levy of taxes, salaries of tribal officials and employees or appointees, emergency ordinances, or ordinances establishing tribal businesses. And, if the Tribal Legislature fails to repeal such ordinance, the ordinances shall be submitted to the eligible voters of the Tribe at a tribal election for their approval or repeal in accordance with Section 5 of this Article.

(2) By action of the Tribal Legislature. The Tribal Legislature, on its own motion, may submit at a tribal election any proposed ordinance or other proposed action of the Legislature to a vote of the eligible voters of the Tribe for their approval or rejection.

Section 2. Procedure

(a) Petitioners' Committee. Any twenty-five (25) eligible voters of the Tribe may commence initiative or referendum proceedings by filing with the Tribal Election Commission an affidavit (1) stating their names, addresses and the address to which all notices regarding the petition are to be sent, and (2) that they will constitute the petitioner's committee and be responsible for circulating the petition and filing it in proper form and (3) If an initiative petition is involved, setting forth in full the proposed ordinance to be subject to this initiative proceeding; provided that, referendum proceedings shall be commenced no later than thirty (30) days after the Tribal Legislature enacts the ordinance.

(b) Issuance of Petition Forms. Promptly upon filing the affidavit of the Petitioners' committee, the Tribal Election Commission shall prepare and issue an appropriate number of certified petition forms to the Committee

(c) Petitions

(1) Form and Content. Each petition form issued to the committee shall contain the full text of the ordinance in question. Every petition form issued shall be numbered and recorded. Every page of each petition form shall be attached as one

instrument, shall be numbered as part of the whole, i.e., page 1 of 10 pages, and shall be certified as a page of the petition by the Tribal Election Commission. Every signature on the petition shall be followed by the address of the person who signed.

(2) Number of signatures. Both initiative and referendum petitions must be signed by at least fifteen percent (15%) of the total number of eligible tribal voters.

(3) Affidavit of Circulator. Each petition shall be circulated by one person and upon filing a completed petition, that person shall attach his or her personal affidavit to the petition stating that he or she personally witnessed the signing of each signature and corresponding address contained in the petition, and that he or she believes each signature and corresponding address to be the name and address of the person who signed them, and that each person who signed the petition read or had explained to him or her the full text of the ordinance in question, and the purpose of the petition.

(d) Time for Filing Petitions. Initiative or referendum petitions must be circulated and filed within thirty (30) days after issuance by the Tribal Election Commission.

(e) Certificate of Sufficiency. Within five (5) work days after a petition is filed, the Tribal Election Commission shall certify as to its sufficiency.

(1) If Certified Insufficient. If the petition is certified insufficient, the Tribal Election Commission shall state in the certificate with particularity the reasons it is insufficient. A copy of the certificate of insufficiency shall be promptly sent to the petitioners' committee by registered mail, or served personally upon the committee. A petition certified insufficient for lack of required number of valid signatures may be supplemented once, and for this purpose an appropriate number of petition forms shall be mailed or given personally to the petitioners' committee along with the certificate of insufficiency. Such supplemental petition shall comply with the requirements of this section. Petitioners' committee shall have fifteen (15) days after receipt of the certificate of insufficiency to file a supplemental petition with the Tribal Election Commission. Within five (5) days after the filing of the supplemental petition, the Tribal Election Commission shall certify as to the sufficiency of the petition as supplemented and promptly send a copy of such certificate to the petitioners' committee by registered mail, or shall serve a copy personally upon a member of the committee.

(2) If Certified Sufficient. If an original petition or a petition as supplemented in accordance with Section 2(e)(1) of this Article is certified as sufficient by the Tribal Election Commission, a copy of the certificate of sufficiency shall promptly be sent by registered mail to or served personally upon the petitioners

committee, and the certificate of sufficiency shall promptly be presented to the Tribal Legislature.

(f) Review of Determination of Sufficiency. The final determination of the Tribal Election Commission in accordance with the procedure in Section 2(e) (1) of this Article that an initiative or a referendum petition is insufficient shall be reviewable as follows: The petitioners committee must file a request for review with the Tribal Chairperson within ten (10) days after receipt of the final certificate notifying them of the insufficiency of their petition. Review shall first be made by the Tribal Legislature at its next meeting following the filing of the request for review. If the Tribal Legislature affirms the finding of the Tribal Election Commission, that decision may be appealed to the Tribal Judiciary in accordance with the rules of court procedure. Pending a final decision by the Tribal Judiciary, a new petition concerning the same matter may not be commenced.

(g) Withdrawal of Petitions. An initiative or referendum petition may be withdrawn at any time prior to the final certification of sufficiency by filing with the Tribal Election Commission a request for withdrawal signed by a majority of the petitioners' committee. The petition shall have no further force or effect and all proceedings thereon shall be terminated.

Section 3. Referendum Partitions: Suspension of Effect of Ordinance in Question

When a referendum petition is certified as sufficient by the Tribal Election Commission in accordance with the procedure set forth in Section 2 of this Article, the ordinance in question shall be suspended, if in effect, or from taking effect, if not in effect. Such suspension shall terminate if the petitioners' committee withdraws its petition or if a 'majority of eligible voters on submission of the ordinance in question to them for vote, vote to retain the ordinance.

Section 4. Action on Petitions

(a) Action by Tribal legislature. When an initiative or referendum petition has been determined sufficient, the Tribal Legislature shall:

(1) Enact the ordinance as submitted by an imitative petition; or

(2) Repeal the ordinance, or part thereof, referred by a referendum petition, or

(3) Decide to submit the proposal in a petition to the eligible voters of the Tribe; provided, however, that, the Tribal Legislature may change the detailed language of any proposed initiative ordinance and may affix the title thereto, so long as the general character of the measure will not be substantially altered.

Appropriate action by the Tribal Legislature shall be taken under this subsection within fifteen (15) days after a referendum petition is certified sufficient, and within thirty (30) days after an initiative petition is certified sufficient.

(b) Submission to Voters. The election on an initiated or referred ordinance shall be held within thirty (30) days after the date of the final Tribal Legislature vote thereon. Copies of the initiated or referred ordinance shall be made available to eligible voters not less than ten (10) days before the election and also at the polls at the time of the election.

Section 5. Results of Election

(a) Initiative. If a majority of the eligible tribal voters voting on a proposed initiated ordinance vote in its favor, it shall be considered effective upon certification of the election results. If conflicting ordinances are approved at the same election, the one receiving the greater number of affirmative votes shall prevail.

(b) Referendum. If a majority of the eligible tribal voters voting on a referred ordinance vote for repeal, it shall be considered repealed upon certification of the election results. If a majority of the eligible tribal voters voting on a referred ordinance vote to approve such ordinance, it shall be considered approved upon certification of the election results.

(c) Voting Percentage Requirements. No initiative or referendum election shall be effective unless at least fifteen percent (15%) of the total number of eligible voters vote in that election.

Section 6. Reenactments, Amendment or Repeal

An ordinance initiated and adopted by the tribal voters may not be amended or repealed by the Tribal Legislature for a period of six (6) months after the date of the election at which it was adopted, and an ordinance referred and repealed by the tribal voters may not be reenacted by the Tribal Legislature for a period of six (6) months after the date of the election at which it was repealed; provided, however, that any such ordinances may be amended or repealed at any time by compliance with the provisions of this Article.

ARTICLE IX – RIGHTS OF TRIBAL MEMBERS AND OTHER PERSONS SUBJECT TO TRIBAL JURISDICTION

Section 1. Hunting, Fishing Trapping, Gathering

In addition to such other rights as are guaranteed by this Constitution and Bylaws, members of the Menominee Indian Tribe of Wisconsin shall have the right to hunt, fish, trap, and gather food from plants subject only to those tribal laws which are necessary to conserve these natural resources of the Tribe; provided that, this right shall not include the right to engage in commercial uses of such tribal resources; such right is reserved to the Tribe acting through its Tribal Legislature in accordance with Section 2 of Article X

of this Constitution. Non-tribal members shall have no right to hunt, fish, trap, and gather foods from plants except as may be permitted by tribal ordinance approved by the Tribe in accordance with Section 3 of Article VI of this Constitution.

Section 2. Rights of Persons Subject To Tribal Jurisdiction

The Menominee Indian Tribe and its officers and agencies in exercising the powers of self-government over persons subject to tribal jurisdiction shall not:

(a) establish an official government religion;

(b) make or enforce any law (1) prohibiting the free exercise of religion or of the dictates of conscience, or (2) abridging the freedom of speech or of the press, or of peaceful assembly or association, or the right to petition for a redress of grievances;

(c) violate a person's right to be safe against unreasonable searches and seizures of person and property;

(d) 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 the tribal law has been committed and that the person or place to be searched holds evidence of the offense or that the persons 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.

(e) Subject any person for the same offense to be put in jeopardy of loss of liberty more than once;

(f) In any criminal proceeding against any person

> (1) 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;
>
> (2) Deny such person the right to:
>
> > (a) a speedy and public trial;
> >
> > (b) to be informed of the nature and cause of the accusation
> >
> > (c) to confront adverse witnesses

(d) to have witnesses in such person's favor compelled to appear to testify; and

(e) to have, at such person's own expense, the assistance of counsel in defending against the accusation.

(3) deny to any person who is accused of a major offense as defined in Bylaw V of this Constitution & Bylaws, the right to a trial by jury of not less than six (6) persons, provided that, such person affirmatively requests such right and further provided that any person accused of an offense not punishable by imprisonment, shall have such right only at such person's own expense.

(4) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments.

(g) Deny to any person the equal protection of tribal laws, provided 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.

(h) Deprive 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; and

(i) Enact any law imposing punishment on one person; or enact any law which makes an action a crime which was not a crime when such action was committed, or which increases 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.

ARTICLE X – LIMITED POWER OF TRIBAL LEGISLATURE TO TRANSFER OWNERSHIP OF, OR TO ENCUMBER, TRIBAL LAND OR INTERESTS THEREIN

Section 1. Limited Power To Transfer Tribal Land Out of Tribal Ownership

The Tribal Legislature shall not transfer land or interests therein out of tribal ownership by any means unless, prior to any such proposed transfer taking effect, such proposed transfer is approved by a vote of two-thirds (2/3) of the total number of eligible voters of the Tribe, by the Secretary of the Interior, and by an Act of Congress; however, the Tribal Legislature may exchange tribal land for land of equal value, but any such proposed exchange, prior to becoming effective, shall be approved by a vote of the Tribe in accordance with Section 3 of Article VI of this Constitution.

Section 2. Limited Power To Encumber Tribal Lands

(a) Except as permitted in subsection (b) of this Section, the Tribal Legislature shall not pledge, mortgage, lease, grant licenses to use land, whether revocable or irrevocable, or otherwise encumber tribal land or interests therein, unless, prior to any such proposed encumbrance taking effect, such proposed encumbrance is approved by the Secretary of the Interior, and by a vote of a majority of the eligible tribal voters voting on the question, provided that, the total vote cast is at least fifteen percent (15%) of those entitled to vote.

(b) The Tribal Legislature may authorize the following encumbrances by a vote of a majority of the entire Tribal Legislature:

(1) Grants of permission to members of the Tribe and to qualified nonmembers, in accordance with Article XI of this Constitution, to use specified portions of tribal land for residential, agricultural, commercial, recreational or industrial purposes.

(2) Leases to members of the Tribe of specified portions of tribal land for residential, agricultural, commercial, recreational, or industrial purposes.

(3) Grants of rights-of-way over tribal land or interests therein, for the purpose of providing municipal services, such as water, sewage disposal, electricity, telephone, and roads, to and for the benefit of tribal members, or the heirs and descendants of tribal members who hold a land use assignment pursuant to Section 2 of Article XI of this Constitution, or a lease.

(4) Leases to United States or its agencies for the purposes of meeting eligibility requirements for federal housing programs; provided that, the term of such a lease shall be for the minimal period of time.

Section 3. Limited Power To Develop Natural Resources

The Tribal Legislature shall not develop on a commercial or industrial basis any natural resources of the Tribe without the consent of a majority of the total number of eligible voters of the Tribe, except as otherwise specified in Article XI, Section 2 (d).

Section 4. Principle of Construction

Section 2 of this Article shall not be construed to deny to the Tribal Legislature its governmental power and authority to regulate activities of tribal land for the Tribe's general welfare, including but not limited to, zoning, the regulation of commercial ventures, fishing, hunting, and other sports activities, and regulations for the purpose of promoting health, safety, welfare, and conservation.

ARTICLE XI – USE OF TRIBAL LAND BY TRIBAL MEMBERS AND QUALIFIED NON-TRIBAL MEMBERS

Section 1. Land Use and Natural Resources Conservation Plan

(a) Land Use and Natural Resources Conservation Plan
The Tribal Legislature shall by ordinance establish a comprehensive land use and natural resources conservation plan, for lands and natural resources subject to tribal jurisdiction. Such plan shall include rules and procedures by which tribal members, and non-tribal members who quality under Section 2 of this Article, may obtain permission to use a specified parcel of tribal land for residential, agricultural, commercial, recreational, or industrial purposes, however, such permission shall not include any subsurface rights except as specifically authorized by the plan. Such plan shall also include rules and procedures by which tribal members may use the natural resources of the Tribe consistent with principles of conservation.

(b) Land Use Assignments.
Permission to use tribal land for the purposes specified in subsection (a) of this Section shall be evidenced by a land use assignment issued to persons who qualify under Section 2 of this Article, in accordance with the land use plan. Copies of such assignments shall be filed and recorded by the Appropriate Tribal Official.

(c) Land Use Assignments Not Transferable.
Permission to use tribal land shall be a right granted only to the person designated in the land use assignment. Such permission shall not be transferable by the permittee during his or her lifetime, and shall pass upon the death of the permittee in accordance with regulations and procedures established by the Tribal Legislature by ordinance.

Section 2. Use of Tribal Land by Non-Tribal Members

(a) General Prohibition.
Except as otherwise specified in this section persons who are not members of the Menominee Indian Tribe shall not be permitted to use tribal land for any purpose.

(b) Heir or Descendent Exception
A nonmember who is an heir or descendent of a member of the Menominee Indian Tribe shall for purposes of determining inheritance of any land use assignment, have the same status as heirs or descendant who are members of the Tribe, provided that, where a nonmember inherits the land use assignment, and notwithstanding any provision to the contrary in the land use assignment issued to the deceased tribal member, the term of such use assignment shall be deemed to be for twenty-five (25) years. The Tribal Legislature may renew such assignment for subsequent terms, each not to exceed twenty-five (25) years

(c) Consent to Abide by Tribal Law
Any nonmember who inherits a land use assignment from a tribal member shall thereby be deemed to have consented to abide by all laws of the Menominee Indian Tribe which would have been applicable to such land had the land use assignment in question been

inherited by a tribal member, and, further such nonmember shall be deemed to have consented to the jurisdiction of the Tribe for purposes of enforcing such laws.

(d) Leases to Non-Tribal Members, Corporations or Businesses
Leases of land located outside the geographical boundaries of the Menominee Reservation as defined by the 1854 Treaty held in trust by the United States for the Menominee Indian Tribe of Wisconsin, the Menominee Indian Tribe of Wisconsin may grant to non-tribal members, corporations, or businesses for any legally permissible purpose pursuant to Tribal Law by majority vote of the Tribal Legislature acting through the Tribal Ordinance process in accordance with applicable provision under Bylaw II, Section 2, of this Constitution and Bylaws. The Tribal Legislature shall set forth the length of time of such leases, the fee, and such other provisions as the Tribal Legislature deems necessary.

ARTICLE XII – SUCCESSOR BUSINESSES TO MENOMINEE ENTERPRISES

Section 1. Duty of the Tribal Legislature

The Tribal Legislature shall reaffirm by resolution the "Management Plan of Menominee Enterprises, a Tribal Enterprise of the Menominee Indian Tribe of Wisconsin," (hereinafter referred to as the "Menominee Enterprises Plan") approved by Congress on March 14, 1975 pursuant to Section 6 of the Menominee Restoration Act (87 Stat. 770), in accordance with Section 14(d) of the "Menominee Enterprises Plan.". The Tribal Legislature shall amend the "Menominee Enterprises Plan" so that the provisions of that document are consistent with the provisions of Section 2 of this Article. Amendments to the "Menominee Enterprises Plan" shall not be inconsistent with any provision of Section 2 of this Article.

Section 2. Successors to Menominee Enterprises

Before the Tribal Legislature takes any action terminating the 'Menominee Enterprises Plan" pursuant to Section 14(d) of that document, or before the Tribal Legislature takes any action terminating any successor to Menominee Enterprises established pursuant to this Article, the Tribal Legislature shall establish a successor tribal business (hereinafter "Successor Business") which shall assume control of the management responsibilities, and all books and records of the predecessor business. The Successor Business shall be the principle business arm of the Tribe and shall be established by means of a written charter issued by the Tribal Legislature by ordinance. The charter shall not be inconsistent with this Constitution and Bylaws and shall include, be consistent with, and be based upon the following principles:

(a) Management Policy.
The Tribal Legislature in providing for the management of the tribal forest lands by the Successor Business shall follow the policy of promoting maximum self-determination of

the Menominee Indian Tribe. The Tribal Legislature in dealing with the United States in the management of tribal land and interests therein shall seek federal protection of the right of the Tribe to self-determination and shall avoid federal domination. All tribal forest lands shall be managed on a sustained yield basis according to the provisions 'of the Forest Management Plan: Menominee Enterprises, Inc. 1968-1982 (1973 Revision) including any revisions which may in the future be made in that document.

(b) Scope of Authority of the Successor Business to Menominee Enterprises
The scope of authority of the Successor Business shall be to manage and operate the property designated in this subsection (hereinafter referred to as the "subject property") in order to conduct the business operations of the Tribe which will best promote the interests of the Tribe and of the Tribal members. Accordingly, the primary duties of the Successor Business shall be to log, manage, and reforest the tribal forest land, and to manufacture market, sell and distribute timber, forest products, and related products. The Successor Business shall be granted all powers necessary to manage and operate the subject property in order properly to perform its duties as set forth herein. The Successor Business shall also have the power to operate subsidiary businesses which come within its scope of authority in order to further the business and economic needs of the Tribe insofar as the management and operation of the subject property is concerned.

The property subject to the control of the Successor Business shall be that property formerly managed and controlled by Menominee Enterprises and any other predecessor business, including the tribal mill, the tribal forest land, the personal property of the predecessor business, and such additional property as may be acquired by the Successor Business in the future. The Successor Business shall have no interests therein, except the right to manage such property in accordance with the principles set forth in this section and in its tribal charter. Tribal land and interests therein shall not be an asset of the Successor Business for any purpose. No tribal property, real or personal, or interests therein, shall be subject to the management and control of the Successor business unless such property shall have been expressly stated in this subsection to be subject to the management and control of the Successor Business. The Successor Business shall not be authorized to pledge, mortgage, lease, or otherwise encumber tribal land or interests therein except as may be authorized by the Tribal Legislature acting in accordance with applicable Federal Law, tribal ordinances, and this Constitution and Bylaws.

The Successor Business shall be authorized to acquire and own land or interests therein in its own name. The Successor Business shall be authorized to sell for business purposes any property owned by it in its own name and shall also be authorized to, pledge, mortgage or otherwise encumber its own property as security for debts.

The Tribal Legislature shall have no authority over the operations of the Successor Business except as specifically set forth in this section. However, the Tribal Legislature shall retain all authority and power to exercise all proper governmental and sovereign functions over the property managed or owned by the Successor Business.

(c) Sovereign Immunity
The Menominee Indian Tribe in authorizing the establishment by charter of the Successor Business does not waive, nor authorize its Tribal legislature to waive, or limit the right of the Tribe or the Successor Business to sovereign immunity from suit, except as specifically provided in this subsection; nor does it waive or limit, or authorize its Tribal Legislature to waive or limit any exceptions and immunities from taxation to which the Successor Business is or may in the future be entitled, and to which the Tribe, its members, and its businesses are entitled by law.

For the purpose of enabling the Successor Business to enter into business agreements either to secure debts or to provide services or products, the Successor Business shall be authorized to agree by specific written agreement with any party to sue and be sued in its capacity as a tribal business upon any contract, claim, or obligation arising out of its authorized activities. For the same purpose, the Successor Business shall be authorized to agree by specific written agreement with any party to waive any immunity from suit it might otherwise have.

(d) Distribution of Profits of the Successor Business
The profits of the Successor Business shall be allocated in the manner set forth in this subsection.

> (1) The Successor Business shall, as soon as practicable, make a determination of the net profits of the Successor Business for each fiscal year. That profit shall be determined from revenues; cost of sales; operating expenses; general income and expenses; taxes, if any; and interest payments on the outstanding bonds administered in accordance with the bond indenture dated April 30, 1961, First Wisconsin Trust Company as trustee, and on any outstanding supplemental bond indentures.
>
> (2) Excess profits shall then be determined by subtracting from net profits such amounts as are deemed appropriate by the Board of Directors for expansion, for asset replacement, and for sinking fund or a reserve to retire the principal obligation on the bond indentures named in subsection (d)(1) of this section.
>
> (3) Excess profits shall then be divided by the Board of Directors on an equitable basis between an amount to be retained by the Successor Business (hereafter "retained share") and an amount to be paid over by the Successor Business to the Tribal Legislature, representing the Tribe (hereafter 'tribal share"). In making the division between the retained share and the tribal share, the Board of Directors shall consult extensively with the Tribal Legislature and shall be guided by industry standards.
>
> (4) The Tribal Legislature shall then determine whether the tribal share shall be utilized for tribal operations, distributed to tribal members, or divided and used for both purposes. In making its determination as to the distribution of the tribal

share, the Tribal Legislature shall use its best judgment and shall carefully consider both the need for effective tribal operations and the individual financial needs of tribal members.

(e) Authority, Duties, and Rights of the Board of Directors of the Successor Business. In addition to such other authority granted by this section and to such other authority as may be granted by the Successor Business charter, not inconsistent with this Constitution and Bylaws, the Board of Directors of the Successor Business shall be granted the following authority and rights and shall be directed as follows:

(1) The Board of Directors of the Successor Business shall be authorized to vote themselves a reasonable compensation for services; but any increase in compensation shall not take effect during the term of office of any Director serving at the time the increase was voted upon.

(2) Directors shall be subject to recall on grounds of dishonesty, incompetency, nonparticipation in Board matters, or other conduct detrimental to the interests of the Tribe or the Successor Business.

(3) The Board of Directors of the Successor Business shall be authorized to elect and remove officers of the Board and officers of the Successor Business, and to fill vacancies in such offices, in accordance with the procedure set forth in subsection 2(e) (4) of this Section.

(4) The Board of Directors shall be authorized to appoint a tribal member to fill the vacant office until the next annual election when a tribal member shall be elected to complete the term of office in question.

(5) The Board of Directors shall be authorized to determine the amount of excess profits of the Successor Business to be retained by the Successor Business (retained share), and the amount to be paid over to the Tribal Legislature on behalf of the Tribe (tribal share) in accordance with the formula set forth in subsection (d) of this Section.

(6) The Board of Directors shall be authorized to amend the following parts of the charter of the Successor Business: the part which concerns the internal rules and regulations of the Board of Directors, that part which concerns the meetings of the Board of Directors and voting at such meetings, that part which concerns the officers of the Board of Directors, and that part which concerns the location of the principle place of business of the Successor Business.

(7) The Board of Directors, its officers, and the officers of the Successor Business, shall be indemnified from any court awarded damages that might result from the performance of the duties of office.

(8) The Board of Directors shall meet at least four (4) times a year to transact the business of the Successor Business.

(f) Rights of the Tribal Members.

(1) There shall be twelve (12) members of the Board of Directors. All Directors of the Board of Directors of the Successor Businesses shall be tribal members with at least one-fourth (1/4) degree Menominee Indian blood elected at large for three (3) year terms of office. The terms of office shall be staggered such that four (4) of the twelve (12) Directors are elected annually.

(2) Eligible voters of the Tribe shall have the right to vote for members of the Board of Directors of the Successor Business, as well as on other matters submitted to the tribal voters for a vote at regular and special business meetings of the Successor Business. Write-in voting, and absentee voting shall be permitted, but voting by proxy, and cumulative voting shall not be permitted.

(3) Eligible tribal voters shall have the right to recall members of the Board of Directors in accordance with the following procedure: upon receipt of a petition signed by two hundred (200) eligible voters, setting forth the alleged misconduct with specificity, the Secretary or other appropriate officer of the Successor Business shall call and give notice of a special meeting of the tribal members. Such meeting shall be held in not less than ten (10) nor more than thirty (30) days after receipt of such petition. At such meeting, eligible tribal voters shall vote on the question of whether the Director in question shall be removed from office on the basis of one or more of the grounds set forth in the petition. No Director shall be removed from office unless (a) at least thirty percent (30%) of all eligible voters participate in the recall election and (b) at least two-thirds (2/3) of the eligible voters participating in the recall election vote in favor of removal.

(4) The tribal members shall have the right to have an annual business meeting of tribal members held to receive reports on business operations, to elect directors, and to transact other business.

(5) Eligible tribal voters shall have the right to petition for special business meetings of the tribal members in accordance with the following procedure:

The Secretary of the Successor Business shall call such a meeting upon receipt of a written petition which is signed by not less than two hundred (200) eligible voters and which sets forth with specificity the business to be transacted at the special meeting. The Secretary shall notify eligible voters of the meeting by posting notice in accordance with Bylaw II, Section 4, of this Constitution and Bylaws. Such notice shall state the place, day, hour and the purpose or purposes for which the meeting is called. Such notice shall be posted not less than ten (10) nor more than fifty (50) days before the date of the meeting. If the place of

meeting is not designated in the notice, the place of meeting shall be the office of the Successor Business, but any such meeting may be adjourned to reconvene at any place designated by a vote of a majority of eligible voters who are present at the meeting. No business shall be transacted at any special meeting except as designated in the notice of the meeting.

(6) There shall be at least one hundred and twenty-five (125) eligible tribal voters present at business meetings of the tribal members before business can be conducted at such meetings.

(7) To be included on the ballot for election to the Board of Directors, a candidate must be named in a nominating petition which is signed by at least seventy-five (75) eligible voters and filed, with the appropriate officer of the Successor Business at least thirty (30) days before the annual business meeting to elect the Board members.

(g) Involvement of the United States
The United States Government shall not be granted any authority in regard to the operation of the Successor Business, except as specifically negotiated and agreed upon in a written trust agreement between the United States and the Menominee Indian Tribe.

ARTICLE XIII – TRIBAL BUSINESSES

Section 1. Interrelationship Between Tribal Businesses And The Tribal Legislature

All business ventures of the Tribe shall be conducted by tribal businesses established by written charters issued by the Tribal Legislature by ordinance. Such tribal businesses shall be established for purposes of management only and no tribal assets shall be transferred to the ownership of such business; however, such business may be authorized to acquire property in its own name. Such tribal businesses shall not be authorized to pledge, mortgage, lease, or otherwise encumber tribal lands or interests therein subject to their management. However, such tribal business may, consistent with Federal law, be authorized to pledge, mortgage, lease, and otherwise encumber land or interest therein held in its own name as security for debts, and to acquire, sell, lease, exchange, transfer, or assign personal property or interests therein. Each tribal business shall be subject to the authority and control of a Board of Directors, or such other form of management as the Tribal Legislature designates in the charter. The Tribal Legislature shall not interfere with the business decisions of the management of the business; however, the Tribal Legislature shall retain all authority and power to exercise all proper governmental and sovereign functions over the tribal business and over property managed or owned by the tribal business. Profits of such tribal businesses shall be shared with the Tribe on an equitable basis. Regular reports on the financial status of such tribal businesses shall be made to the Tribal Legislature and to the tribal members.

Section 2. Duty To Enforce

The Tribal Legislature shall enforce this Article by a code of laws establishing, insofar as practicable, uniform rules governing the establishment and operation of tribal businesses.

Section 3. Forestry Business Exception

This Article shall not be applicable to the forestry business of the Tribe which is covered by Article XII of this Constitution.

ARTICLE XIV – TRUST AGREEMENT BETWEEN THE MENOMINEE INDIAN TRIBE AND THE UNITED STATES

Section 1. Trust Agreement

Upon taking office, the Tribal Legislature shall enter into negotiations with the United States for the purpose of executing the kind of trust agreement between the Tribe and United States as is contemplated in Section 4 of the "Trust and Management Agreement between the Menominee Indian Tribe of Wisconsin and the Secretary of the Interior of the United States of America" (hereinafter "Trust and Management Agreement"). Such agreement shall provide the Menominee Indian Tribe with maximum control over its own property and its own affairs and shall define accordingly the long-term, ongoing trust relationship between the Tribe and the United States.

The Tribal Legislature shall make every effort to execute such a long-term trust agreement prior to the expiration of the "Trust and Management Agreement", now in effect and scheduled to expire six (6) months after the date on which the Tribal Legislature takes office. If the long-term agreement cannot be executed prior to the expiration of the "Trust and Management Agreement", the Tribal Legislature shall reaffirm the "Trust and Management Agreement" pursuant to Section 3 of that Agreement until such date as a new long-term agreement is executed.

Section 2. Negotiating Principles

The Tribal Legislature in negotiating a long-term trust and management agreement with the United States shall be bound by the following principles which the Menominee Indian Tribe considers fundamentally important parts of such an agreement:

(a) The United States should expressly acknowledge that the Menominee Indian Tribe has the right to be self-determining to the maximum possible extent while still preserving the integrity of the trust responsibility of the United States to the Tribe. This includes the right to manage and control all tribal businesses, and the right to tax all assets within the Tribe's jurisdiction, including tribal assets held in trust.

(b) The powers and responsibilities of the United States as trustee should be expressly and specifically set forth in the agreement.

(c) The United States should expressly agree that the tribal forest land shall be managed on a sustained yield basis.

(d) The United States should expressly acknowledge that all tribal assets transferred to the United States in trust for the Tribe shall, as of the date of this transfer, be exempt from all local, state and federal taxation; and that the Tribe, the tribal assets, the tribal members, and the tribal businesses shall be entitled to all immunities from taxation to which American Indian Tribes, their members, and their businesses are entitled by the laws of the United States.

(e) The United States should expressly agree to provide business advice and other advice and assistance to the Tribe on request of the Tribe.

(f) The United States should expressly acknowledge the Tribe's right to exercise all sovereign and governmental powers within the boundaries of the Menominee Indian Reservation except those which the United States Congress has expressly and specifically denied the Tribe the right to exercise.

Section 3. Approval By Tribe Required

Any long-term agreement negotiated pursuant to Section 1 of this Article between the Menominee Indian Tribe and the United States shall be effective only if such agreement is approved by vote of a majority of tribal voters voting, so long as the total vote cast is at least fifteen percent (15%) of those entitled to vote. Amendments to such agreement shall be effective only if approved in the same manner as the agreement.

ARTICLE XV – TRIBAL GOVERNMENT CAREER AND MERIT SYSTEM OF EMPLOYMENT

Section 1. Merit Principle

All employment and promotions of employees of the tribal government shall be made solely on the basis of merit and fitness as demonstrated by examinations or other evidence relevant to show competence for the particular employment in question. All termination of employment with the tribal government shall be made solely on the basis of incompetence, or any other reason which results in failure to perform employment duties satisfactorily. Tribal employees shall adhere to the personnel policies and procedures. This section shall apply to appointed tribal officials, but not to elected tribal officials or tribal judges.

Section 2. Duty To Enforce

The Tribal Legislature shall enforce this Article by ordinance.

ARTICLE XVI – FINANCIAL CONTROL

Section 1. Budget and Appropriations

All appropriations by the Tribal Legislature of tribal funds shall be in accordance with an annual budget established by ordinance.

Section 2. Accounting System

The Tribal Legislature shall by ordinance establish an accounting system, approved by an independent certified public accounting firm, and shall cause an audit of the tribal accounts to be conducted annually.

Section 3. Fiscal Year

The Tribal Legislature shall by ordinance establish a fiscal year for the tribal government.

ARTICLE XVII – CONFLICT OF INTEREST

Section 1. Conflicting Personal Financial Interest Prohibited

In carrying out the duties of tribal office, no tribal official, elected or appointed, shall make or participate in making decisions which involve balancing a substantial personal financial interest, other than interests held in common by all tribal members, against the best interests of the Tribe.

Section 2. Other Conflicts of Interest

The Tribal Legislature may by ordinance prohibit other kinds of conflicts of interests.

ARTICLE XVIII – SOVEREIGN IMMUNITY

Section 1. General Prohibition

The Tribal Legislature shall not waive or limit the right of the Menominee Indian Tribe to be immune from suit, except as authorized by this Article and by Article XII of this Constitution.

Section 2. Suits Against The Tribe in Tribal Courts By Persons Subject To Tribal Jurisdiction

The Menominee Indian Tribe shall be subject to suit in Tribal Courts by persons subject to tribal jurisdiction for the purpose of enforcing rights and duties established by this Constitution and Bylaws, by the ordinances of the Tribe, and by the Indian Civil Rights

Act, (25 U.S.C. s1301 and 1302). The Tribe does not, however, waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any State.

Section 3. Suits Against The Tribe In The Courts Of The United States

In seeking redress of grievances against the Tribe, persons subject to tribal jurisdiction shall exhaust all remedies available to them under this Constitution and Bylaws and the ordinances of the Tribe before seeking redress of grievances against the Tribe in the courts of the United States under any law of the United States granting those persons such rights.

ARTICLE XIX – AMENDMENTS TO CONSTITUTION AND BYLAWS

This Constitution and Bylaws is adopted pursuant to Section 16 of the Indian Reorganization Act (25 U.S.C. s. 476, 48 Stat. 987) and may be amended in accordance with the rules and regulations adopted by the Secretary of the Interior pursuant to that section. The Secretary of the Interior shall hold an election on the adoption of an amendment or amendments to this Constitution and Bylaws when requested by a vote of two-thirds (2/3) of the entire Tribal Legislature or by a petition signed by at least three hundred (300) eligible tribal voters and validated in accordance with applicable rules of the Secretary, or if none, with applicable tribal ordinance. The Secretary of the Interior shall not propose amendments to this Constitution and Bylaws.

ARTICLE XX – ADOPTION OF CONSTITUTION AND BYLAWS

This Constitution and Bylaws, when adopted by a majority vote of the eligible voters of the Menominee Indian Tribe of Wisconsin, voting in an election called for that purpose by the Secretary of the Interior, in which at least thirty percent (30%) of those entitled to vote shall cast their ballots, and submitted to the Secretary of the Interior for his approval, shall be effective from the date of approval.

BYLAW I – OFFICERS AND COMMITTEES OF THE TRIBAL LEGISLATURE; DUTY TO VOTE STOCK OF MENOMINEE ENTERPRISES, INC.

Section 1. Officers of the Tribal Legislature

(a) Number. There shall be three officers of the Tribal Legislature. A Chairperson, a Vice-Chairperson, and a Secretary. No Legislator shall hold more than one (1) of these offices simultaneously.

(b) Election and Terms of Office. The Chairperson, the Vice-Chairperson and the Secretary shall be elected by the Tribal Legislature in accordance with rules and procedures established by the Legislature.

(c) Qualifications. The Chairperson shall be a resident on the Menominee Indian Reservation.

(d) Removal. A Legislator may be removed from the office of Chairperson, Vice-Chairperson or Secretary by the Tribal Legislature on grounds of failure to perform adequately the duties of the office in question, or nonparticipation in business of the Legislature.

(e) Vacancies. A vacancy in the office of Chairperson or Vice-Chairperson, or Secretary shall be filled by the Tribal Legislature for the unexpired portion of the term.

(f) Chairperson of the Tribal Legislature. The Chairperson shall receive a reasonable compensation for services. Such compensation shall not be increased or decreased during a Chairperson's term in office. The Tribal Legislature may authorize the Chairperson to serve full time in the office.

The duties and powers of the Chairperson shall include but not be limited to the following:

> (1) Preside at all meetings of the Tribal Legislature and at any other meeting called by the Tribal Legislature at which the Chairperson may be designated to preside.
>
> (2) Represent the Tribal Legislature in its relations with other governments, but only where the Tribal Legislature has specifically and expressly authorized the Chairperson to do so provided that the Tribal Legislature shall not authorize the Chairperson to take any action which under this Constitution and Bylaws must be taken by the Legislature.
>
> (3) Appoint members of all committees of the Tribal Legislature subject to the approval of the Legislature and in accordance with rules of procedure of the Legislature.
>
> (4) Serve as an ex officio member of all committees of the Tribal Legislature.
>
> (5) Call special meetings when appropriate of the Legislature and of any committee of the Legislature, in accordance with this Constitution and Bylaws, laws of the Tribe, and rules of procedure of the Legislature.
>
> (6) Receive reports of all committees of the Legislature and deliver such reports or cause such reports to be delivered to the Legislature.
>
> (7) Exercise supervision over all committees of the Legislature and recommend to the Legislature the establishment, consolidation, or abolition of Legislative committees.

(8) Be responsible for the administrative details of calling and holding meetings of the Legislature and of the tribal members.

(9) Perform such other duties as may be prescribed by this Constitution and Bylaws, by ordinance, or as required by the Tribal Legislature.

(g) Vice-Chairperson of the Tribal Legislature. The Vice-Chairperson of the Tribal Legislature shall perform the duties of the Chairperson when the Chairperson is absent or unable to perform his duties, or as long as the office is vacant. In addition, the Vice-Chairperson shall perform such other duties as may be prescribed by this Constitution, by ordinance, or as required by the Tribal Legislature.

(h) Secretary of the Tribal Legislature. The Secretary of the Tribal Legislature shall perform the duties of the Chairperson when the Chairperson and the Vice-Chairperson are absent or unable to perform such duties. The Secretary shall also perform such other duties as may be required by the Tribal Legislature.

Section 2. Committees of the Tribal Legislature

The Tribal Legislature shall establish such committees as it deems appropriate to provide research, investigating and advisory assistance to the Legislature in the exercise of its powers, provided that, each committee shall be headed by a Tribal Legislator.

Section 3. Duty To Vote Stock of Menominee Enterprises, Inc.

The stock of Menominee Enterprises, Inc., which was transferred to the Tribe by the document entitled, "Transfer, Assignment and Special Endorsement of Security" made pursuant to the Menominee Transfer Plan submitted and approved by the Congress of the United States pursuant to Section 6 of the Menominee Restoration Act (87 Stat. 772) shall be voted by the Tribal Legislature. The Tribal Legislature shall also exercise all other rights in regard to such stock.

BYLAW II – PROCEDURE OF THE TRIBAL LEGISLATURE

Section 1. Meetings of the Tribal Legislature

(a) Regular Meetings
The Tribal Legislature shall meet in official session at least four (4) times a year at such time and place as shall be established by ordinance. The order of business for any such meeting shall be posted in accordance with Section 4 of this Bylaw; however, other business may also be transacted at such meeting if the Tribal Legislature votes to consider such other business.

(b) Special Meetings

(1) Calling and Notice
Special meetings of' the Tribal Legislature shall be called by the Chairperson of the Legislature or upon the written request of any two (2) Legislators, provided that, at least seventy-two (72) hours written notice of such meeting shall be given to each Legislator, by personal service or by registered mail sent to the Legislator's usual place of residence, or left at the Legislator's usual place of residence with some person of suitable age and discretion residing there; however, notice may be waived by attendance at the meeting. Notice to tribal members shall be posted as provided in Section 4 of this Bylaw promptly after such meeting is called. Special meetings of the Tribal Legislature shall be called by the Chairperson upon the petition of three hundred (300) eligible tribal voters, provided that, not less than five (5) nor more than thirty (30) days notice of such meeting is given to tribal members.

(2) Business
No business shall be transacted at any special meeting of the Tribal Legislature unless such business has been stated in the notice of such meeting. However, any business which may lawfully come before a regular meeting may be transacted at a special meeting if all the members of the Legislature consent in writing.

(3) Emergencies
A special meeting of the Tribal legislature may be called upon less than seventy-two (72) hours written notice if such meeting is necessary for the preservation or protection of the health, welfare, peace, safety, or property of the Tribe. Efforts shall be made to give maximum practical notice to each Tribal Legislator. Maximum practical notice shall be given to such meeting, and such notice shall be posted as provided in Section 4 of this Bylaw, promptly after such meeting is called. No business other than that stated in the notice shall be transacted.

(c) Open Meetings And Executive Sessions
All meetings of the Tribal Legislature called pursuant to this Bylaw shall be open to tribal members; and tribal members shall have a reasonable opportunity to be heard under such rules and regulations as the Legislature may prescribe, provided, however, that the Legislature may meet in executive session
for the following purposes:

(1) Personnel matters.

(2) Claims against the Tribe or the Tribal Legislature, whether in Litigation or otherwise.

(3) Legal consultation and advice.

(4) Matters involved in litigation concerning the Tribe or the Tribal Legislature.

(5) Deliberation and/or review of any matter heard by the Legislature in a quasi-judicial capacity.

(6) Negotiations concerning the purchase, sale, lease or other acquisition of realor personal property, or interests therein, or concerning any contracts except those required to be the subject of competitive bidding.

The Tribal Legislature may determine not to keep a record of all or any part of the discussion in executive session; however, the general reason for such determination shall be recorded, and a record shall be kept of any action taken in executive session. Such record may be withheld from inspection by tribal members pending final disposition of the matter concerned.

(d) Organization and Rules of the Tribal Legislature.
The Tribal Legislature shall adopt by motion written rules governing its own organization and procedure. Such rules shall be open and available to review by tribal members in accordance with Section 3 of this Bylaw.

Section 2. Ordinances, Resolutions, and Motions

(a) Kinds of Action By Tribal Legislature
The Tribal Legislature shall act only by ordinance, resolution or motion. All acts of a general and permanent nature or those affecting compelling interests of the Tribe or tribal members shall be by ordinance. All other actions shall be in the form of resolutions or in the form of motions. Action by resolution shall be the form of action in which the purpose or policy underlying the action is expressly set forth. Action by motion shall be the form of action in which only the action taken is expressly set forth without an accompanying statement of purpose of policy. Ordinances making appropriations shall be confined to the subject of appropriations, but may include more than one appropriation.

(b) Action By Ordinance Required
In addition to such acts of the Legislature as are required by other provisions of this Constitution to be by ordinance, the following acts shall be by ordinance: an appropriation, creating an indebtedness, authorizing the borrowing of money, levying a tax, establishing criminal or civil penalties, and any act which places any burden upon or limits the use of private property without the consent of the owner, or which limits the freedom of tribal members to exercise rights to which they are entitled by virtue of their membership in the Tribe, or which-limits any right granted by this Constitution and Bylaws to any person.

(c) Form Of Ordinances
Every ordinance shall be introduced in written or printed form. The enacting clause of all ordinances shall be: BE IT ORDAINED BY THE LEGISLATURE OF THE MENOMINEE INDIAN TRIBE OF WISCONSIN

(d) Procedure For Passing Ordinances
Except for emergency ordinances and ordinances organizing into codes other related and existing ordinances, the following procedure for enactment of ordinances shall be followed:

(1) The ordinance shall be introduced at either a regular or special meeting of the Legislature by any Legislator or Legislators, and

(2) The ordinance shall be read in full, and copies of the ordinance shall be made available to the Tribal Legislature and to tribal members at or before the meeting at which the ordinance is introduced.

(3) After the first reading of the ordinance, in accordance with (2) above, it shall be approved with or without amendment, rejected, or tabled by vote of the Tribal Legislature.

(4) If the ordinance is approved on the first reading, it shall promptly be posted in full in accordance with Section 4 of this Bylaw, unless otherwise provided in this Constitution. The Legislature shall hold a tribal hearing on the ordinance not earlier than four (4) days nor later than fourteen (14) days after posting, and notice of the tribal hearing, specifying the day, hour, and place of the same, shall be included in the posting.

(5) If the ordinance is tabled, it shall be reconsidered at subsequent meetings until it is approved with or without amendment, or rejected by vote of the Legislature.

(6) The ordinance shall be read in full a second time at the tribal hearing for adoption, rejection, or other action as may be taken by vote of the Tribal Legislature.

(7) Except as otherwise provided in this Constitution and Bylaws after adoption, an ordinance shall be posted by title only, stating that complete copies of the ordinance are available at the offices of the Tribal Legislature, and if the ordinance was amended subsequent to its last previous posting, the posting shall state that it has been amended and shall contain a summary of the subject matter of all amendments.

(8) All ordinances shall take effect five (5) calendar days after posting following final passage, except as otherwise provided in this Constitution and Bylaws, or as specified in the ordinance itself.

(e) Voting By The Legislature

(1) Ordinances

Except as provided in subsection (g) of this section, and except as may otherwise be provided in this Constitution and Bylaws, every ordinance shall be adopted at a regular meeting of the Tribal Legislature by the affirmative vote of at least a majority of the entire Tribal Legislators, provided that, the quorum for such meetings shall be five (5) legislators.

(2) Resolutions and Motions
Every resolution and motion shall be adopted by the affirmative vote of at least a majority of the Tribal Legislators present at a regular or special meeting of the Tribal Legislature; provided that, the quorum for such meetings shall be five (5) Legislators.

(f) Review of Ordinances By Tribal Judiciary
If in reviewing an ordinance, a Tribal court finds a part or parts of the ordinance to be invalid, the Court shall determine whether the remaining parts of the ordinance are rendered inoperable as a result of the invalidity of the part or parts in question. If the Court determines that the ordinance is not rendered inoperable, such ordinance shall without the invalid part or parts, continue in effect.

(g) Emergency Ordinances
Emergency ordinances for the immediate preservation of public health, welfare, peace, safety, or property may be adopted by the Tribal Legislature at any meeting at which the emergency ordinance is introduced. The facts showing such urgency and need shall be specifically stated in the ordinance itself. No ordinance making a grant of any special privilege shall ever be passed as an emergency ordinance. No action required by this Constitution and Bylaws to be taken by ordinance shall be taken by emergency ordinance. An emergency ordinance shall take effect immediately upon passage and, for information purposes, shall be posted or published in full promptly after passage. An emergency ordinance shall not be in effect longer than sixty (60) days after passage, and shall not again be passed as an emergency ordinance.

(h) Codification
The Legislature shall, where appropriate, organize ordinances into codes and maintain such codes in current form. The Legislature shall periodically review the codes and ordinances and examine them for current need.

(i) Technical Codes
Standard technical codes, including amendments and revisions, promulgated by the Federal Government, or by any state, or by another Indian Tribe or by recognized trade or professional organizations may be adopted, whole or in part, by reference in an adopting ordinance without reading or posting such codes in full. Such adopting ordinance shall also be deemed to adopt by reference, in whole or in part, any other codes incorporated in the adopted code. The enactment of ordinances adopting any such code or codes shall be as provided in subsection (f) of this section, and the posting thereof shall state that copies of the code or codes proposed to be adopted are available for inspection at the office of

the Tribal Chairperson. Any penalty clause in said code or codes may be adopted only if set forth in full in the adopting ordinance.

(j) Amendment or Repeal
No ordinance or section or subsection of an ordinance shall be amended, superseded, or repealed except by an ordinance regularly adopted, provided that, repeal may be by reference to the title of the ordinance or any part thereof.

(k) Authentication of Ordinances
An ordinance as finally enacted shall be authenticated by the signature of the Chairperson of the Legislature or other person authorized by the Tribal Legislature. A true copy of every such authenticated ordinance shall be numbered and recorded in the official records of the Tribe. Attached to each ordinance and made a part thereof, shall be a certification by the Chairperson of the Tribe or other person authorized by the Legislature, that the same has been posted in accordance with this Constitution and Bylaws and any applicable tribal ordinance.

Section 3. Tribal Records

(a) Tribal records shall include documents of all kinds and any other form of record keeping which result from the operation of both branches of the tribal government. Except as otherwise specifically provided by tribal ordinance, tribal records shall include, but not necessarily be limited to the following: records of meetings of the Legislature or of the General Council and any action taken therein; records of court proceedings and any court decisions or orders; all correspondence, memoranda, and any other documents or other form of records produced by tribal officials or their agents while holding tribal office and during the performance of the duties of tribal office.

(b) The Tribal Legislature may designate the form in which tribal records shall be kept. The Tribal Legislature shall keep records of all actions taken by the Tribal Legislature and its departments and other agencies. The Tribal Legislature, shall, if feasible, keep records of all debate and discussion underlying such actions. It shall also, if feasible, keep records of all action, debate and discussion at General council meetings. The Tribal Legislature, in consultation with the Supreme Court of the Tribal Judiciary, shall provide for the keeping of all records of proceedings, decisions, and orders of the Tribal Judiciary. The Supreme Court of the Tribal Judiciary shall be responsible for implementing the record keeping system so established.

(c) All tribal records shall be the exclusive property of the Menominee Indian Tribe, and shall be transferred by tribal officials leaving office to the appropriate tribal officials in office.

(d) Tribal records shall be preserved in the files of the Tribal Legislature or, where appropriate, in the files of the Tribal Judiciary. Except as provided in subsection (a) of this Section, all tribal records shall be fully accessible for review by any tribal member or

his or her authorized representative, provided that, such review shall be conducted during normal office hours of the Legislature. The Tribal Legislature shall establish rules and procedures so that such review will be conducted in a reasonable manner so as to avoid undue disturbance of the daily operation of the tribal government.

Section 4. Posting Procedures

The following shall be the procedure of the Legislature in posting any notice, ordinance, or other document as required by this Constitution and Bylaws or by tribal ordinance.

> (1) The Legislature shall designate by ordinance no fewer than four (4) public places within the reservation and an appropriate number of places in appropriate urban areas where such posting shall be done. If any posting place is to be changed, the Legislature shall make such change by ordinance.
>
> (2) Posting shall take place as soon as practicable

BYLAW III – GENERAL COUNCIL

Section 1. Establishment of General Council; Response To Recommendations

(a) There is hereby established a General Council which shall be a meeting called at least once a year by the Tribal Legislature and open to all tribal members. The purpose of the General Council shall be to discuss problems and issues concerning tribal affairs; to review the policies, goals, and priorities of the Tribal Legislature; to review the functioning of tribal programs and to make recommendations for change.

(b) The Tribal Legislature shall respond to any recommendations of the General Council in writing and shall post such response in accordance with Bylaw II, Section 4 of the Bylaws of this Constitution.

Section 2. Annual General Council Meeting

The Tribal Legislature shall set the time, date, and place for the annual meeting of the General Council, and shall provide reasonable notice to tribal voters of such meeting by posting such notice in accordance with Bylaw 11, Section 4 of the Bylaws of this Constitution. The first item of business at the annual meeting of the General Council shall be an election to determine whether the Chairperson of the Legislature shall chair such meeting or whether a tribal voter in attendance shall be elected from the floor to chair such meeting, The last item of business shall be a vote as to whether the meeting shall be adjourned or recessed; provided that, at least fifty (50) voters shall be required to recess a meeting.

Section 3. Special General Council Meeting

(a) The Tribal Legislature may call special General Council meetings when it deems appropriate.

(b) Tribal members may require the Tribal Legislature to call a General Council meeting for a specified purpose or purposes by presenting to the Tribal Legislature a petition with two hundred (200) signatures of eligible tribal voters, which petition shall specify the purpose or purposes for calling the meeting. The General Council meeting called pursuant to a petition shall be convened no later than thirty (30) days following the presentation of a valid petition.

Section 4. Election of Enrollment Committee

The Enrollment Committee established by Article II, Section 3, of this Constitution may be elected at the annual General Council meeting; provided that, the quorum for the holding of such election shall be one hundred fifty (150) tribal voters. If a quorum is not present, the Tribal Legislature shall within two (2) months appoint the Enrollment Committee from applications submitted by tribal voters. The annual General Council meeting shall not be subject to recess insofar as the election of an Enrollment Committee is concerned. To be included on the ballot for election to the Enrollment Committee, a candidate must be named in a nominating petition which is signed by at least seventy-five (75) eligible tribal voters and filed with the Tribal Legislature at least thirty (30) days before the annual General Council meeting. Absentee voting shall be permitted at such election.

BYLAW IV – OATH OF OFFICE

Every tribal official shall, prior to assuming the duties of the office, take the following oath of office:
I, _____, do hereby solemnly swear that I will support and defend the Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin, that I will carry out faithfully and impartially the duties of my office to the best of my ability; and that I will promote and protect the best interests of the people of the Menominee Indian Tribe of Wisconsin.

BYLAW V – DEFINITIONS

As used in this Constitution and Bylaws, except as otherwise specifically provided or indicated by the context:

(a)"Major Crime" means any crime included in 18 U.S.C. s. 1153 and any equivalent crime defined under any state law.

(b)"Convicted of a major crime" means conviction of a crime, as defined in paragraph (a) of this Bylaw, where no further appeal is possible.

(c) "Tribal Official" means any person who is elected or appointed to office by the Tribal Legislature, including appointees to boards and commissions; however, this term shall not include members of the Board of Directors of Menominee Enterprises or any equivalent body of any successor business to Menominee Enterprises, or any person or persons appointed to manage a tribal business.

(d) "Tribal Funds" means all funds of the Menominee Indian Tribe, except funds derived from appropriations of the United States or the State of Wisconsin.

(e) "Tribal Law" means an ordinance or ordinances adopted by the Tribal Legislature.

(f) "Tribal Employees' means all persons regularly employed by the tribal government who receive monetary compensation for their services.

(g)" Resident on the Reservation", "residence on the Reservation", or "reside on the Reservation" means physically residing within the exterior boundaries of the Menominee Indian Reservation as established by the Treaty of the Wolf River of 1854 (10 Stat. 1064).

(h) "Shall" in the context of provisions establishing the duties of the tribal government, means that compliance with the provision in question is mandatory, and may be compelled by order of the tribal court, after all administrative remedies have been exhausted.

(i) "May", in the context of provisions establishing the duties of the tribal government, means that compliance with the provision in question is left to the discretion of the tribal government or its agents and may not be compelled by order of the tribal court, unless there is an abuse of discretion.

BYLAW VI – AMENDMENTS TO BYLAWS

These Bylaws are an integral part of this Constitution; therefore, these Bylaws shall be subject to amendment in the same manner as the Constitution, in accordance with Article XIX of the Constitution.

NOTES:

1) Pursuant to s. 5(b) of the Menominee Restoration Act (P.L. 93-197; 87 Stat. 770), the Menominee Constitution and Bylaws was developed by the Menominee Restoration Committee and ratified on November 12, 1977.

2) Amendments to the Menominee Constitution and Bylaws (of 1977), were introduced and approved by a vote of the Menominee people May 21, 1990 through May 24, 1990. (The four amendments are on record in the Office of the Menominee Tribal Chairperson)

3) A revision of the Menominee Constitution and Bylaws (of 1977), was approved by a vote of the Menominee people January 29, 1991 through January 30, 1991. (The sixteen amendments are on record in the Office of the Menominee Tribal Chairperson).

Appendix F:

Essentials of the Quebec Act

The Quebec Act of 1774 was an Act of the Parliament of Great Britain (citation 14 Geo. III c. 83) setting procedures of governance in the area of Quebec.

From <http://www.ushistory.org/declaration/related/intolerable.htm>, accessed 14 Sep 2007.

June 22, 1774

AN ACT for making effectual Provision for the Government of the Province of Quebec, in North America.

MAY it therefore please Your most Excellent Majesty

That it may be enacted: [Boundaries defined, Boundaries of Proclamation of 1763 extended to include territory west to the Mississippi, north to the frontiers of the Hudson's Bay territory, and the islands in the mouth of the St. Lawrence.]

... And whereas the Provisions made by the said Proclamation, in respect to the Civil Government of the said Province of Quebec, and the Powers and Authorities given to the Governor and other Civil Officers of the said Province, by the Grants and Commissions issued in consequence thereof, have been found, upon Experience, to be inapplicable to the State and Circumstances of the said Province, the Inhabitants whereof amounted at the Conquest, to above Sixty five thousand Persons, professing the Religion of the Church of Rome....

It is hereby declared, That His Majesty's Subjects professing the Religion of the Church of Rome, of, and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy, declared and established by an Act made in the First Year of the Reign of Queen Elizabeth, over all the Dominions and Countries which then did, or thereafter should, belong to the Imperial Crown of this Realm;and that the Clergy of the said Church may hold, receive, and enjoy their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion.

Provided nevertheless, That it shall be lawful for His Majesty, His Heirs or Successors, to make such Provisions out of the rest of the said accustomed Dues and Rights, for the Encouragement of the Protestant Religion, and for the Maintenance and Support of a Protestant Clergy within the said Province, as he or they shall, from Time to Time, think necessary or expedient... .

And be it further enacted by the Authority aforesaid, That all His Majesty's Canadian Subjects within the Province of Quebec, the Religious Orders and Communities only excepted, may also hold and enjoy their Property and Possessions, together with all Customs and Usages, relative thereto, and all other their Civil Rights, in as large, ample and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments, had not been made, and as may consist with their Allegiance to His Majesty, and Subjection to the Crown and Parliament of Great Britain; and that in all Matters of Controversy relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same; and all Causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province by His Majesty, His Heirs and Successors, shall, with respect to such Property and Rights, be determined agreeably to the said Laws and Customs of Canada, ...

And whereas the Certainty and Lenity of the Criminal Law of England, and the Benefits and Advantages resulting from the Use of it, have been sensibly felt by the Inhabitants from an Experience of more than Nine Years, during which it has been uniformly administered; be it therefore further enacted by the Authority aforesaid, That the same shall continue to be administered, and shall be observed as Law, in the Province of Quebec, as well in the Description and Quality of the Offense, as in the Method of Prosecution and Trial, and the Punishment and Forfeitures thereby inflicted, to the Exclusion of every other Rule of Criminal Law, or Mode of Proceeding thereon, which did or might prevail in the said Province before the Year of our Lord One thousand seven hundred and sixtyfour; any Thing in this Act to the Contrary thereof in any Respect notwithstanding;

And whereas it may be necessary to ordain many Regulations, for the future Welfare and good Government of the Province of Quebec, the Occasions of which cannot now be foreseen, nor without much Delay and Inconvenience be provided for, without entrusting that Authority for a certain Time, and upon proper Restrictions to Persons resident there:

And whereas it is at present inexpedient to call an Assembly; be it therefore enacted by the Authority aforesaid, That it shall and may be lawful for His Majesty, ... and with the Advice of the Privy Council, to constitute and appoint a Council for the Affairs of the Province of Quebec, to consist of such Persons resident there, not exceeding Twenty three, nor less than Seventeen, as His Majesty, ... shall be pleased to appoint; ... which Council, so appointed and nominated, or the major Part thereof, shall have Power and Authority to make Ordinances for the Peace, Welfare, and good Government of the said Province
with the Consent of His Majesty's Governor, or, in his Absence, of the Lieutenant Governor, or Commander in Chief for the Time being ...
Sources:
Quartering Act of 1774

Quebec Act

The Declaration and Resolves of the First Continental Congress

Content for these pages provided by
Thomas Kindig.

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• John C. Miller; Origins of the American Revolution 1943.
online version
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Appendix G:

Statute of Westminster, 1931

CHAPTER 4.

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930. [11th December 1931.]

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for malting such provision with regard to the matters aforesaid as is hereafter in this Act contained

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6. Without prejudice to the generality of the foregoing provisions of this Act; section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to

matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9.(1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10.(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in sub-section (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute of Westminster, 1931.

Appendix H:

CHARTER TO SIR WALTER RALEIGH - 1584

NORTH CAROLINA
[Footnote 1]

ELIZABETH by the Grace of God of England, Fraunce and Ireland Queene, defender of the faith, &c. To all people to whome these presents shall come, greeting. Knowe yee that of our especial grace, certaine science, and meere motion, we haue given and graunted, and by these presents for us, our heires and successors, we giue and graunt to our trustie and welbeloued seruant Walter Ralegh, Esquire, and to his heires and assignes for euer, free libertie and licence from time to time, and at all times for euer hereafter, to discouer, search, finde out, and view such remote, heathen and barbarous lands, countreis, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People, as to him, his heires and assignes, and to euery or any of them shall seeme good, and the same to haue, holde, occupie and enjoy to him, his heires and assignes for euer, with all prerogatiues, commodities, jurisdictions, royalties, priuileges, franchises, and preheminences, thereto or thereabouts both by sea and land, whatsoeuer we by our letters patents may graunt, and as we or any of our noble progenitors haue heretofore graunted to any person or persons, bodies politique or corporate: and the said Walter Ralegh, his heires and assignes, and all such as from time to time, by licence of us, our heires and successors, shall goe or trauaile thither to inhabite or remaine, there to build and fortifie, at the discretion of the said Walter Ralegh, his heires and assignes, the statutes or acte of Parliament made against fugitiues, or against such as shall depart, remaine or continue out of our Realme of England without licence, or any other statute, acte, lawe, or any ordinance whatsoeuer to the contrary in anywise notwithstanding.

And we do likewise by these presents, of our especial grace, meere motion, and certain knowledge, for us, our heires and successors, giue and graunt full authoritie, libertie and power to the said Walter Ralegh, his heires and assignes, and euery of them, that he and they, and euery or any of them, shall and may at all and euery time, and times hereafter, haue, take, and leade in the saide voyage, and trauaile thitherward, or to inhabit there with him, or them, and euery or any of them, such and so many of our subjects as shall willingly accompanie him or them, and euery or any of them to whom also we doe by these presents, giue full libertie and authority in that behalfe, and also to haue, take, and employ, and vse sufficient shipping and furniture for the Transportations and Nrauigations in that behalfe, so that. none of the same persons or any of them, be such as hereafter shall be restrained by us, our heires, or successors.

And further that the said Walter Ralegh, his heires and assignes, and euery of them, shall haue, holde, occupie, and enioye to him, his heires and assignes, and euery of them for euer, all the soile of all such landes, territories, and Countreis, so to bee discouered and possessed as aforesaide, and of all such Cities, castles, townes, villages, and places in the

same, with the right, royalties, franchises, and iurisdictions, as well marine as other within the saide landes, or Countreis, or the seas thereunto adioyning, to be had, or used, with full power to dispose thereof, and of euery part in fee

* * *

FOOTNOTE:

1. This charter constitutes the first step in the work of English.colonization in America. Five voyages were made under it, but without success in establishing a permanent settlement.

* * *

simple or otherwise, according to the order of the laves of England, as neere as the same conveniently may bee, at his, and their will and pleasure, to any persons then being, or that shall remaine within the allegiance of us, our heires, and successors: reseruing always to us our heires, and successors, for all services, duties, and demaundes, the fift part of all the oare of golde and siluer, that from time to time, and at all times after such discouerie, subduing and possessing, shal be there gotten and obtained: All which landes, Countreis, and territories, shall for euer beholden of the said Walter Ralegh, his heires and assignes, of us, our heirs and successors, by homage, and by the said paiment of the said fift part, reserued onely for all services.

And moreouer, we doe by these presents, for us, our heires and successors, giue and graunt licence to the said Walter -Ralegh, his heirs, and assignes, and euery of them, that he, and they, and euery or any of them, shall and may from time to time, and at all times for euer hereafter, for his and their defence, encounter and expulse, repell and resist as well by sea as by lande, and by all other, wayes whatsoever, all, and every such person and persons whatsoever, as without the especiall liking and licence of the saide Walter Ralegh, and of his heires and assignes, shall attempt to inhabite within the said Countreis, or any of them, or within the space of two hundreth leagues neere to the place or places within such Countreis as aforesaide (if they shall not bee before planted or inhabited within the limits as aforesaide with the subjects of any Christian Prince being in amitie with us) where the saide Walter Ralegh, his heires, or assignes, or any of them, or his, or their or any of their associates or company, shall within sixe yeeres (next ensuing) make their dwellings or abidings, or that shall enterprise or attempt at any time hereafter unlawfully to annoy, either by Sea or lande, the saide Walter Ralegh, his heirs or assignes, or any of them, or his or their, or any of his or their companies: giuing, and graunting by these presents further power and authoritie, to the said Walter Ralegh, his heirs and assignes, and euery of them from time to time, and at all times for euer hereafter, to take and surprise by all maner of meanes whatsoever, all and euery those person or persons, with their shippes, vessels, and other goods and furniture, which without the licence of the saide Walter Ralegh, or his heires, or assignes, as aforesaide, shalbe founde trafiquing into any harbour, or harbors, creeke, or creekes, within the limits aforesaide, (the subjects of our Realms and Dominions, and all other persons in amitie with us, trading to the Newfound lands for fishing as heretofore they haue commonly

used, or being driuen by force of a tempest, or shipwracke onely excepted:) and those persons, and euery of them, with their shippes, vessels, goods and furniture to deteine and possesse as of good and lawfull prize, according to the discretion of him the saide [Lader Ralegh, his heires, and assignes, and euery, or any of them. And for vniting in more perfect league and amitie, of such Countreis, landes, and territories so to bee possessed and inhabited as aforesaide with our Realmes of Englande, and Ireland, and the better incouragement of men to these enterprises: we do by these presents, graunt and declare that all such Countreis, so hereafter to be possessed and inhabited as is aforesaide, from thencefoorth shall bee of the allegiance of vs, our heires and successours. And wee doe graunt to the saide Walter Ralegh, his heires, and assignes, and to all, and euery of them, and to all and euery other person, and persons being of our allegiance, whose names shall be noted or entred in some of our Courtes of recorde within our Realme of Englande, that with the assent of the saidc Walter Ralegh, his heires or assignes, shall in his iourneis for discouerie, or in the iourneis for conquest, hereafter traueile to such lands, countreis and territories, as aforesaide, and to their, and to euery of their heires, that they, and every or any of them, being either borne within our saide Realmes of Englande, or Irelande, or in any other place within our allegiance, and which hereafter shall be inhabiting within any the lands, Countreis, and territories, with such licence (as aforesaide) shall and may haue all the priuiledges of free Denizens, and persons natiue of England, and within our allegiance in such like ample maner and fourme, as if they were borne and personally resident within our saide Realme of England, any lave, custome, or vsage to the contrary notwithstanding.

And for asmuch as upon the finding out, discovering, or inhabiting of such remote lands, countreis, and territories as aforesaid, it steal be necessary for the safetie of al rnen, that steal aduenture them selues in those iournies or voyages, to determine to liue together in Christian peace, and ciuil quietnes ech with other, whereby euery one may with more pleasure and profit enioy that whereunto they shall attaine with great paine and perill, we for vs, our heires and successors, are likewise pleased and contented, and by these presents do giue and graunt to the said Walter Ralegh, his heires and assignes for ever, that hec and they, and euery or any of them, shall and may from time to time for euer hereafter, within the said mentioned remote landes and Countreis in the way by the seas thither, and from thence, haue full and meere power and authoritie to correct, punish, pardon, gouerne, and rule by their and euery or any of their good discretions and pollicies, as well in causes capital, or criminal], as ciuil, both marine and other, all such our subiects as shall from time to time aduenture themselves in the said iournies or voyages, or that shall at any time hereafter inhabite any such landes, countreis, or territories as aforesaide, or that shall abide within zoo. leagues of any of the saide place or places, where the saide Walter Ralegh, his heires or assignes, or any of them, or any of his or their associats or companies, shall inhabite within 6 yeeres next ensuing the date hereof, according to such statutes,]awes and ordinances, as shall bee by him the saide Walter Ralegh his heires and assignes, and euery or any of them deuised, or established, for the better governement of the said people as aforesaid. So always as the said statutes,]awes, and ordinances may be as neere as conueniently may be, agreeable to the forme of the]awes, statutes, governement, or pollicie of England, and also so as they be not

against the true Christian faith, nowe professed in the Church of England, nor in any wise to withdrawe any of the subiects or people of those landes or places from the allegiance of vs, our heires and successours, as their immediate Soueraigne vnder God.

And further, wee doe by these presents for vs, our heires and successors, giue and graunt full power and authoritie to our trustie and welbeloued counsailer sir William Cieill knight, Lorde Burghley, our high Treasourer of. England, and to the Lorde Treasourer of England, for vs, our heires and successors for the time being, and to the priuie Counsell, of vs, our heirs and successours, or any foure or more of them for the time being, that hee, they, or any foure or more of them, shall and may from time to time, and at all times hereafter, vnder his or their handes or seales by vertue of these presents, authorise and licence the saide Walter Ralegh, his heires and assignes, and euery or any of them by him, and by themselues, or by their, or any of their sufficient Atturnies, deputies, officers, ministers, factors, and seruants, to imbarke and transport out of our Realme of England and Ireland, and the Dominions thereof all, or any of his, or their goods, and all or any the goods of his and their associats and companies, and euery or any of them, with such other necessaries and commodities of any our Realmes, as to the saide Lorde Treasourer, or foure or more of the priuie Counsaile, of vs, our heires and successors for the time being (as aforesaide) shalbe from time to time by his or their wisdomes, or discretions thought meete and conuenient, for the better reliefe and supportation of him the saide Walter Ralegh, his heires, and assignes, and euery or any of them, and of his or their or any of their associats and companies, any acte, statute, lawe, or other thing to the contrary in any wise notwithstanding.

Provided alwayes, and our will and pleasure is, and wee do hereby declare to all Christian kings, princes and states, that if the saide Walter Ralegh, his heires or assignes, or any of them, or any other by their licence or appointment, shall at any time or times hereafter, robbe or spoile by sea or by lande, or do any acte of unjust or unlawful hostilitie, to any of the subjects of vs, our heires or successors, or to any of the subjects of any the kings, princes, rulers, governors, or estates, being then in perfect league and amitie with us, our heires and successors, and that upon such injury, or upon iust complaint of any such prince, ruler, governour, or estate, or their subiects, wee, our heires and successours, shall make open proclamation within any the portes of our Realme of England, that the saide Walter Ralegh, his heires and assignes, and adherents, or any to whome these our letters patents may extende,, shall within the termes to be limitted, by such proclamation, make full restitution, and satisfaction of all such injuries done, so as both we and the said princes, or other so complayning, may holde vs and themselues fully-contented. And that if the saide Walter Ralegh, his heires and assignes, shall not make or cause to be made satisfaction accordingly, within such time so to bee limitted, that then it shall be lawfull to us our heires and successors, to put the saide Walter Ralegh, his heires and assignes and adherents, and all the inhabitants of the said places to be discouered (as is aforesaide) or any of them out of our allegiance and protection, and that from and after such time of putting out of protection the said Walter Ralegh, his heires, assignes and adherents, and others so to be put out, and the said places within their habitation, possession and rule, shal be out -of our allegiance and protection, and free for all princes and others, to pursue

with hostilitie, as being not our subjects, nor by vs any way to be auouched, maintained or defended, nor to be holden as any of ours, nor to our protection or dominion, or allegiance any way belonging, for that expresse mention of the cleer yeerely value of the certaintie of the premisses, or any part thereof, or of any other gift, or grant by vs, or any our progenitors, or predecessors to the said Walter Ralegh, before this time made in these presents be not expressed, or any other grant, ordinance, prouision, proclamation, or restraint to the contrarye thereof, before this time giuen, ordained, or prouided, or any other thing, cause, or matter whatsoever, in any wise notwithstanding. In witness whereof, we haue caused these our letters to be made patents. Witnesse our selues, at Westminster, the 25 day of March, in the sixe and twentieth yeere of our Raigne.

GRANT TO SIR ROBERT HEATH - 1630. [Footnote 2]
[See records in the office of the general court at Richmond, labelled No. i, 1639-1642, p. 70.1]

CHARTER OF CAROLINA - 1663

CHARLES the Second, by the grace of God, king of England, Scotland, France, and Ireland, Defender of the Faith, &c., To all to whom these present shall come: Greeting

1st. Whereas our right trusty, and right well beloved cousins and counsellors, Edward Earl of Clarendon, our high chancellor of England, and George Duke of Albemarle, master of our horse and captain general of all our forces, our right trusty and well beloved William Lord Craven, John Lord Berkley, our right trusty and well beloved counsellor, Anthony Lord Ashley, chancellor of our exchequer, Sir George Carteret, knight and baronet, vice chamberlain of our household, and our trusty and well beloved Sir William Berkley, knight, and Sir John Colleton, knight and baronet, being excited with a laudable and pious zeal for the propagation of the Christian faith, and the enlargement of our empire and dominions, have humbly besought leave of us, by their industry and charge, to transport and make an ample colony of our subjects, natives of our kingdom of England, and elsewhere within our dominions, unto a certain country hereafter described, in the parts of America not yet cultivated or planted, and only inhabited by some barbarous people, who have no knowledge of Almighty God.

2d. And whereas the said Edward Earl of Clarendon, George Duke of Albemarle, William Lord Craven, John Lord Berkley, Anthony Lord Ashley, Sir George Carteret,, Sir William Berkley, and Sir John Colleton, have humbly besought us to give, grant and confirm unto them and their heirs, the said country, with priviledges and

FOOTNOTE:

2. Sir Robert Heath was attorney-general to Charles I, and Bancroft says; "There is room to believe that, in 1639, permanent plantations were planned and perhaps attempted by

his assign," but the patent was declared void in 1663, because the purposes for which it had been granted had never been fulfilled.

Appendix I:

The First Charter of Virginia – 1606

[Footnote 1]

JAMES, by the Grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, &c. WHEREAS our loving and well-disposed Subjects, Sir Thomas Gates, and Sir George Somer, Knights, Richard Hackluit, Clerk, Prebendary of Westminster, and Edward-Maria Wingfield, Thomas Hanham, and Ralegh Gilbert, Esqrs William Parker, and George Popham, Gentlemen, and divers others of our loving Subjects, have been humble Suitors unto us, that we would vouchsafe unto them our Licence, to make Habitation, Plantation, and to deduce a colony of sundry of our People into that part of America commonly called VIRGINIA, and other parts and Territories in America, either appertaining unto us, or which are not now actually possessed by any Christian Prince or People, situate, living, and being all along the Sea Coasts, between four and thirty Degrees of Northerly Latitude from the Equinoctial Line, and five and forty Degrees ' of the same Latitude, and in the main Land between the same four and thirty and five and forty Degrees, and the Islands there unto adjacent, or within one hundred miles of the Coast thereof;

And to that End, and for the more speedy Accomplishment of their said intended Plantation and Habitation there, are desirous to divide themselves into two several Colonies and Companies; the one consisting of certain Knights, Gentlemen, Merchants, and-other Adventurers, of our City of London and elsewhere, which are, and from time to time shall be, joined unto them, which do desire to begin their Plantation and Habitation in some fit and convenient Place, between four and thirty and ore and forty Degrees of the said Latitude, alongst the Coasts of Virginia, and the Coasts of America aforesaid: And the other consisting of sundry Knights, Gentlemen, Merchants, and other Adventurers, of our Cities of Bristol and Exeter, and of our Town of Plimouth, and of other Places, which do join themselves unto that Colony, which do desire to begin their Plantation and Habitation in some fit and convenient Place, between eight and thirty Degrees and five and forty Degrees of the said

* * *

FOOTNOTE:

1. Hening's Statutes of Virginia, I, 57-66

* * *

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Latitude, all alongst the said Coasts of Virginia and America, as that Coast Lyeth:

We greatly commending, and graciously accepting of, their Desires for the furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the

Glory of his Divine Majesty, in propagating; of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those arts, to human Civility, and to a settled and quiet Government: DO, by these our Letters Patents, graciously accept of, and agree to, their humble and well-intended Desires;

And do therefore, for us, our Heirs, and Successors, GRANT and agree, that the said Sir Thomas Gates, Sir George Somers, Richard Hachluit, and Edward-Maria Wingfield, Adventurers of and for our City of London, and all such others, as are, or shall be, joined unto them of that Colony, shall be called the first Colony; And they shall and may begin their said first Plantation and habitation, at any Place upon the said Coast of Virginia or America, where they shall think fit and convenient, between the said four and thirty and one and forty Degrees of the said Latitude; And that they shall have all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said first Seat of their Plantation and Habitation by the Space of fifty Miles of English Statute Measure, all along the said Coast of Virginia and America, towards the Vest and South-west, as the Coast lyeth, with all the Islands within one hundred Miles directly over against the same Sea Coast; And also all the Lands, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woody, Waters, Marshes, Fishings, Commoditites, and Hereditaments, whatsoever, from the said Place of their first Plantation and Habitation for the space of fifty like English Miles, all alongst the said Coasts of Virginia and America, towards the East and Northeast, or towards the North, as the Coast lyeth, together with all the Islands within one hundred Miles, directly over against the said Sea Coast; And also all the Lands, Woods, Soil, brounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the same fifty Miles every way on the Sea Coast, directly into the main Land by the Space of one hundred like English, Miles; And shall and may inhabit and remain, there; and shall and may also build and fortify within any the same, for their better Safeguard and Defence, according to their best Discretion, and the Discretion of the Council of that Colony; And that no other of our Subjects shall be permitted, or suffered, to plant or inhabit behind, or on the Backside of thetas, towards the main Land, without the Express License or Consent of the Council of that Colony, there unto in writing first had and obtained.

And we do likewise, for Us, our Heirs, and Successors, by these Presents, GRANT and agree, that the said Thomas Hanham, and Ralegh Gilbert, William Parker, and George Popham, and all others of the Town of Plimouth, in the County of Devon, or elsewhere, which are, or shall be, joined unto them of that; Colony, shall be called the second Colony; And that they shall and may begin their said Plantation and Seat of their first Abode and Habitation at any place upon the said Coast of Virginia and America, where they shall

think fit and convenient, between eight and thirty Degrees of the said Latitude, and five and forty Degrees of the same Latitude; And that they shall have all the Lands, Soils, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the first Seat of their Plantation and Habitation, by the Space of fifty like English Miles, as is aforesaid, all alongst the said Coasts of Virginia and America, towards the West and Southwest, or towards the South, as the Coast lyeth, and all the' Islands within one hundred Miles, directly over against the said Sea Coast; And also all the Lands, Soils, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said Place of their first Plantation and Habitation for the Space of fifty like Miles, all alongst the said Coast of Virginia and America; towards the East and Northeast, or towards the North, as the Coast lyeth, and all the Islands also within one hundred Miles directly over against the same Sea Coast; And also all the Lands, Soils, Grounds, Havens, Ports, Rivers, Woods, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the same fifty Miles every way on the Sea Coast, directly into the main Land, by the Space of one hundred like English Miles; And shall and may inhabit and remain there; and shall and may also build and fortify within any the same for their better Safeguard, according to their best Discretion, and the Discretion of the Council of that Colony; And that none of our Subjects shall be permitted, or suffered, to plant or inhabit behind, or on the back of them, towards the main Land, without express Licence of the Council of that Colony, in Writing thereunto first had and obtained.

Provided always, and our Will and Pleasure herein is, that the Plantation and habitation of such of the said Colonies, as shall last let themselves, as aforesaid, shall not be made within one hundred e English Miles of the other of them, that first began to make their Plantation, as aforesaid.

And we do also ordain, establish, and agree, for Us, our Heirs, and Successors, that each of the said Colonies shall have a Council, which shall govern and order all Matters and Causes, which shall arise, grow, or happen, to or within the same several Colonies, according to such Laws, Ordinances, and Instructions, as shall be, in that behalf, given and signed with Our Hand or Sign Manual, and pass under the Privy Seal of our Realm of England, Each of which Councils shall consist of thirteen Persons, to be ordained, made, and removed, from time to time, according as shall be directed and comprised in the same instructions; And shall have a several Seal, for all Matters that shall pass or concern the same several Councils; Each of which Seals, shall have the King's Arms engraven on the one Side thereof, and his Portraiture on the other; And that the Seal for the Council of the said first Colony shall have engraver round about, on the one Side, these Words; Sigilhim Regis Magnte Britannice, Francice, & Hibernies; on the other Side this Inscription round about; Pro Cojoncilio printed Colony Virginia And the Seal for the Council of the said second Colony shall also have engraven, round about the one Side thereof, the aforesaid Words; Sigillum Regis Magna; Britannice, France, & Hibernice; and on the other Side; Pro Concilio secundes Colonies Virginicet:

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And that also there shall be a Council, established here in England, which shall, in like manner, consist of thirteen Persons, to be, for that Purpose, appointed by us, our Heir; and Successors, which shall be called our Council o f Virginia; And shall, from time to time, have, the superior Managing and Direction, only of and for all Matters that shall or may concern the Government, as well of the said several. Colonies, as of and for any other Part or Place, within the aforesaid: Precincts of four and thirty and five and forty Degrees above mentioned; Which Council shall, in like manner, have it Seal, for Matters concerning the Council or Colonies, with the like Arms and Portraiturc, as aforesaid, with this inscription, engraven round about on the one Side; Sigillum Regis Magnce Britannice, Francia, cC Ilibernice; and round about on the other Side, Pro Coneilio for Virginice.

And moreover, we do GRANT and agree, for Us, our Heirs and Successors; that that the said several Councils of and for the said several Colonies, shall and lawfully may, by Virtue hereof, from time to time, without any Interruption of Us, our Heirs or Successors, give and take Order, to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, as well within any Part of their said several Colonies, as of the said main Lands on the Backside of the same Colonies; And to lie, and enjoy the Gold, Silver, and Copper, to be gotten there of, to the Use and Behoof of the same Colonies, and the Plantations thereof; YIELDING therefore to TTs, our Heirs' and Successors, the fifth Part only of all the same Gold and Silver, and the fifteenth Part of all the same Copper; so to be gotten or had, as is aforesaid, without any other Manner of Profit or Account, to be given or yielded to us, our Heirs, or Successors, for or in Respect of the same

And that they shall, or lawfully may, establish and cause to be made a Coin, to pass current there between the people of those several Colonies, for the more Ease of Traffick and Bargaining between and amongst them and the Natives there, of such Metal, and in such Manner and Form, as the said several Councils there shall limit and appoint.

And we do likewise, for Us, our Heirs, and Successors, by these Presents, give full Power and Authority to the said Sir Thomas Gates, Sir George Somers, Richard Hackluit, Edward-Maria Wingfield, Thomas Ianham, Halegh Gilbert, William Parker, and George. Popham, and to every of them, and to the said several Companies, Plantations, and Colonies, that they, and every of them, shall and may, at all and every time and times hereafter, have, take, and lead in the said Voyage, and for and towards the said several Plantations, and Colonies, and to travel through ward, and to abide and inhabit there, in every the said Colonies and Plantations, such and so many of our Subjects, as shall willingly accompany them or tiny of them, in the said Voyages and Plantations; With sufficient Shipping, and Furniture of Armour, Weapons, Ordinance, Powder, Victual and all other things, necessary for the said Plantations, and for their Use and Defence there: Provided always, that none of the said Persons be such, as shall hereafter be specially restrained by Us, our Heirs, or Successors.

Moreover, we do, by these Presents, for Us, our Heirs, and Successors, GIVE AND GRANT Licence unto the said Sir Thomas Gates, Sir

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George Somers, Richard Hacklutit, Edward-Maria Wingfield, Thomas Hanham, Ralegh Gilbert, William Parker, and George Pophamm, and to every of the said Colonies, that, they, and every of them, shall and may, from time to time, and at all times forever hereafter, for their several Defences, encounter, expulse, repel, and resist, as well by Sea as by: Land, by all Ways and Means whatsoever, all and every such Person or Persons, as without the especial Licence of the said several Colonies and Plantations, shall attempt to inhabit within the said several Precincts and Limits of the said several Colonies and Plantations, or any of there, or that shall enterprise or attempt, at any time hereafter, the Hurt, Detriment, or Annoyance, of the said several Colonies or Plantations

Giving and granting, by these Presents, unto the said Sir Thomas Gates, Sir George Somers, Richard Hackluit, Edward-Maria Wingfield, Thomas Hanham, Raleyh Gilbert, William Parker, and George Thomas Haha7n, Ralegh Gilbert, William Parker, and George Popham, and their Associates of the said second Colony, and to every of them, from time to time, and at all times for ever hereafter, Power and Authority to take and surprise, by all Ways and Means whatsoever, all and every Person and Persons, with their Ships, Vessels, Goods, and other furniture, which shall be found trafficking, into any Harbour or Harbours; Creek or Creeks, or Place, within the Limits or Precincts of the said several Colonies and Plantations, not being of the same Colony, until such time, as they, being of any Realms, or Dominions under our Obedience, shall pay, or agree to pay, to the Hands of the Treasurer of that Colony, within whose Limits and Precincts they shall so traffick, two and a half upon every Hundred, of any thing so by them trafficked, bought, or sold; And being Strangers, and not Subjects under our Obeysance, until they shall pay five upon every Hundred, of such Wares and Merchandises, as they shall traffick, buy, or sell, within the Precincts of the said several Colonies, wherein they shall so traffick, buy, or sell, as -aforesaid; WI3ICII Sums of Money, or Benefit, as aforesaid, for I and during tire Space of one and twenty Years, next ensuing the Date hereof, shall be wholly employed to tire Use, Benefit, and Behoof of the said several Plantations, where such Traffick shall be made; And after the said one and twenty Years ended, the same shall be taken to the Use of Us, our Heires, and Successors, by such Officers and Ministers as by Us, our Heirs, and Successors, shall be thereunto assigned or appointed.

And we do further, by these Presents, for Us, our Heirs and Successors, GIVE AND GRANT unto the said Sir Thomas Gates, Sir George Somers, Richard Hackluit, and Edward-Maria Wingfield, and to their Associates of the said first Colony and Plantation, and to the said Thomas Hanham, Ralegh Gilbert, William Parker, and George Popham, and their Associates of the said second Colony and Plantation, that they, and every of them, by their Deputies; Ministers, and Factors, may transport the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel,

Food, Defence, or otherwise in Respect of tire said Plantations, out of our Realms of England and Ireland, and all other our Dominions, from time to time, for and during tire Time of seven Years, nest ensuing tire Date hereof, for the better Relief of the said several Colonies and

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Plantations, without any Customs, Subsidy, or other Duty, unto us, our Heirs, or Successors, to be yielded or payed for the same.

Also we do, for Us, our Heirs, and Successors, DECLARE, by these Presents, that all and every the Persons being our Subjects, which Shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.

Moreover, our gracious Will and Pleasure, is, and we do, by these Presents, for Us, our Heirs, and Successors, declare and set forth, that if any Person or Persons, which shall be of any of the said Colonies and Plantations, or any other, which shall traffick to the said Colonies and Plantations, or any of them, shall, at any time or times hereafter, transport any Wares, Merchandises, or Commodities, out of any of our Dominions, with a Pretence to land, sell, or otherwise dispose of the same, within any the Limits and Precincts of any of the said Colonies and Plantations, and yet nevertheless, being at Sea, or after lie hath landed the same within any of the said Colonies and Plantations, shall carry the same into any other Foreign Country, with a Purpose there to sell or dispose of the same, without the Licence of Us, our Heirs, and Successors, in that Belief first had and obtained; That then, all the Goods and Chattels of such Person or Persons, so offending and transporting, together with the said Ship or Vessel, where in such Transportation was made, shall be forfeited to Us, our Heirs, and Successors.

Provided always, and our Will and Pleasure is, and we do hereby declare to all Christian Kings, Princes, and States, that if any Person or Persons which shall hereafter be of any of the said several Colonies and Plantations, or any other, by his, their, or any of their Licence and Appointment, shall, at any Time or Times hereafter, rob or spoil, by Sea or Land, or do any Act of unjust and unlawful Hostility to any the Subjects of Us,' our Heirs, or Successors, or any the Subjects of any King, Prince, Ruler, Governor, or State, being then in League or Amitie with us, our Heirs, or Successors, and that upon such Injury, or upon just Complaint of such Prince, Ruler, Governor, or State, or their Subjects, Ave, our Heirs, or Successors, shall make open Proclamation, within any of the Ports of our Realm of England, commodious for that purpose, That the said Person or Persons, having committal any such robbery, or Spoil, shall, within the term to be limited by such Proclamations, make full Restitution or Satisfaction of all such Injuries clone, so as the said Princes, or others so complaining, may hold themselves frilly satisfied and

contented; And, that if the said Person or Persons, having committed such hobery or Spoil, shall not snake, or cause to be made Satisfaction accordingly, within such Time so to be limited, That then it shall be lawful to Us, our Heirs, and Successors, to put the said Person or Persons, having committed such Robbery or Spoil, and "their Procurers, Abettors and Comforters, out of 'our Allegiance and Protection; And that it Tall be lawful and tree, for all Princes, and

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others to pursue with hostility the said offenders, and every of them, and their and every of their Procurers, Aiders, abettors, and comforters, in that behalf.

And finally, we do for Us, our Heirs, and Successors, GRANT and agree, to and with the said Sir Thomas Gates, Sir George Somers, Richard Hackluit, Edward-Maria Tuing fleld, and all others of the said first colony, that We, our Heirs and Successors; upon Petition in that Behalf to be made, shall, by Letters Patent under the Great Seal of England, GIVE and GRANT, unto such Persons, their Heir: and Assigns, as the Council of that Colony, or the host part of them, shall, for that Purpose, nominate and assign all the lands, Tenements, and Hereditaments, which shall be within the Precincts limited for that Colony, as is aforesaid, To Be Holden of Us, our heirs and Successors, as of our Manor at East-Greenwich, in the County of Kent, in free and common Soccage only, and not in Capite

And do in like Manner, Grant and Agree, for Us, our Heirs and Successors, to and with the said Thomas Hanham, Ralegh Gilbert, William Parker, and George Popham, and all others of the said second Colony, That We, our Heirs, and Successors, upon Petition in that Behalf to be made, shall, by Letters-Patent, under the Great Seal of England, GIVE and GRANT, unto such Persons, their Heirs and Assigns, as the Council of that Colony, or the most Part of them, shall for that Purpose nominate and assign, all the Lands, Tenements, and Hereditaments, which shall be within the Precincts limited for that Colony, as is aforesaid, To BE HOLDEN of Us, our Heires, and Successors, as of our Manor of East-Greenwich, in the County of Kent, in free and common Soccage only, and not in Capite.

All which Lands, Tenements, and Hereditaments, so to be passed by the said several Letters-Patent, shall be sufficient Assurance from the said Patentees, so distributed and divided amongst the Undertakers for the Plantation of the said several Colonies, and such as shall make their Plantations in either of the said several Colonies, in such Manner and Form, and for such Estates, as shall be ordered and set down by the Council of the said Colony, or the most part of them, respectively, within which the same Lands, Tenements, and Hereditainents shall lye or be; Although express Mention of the true yearly Value or Certainty of the Premises, or any of them, or of any other Gifts or Grants, by Us or any of our Progenitors or Predecessors, to the aforesaid Sir Thomas Gates, Knt. Sir George Somers, Knt. Richard Haelaluit, Edward-Maria Wingfield, Thomas Hanham, Ralelyh Gilbert, William Parker, and George Popham, or any of them, heretofore made, in these Presents, is not made; Or any Statute, Act, Ordinance or Provision, Proclamation, or Restraint, to the contrary hereof have made, ordained, or any other Thing, Cause, or

Matter whatsoever, in any wise notwithstanding. IN WITNESS whereof, we have caused these our Letters to be made Patent; Witness Ourself at Westminister, the tenth Day of April, in the fourth Year of our Reign of England, Prance, and Ireland, and of Scotland the nine and thirtieth.

LUKIN
Per breve.de privato Sigillo

Appendix J:

Ghana Independence Act, 1957

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CHAPTER 6

ARRANGEMENT OF SECTIONS

Section

1.Provision for the fully responsible status of the Gold Coast under the name of Ghana.
2.Consequential modification of British Nationality Act.
3.Consequential modifications with respect to development schemes, etc.
4.Consequential modification of other enactments.
5.Short title and appointed day.

SCHEDULES

First Schedule-Legislative powers of Ghana.
Second Schedule-Amendments not affecting law of Ghana.

An Act to make provision for, and in connection with, the attainment by the Gold Coast of fully responsible status within the British Commonwealth of Nations. [7th February, 1957]

Be it enacted by the Queen's most Excellent Majesty, by and with-the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The territories included immediately before the appointed day in the Gold Coast as defined in and for the purposes of the Gold Coast (Constitution) Order in Council, 1954, shall as from that day together form part of Her Majesty's dominions under the name of Ghana, and

(a) no Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ghana as part of the law of Ghana, unless it is expressly declared in that Act that the Parliament of Ghana has requested, and consented to, the enactment thereof;

(b) as from the appointed day, Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Ghana or any part thereof;

(c) as from the appointed day, the provisions of the First Schedule to this Act shall have effect with respect to the legislative powers of Ghana

Provided that nothing in this section other than paragraphs (a) to (c) thereof shall affect the operation in any of the territories aforesaid of any enactment, or any other instrument having the effect of law, passed or made with respect thereto before the appointed day.

* * *
SIDENOTES:

Provision for the fully responsible status of the Gold Coast under the name of Ghana.
* * *

2. As from the appointed day, the British Nationality Act., 1948, shall have effect -

(a) with the substitution in subsection (3) of section one thereof (which provides for persons to be British subjects or Commonwealth citizens by virtue of citizenship of certain countries) for the words " and Ceylon " of the words " Ceylon and Ghana ";

(b) as if in the British Protectorates, Protected States and Protected Persons Order in Council, 1949, the words " Northern Territories of the Gold Coast " in the First Schedule thereto and the words " Togoland under United Kingdom Trusteeship " in the Third Schedule thereto were omitted:

Provided that a person who, immediately before the appointed day, was for the purposes of the said Act and Order in Council a British protected person by virtue of his connection with either of the territories mentioned in paragraph (b) of this section shall not cease to be such a British protected person for any of those purposes by reason of anything contained in the foregoing provisions of this Act, but shall so cease upon his becoming a citizen of Ghana under any law of the Parliament of Ghana making provision for such citizenship.

3.(1) No scheme shall be made on or after the appointed day under the Colonial Development and Welfare Acts, 1940 to 1955, wholly or partly for the benefit of Ghana.

(2) Any scheme in force under the said Acts immediately before the appointed day which was made solely for the benefit of Ghana or any part thereof shall cease to have effect on that day without prejudice to the making of payments in pursuance of that scheme on or after that day in respect of any period falling before that day; and, so far as practicable, no part of any sums paid out of moneys provided by Parliament for the purposes of any other scheme made under those Acts before that day shall be employed in respect of any period falling on or after that day for the benefit of Ghana.

(3) Nothing in the two foregoing subsections shall restrict the making of, or the employment of sums paid out of moneys provided by Parliament for the purposes of, any scheme under the said Acts with respect to a body established for the joint benefit of Ghana and one or more of the following territories, that is to say, the Federation or any Region of Nigeria, Sierra Leone and the Gambia, in a case where Ghana has undertaken to bear a reasonable share of the .cost of the scheme.

* * *

SIDENOTES:

Consequential modification of British Nationality Act.

Consequential modifications with respect t development schemes, etc.

* * *

(4) Without prejudice to the continuance of any operations commenced by the Colonial Development Corporation in any part of Ghana before the appointed day, as from that day the expression "colonial territories" in the Overseas Resources Development Acts, 1948 to 1956, shall not include Ghana or any part thereof.

4.-(1) Notwithstanding anything in the Interpretation Act, 1889, the expression "colony" in any Act of the Parliament of the United Kingdom passed on or after the appointed day shall not include Ghana or any part thereof.

(2) As from the appointed day, the expression "colony" in the Army Act, 1955, and the Air Force Act, 1955, shall not include Ghana or any part thereof, and in the definitions of "Commonwealth force" in subsection (1) of section two hundred and twenty-five and subsection (1) of section two hundred and twenty-three respectively of those Acts and in section eighty-six of the Naval Discipline Act as amended by the Revision of the Army and Air Force Acts (Transitional Provisions) Act, 1955, for the words " or Ceylon. " there shall be substituted the words "Ceylon or Ghana".

(3) Any Order in Council made on or after the appointed day under the Army Act, 1955, or the Air Force Act, 1955, providing for that Act to continue in force beyond the date on which it would otherwise expire shall not operate to continue that Act in force beyond that date as part of the law of Ghana.

(4) As from the appointed day, the provisions specified in the Second Schedule to this Act shall have effect subject to the amendments respectively specified in that Schedule, and Her Majesty may by Order in Council, which shall be subject to annulment in pursuance of a resolution of either House of Parliament, make such further adaptations in any Act of the Parliament of the United Kingdom passed before this Act, or in any instrument having effect under any such Act, as appear to her necessary in consequence of section one of this Act; and any Order in Council made under this subsection may be

varied or revoked by a subsequent Order in Council so made and, though made after the appointed day, may be made so as to have effect from that day:

Provided that this subsection shall not extend to Ghana as part of the law thereof.

5.(1) This Act may be cited as the Ghana Independence Act, 1957.

(2) In this Act, the expression "the appointed day " means the sixth day of March, nineteen hundred and fifty-seven, unless before that date Her Majesty has by Order in Council appointed some other day to be the appointed day for the purposes of this Act.

* * *
SIDENOTES:

Consequential modification of other enactments.

Short title and appointed day.
* * *

SCHEDULES

FIRST SCHEDULE

LEGISLATIVE POWERS OF GHANA

1. The Colonial Laws Validity Act, 1865, shall not apply to any law made on or after the appointed day by the Parliament of Ghana.

2. No law and no provision of any law made on or after the appointed day by the Parliament of Ghana shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of Ghana shall include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of Ghana.

3. The Parliament of Ghana shall have full power to make laws having extra-territorial operation.

4. Without prejudice to the generality of the foregoing provisions of this Schedule, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the legislature of a British possession did not include reference to the Parliament of Ghana.

5. Without prejudice to the generality of the foregoing provisions of this Schedule, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws

to be reserved for the signification of Her Majesty's pleasure or to contain a suspending clause) and so much of section seven of that Act as requires the approval of Her Majesty in Council to any rules of court for regulating the practice and procedure of a Colonial Court of Admiralty shall cease to have effect in Ghana.

6. Notwithstanding anything in the foregoing provisions of this Schedule, the constitutional provisions shall not be repealed, amended or modified otherwise than in such manner as may be specified in those provisions.

In this paragraph, the expression "the constitutional provisions " means the provisions for the time being in force on or at any time after the appointed day of the Gold Coast (Constitution) Orders in Council, 1954 to 1956, and of any other Order in Council made before that day, or any law, or instrument made under a law, of the Parliament of Ghana made on or after that day, which amends, modifies, re-enacts with or without amendment or modification, or makes different provision in lieu of, any of the provisions of any such Order in Council or of any such law or instrument previously made.

SECOND SCHEDULE

AMENDMENTS NOT AFFECTING LAW OF GHANA

Diplomatic immunities

1. In section four hundred and sixty-one of the Income Tax Act, 1952 (which relates to exemption from income tax in the case of certain Commonwealth representatives and their staffs) for the words " or Ceylon " in both places where they occur there shall be substituted the words " Ceylon or Ghana ".

2. In subsection (6) of section one of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, after the word " Ceylon " there shall be inserted the word " Ghana "; and the proviso to subsection (1) of that section shall not apply in relation to Ghana until a law of the Parliament of Ghana making provision for citizenship of Ghana has come into force.

Financial

3. As respects goods imported after such date as Her Majesty may by Order in Council appoint, section four of the Import Duties Act, 1932, and section two of the Isle of Man (Customs) Act, 1932 (which relate to imperial preference other than colonial preference) shall apply to Ghana.

4. In the Colonial Stock Act, 1934 (which extends the stocks which may be treated as trustee securities), the expression " Dominion " shall include Ghana; and, during any period falling on or after the appointed day during which there is in force as part of the

law of Ghana any instrument passed or made before that day which makes provision corresponding to the undertaking required to be given by the Government of a Dominion under paragraph (a) of subsection (1) of section one of that Act, paragraphs (a) and (b) of the said subsection (1) shall be deemed to have been complied with in the case of Ghana.

Visiting forces

5. In the Visiting Forces (British Commonwealth) Act, 1933, section four (which deals with attachment and mutual powers of command) and the definition of " visiting force " for the purposes of that Act which is contained in section eight thereof shall apply in relation to forces raised in Ghana as they apply in relation to forces raised in Dominions within the meaning of the Statute of Westminster, 1931.

6. In the Visiting Forces Act, 1952

(a) in subsection (1) of section one (which specifies the countries to which that Act applies) for the words "or Ceylon" there shall be substituted the words "Ceylon or Ghana";

(b) in paragraph (a) of subsection (1) of section ten the expression "colony" shall not include Ghana or any part thereof;

and, until express provision with respect to Ghana is made by an Order in Council under section eight of that Act (which relates to the application to visiting forces of law relating to home forces), any such Order for the time being in force shall be deemed to apply to visiting forces of Ghana.

Ships and aircraft

7. In subsection (2) of section four hundred and twenty-seven of the Merchant Shipping Act, 1894, as substituted by section two of the Merchant Shipping (Safety Convention) Act, 1949, for the words "or Ceylon" there shall be substituted the words "Ceylon or Ghana".

8. In the proviso to subsection (2) of section six of the Merchant Shipping Act, 1948, for the words "or Ceylon" there shall be substituted the words "Ceylon or Ghana".

9. In the definitions of "Dominion ship or aircraft" contained in subsection (2) of section three of the Emergency Powers (Defence) Act, 1939, and in Regulation one hundred of the Defence (General) Regulations, 1939, the expression "a Dominion" shall include Ghana.

10. The Ships and Aircraft (Transfer Restriction) Act, 1939, shall not apply to any ship by reason only of its being registered in, or licensed under the law of, Ghana; and the penal provisions of that Act shall not apply to persons in Ghana (but without prejudice to

the operation with respect to any ship to which that Act does apply of the provisions thereof relating to the forfeiture of ships).

11. In the Whaling Industry (Regulation) Act, 1934, the expression "British ship to which this Act applies" shall not include a British ship registered in Ghana.

12.(1) If on or after the appointed day the Parliament of Ghana repeals or amends the Copyright Act, 1911, in so far as it forms part of the law of Ghana or of any part of Ghana, the following provisions of this paragraph shall have effect.

(2) Any provision of the said Act in force at the date of the repeal or amendment as part of the law of the United Kingdom shall no longer apply in relation to, or to any part of, Ghana, whether as part of Her Majesty's dominions to which that Act extends or by virtue of section twenty-eight of that Act:

Provided that

(a) this sub-paragraph shall not prejudicially affect any legal rights existing at the time of the repeal or amendment;

(b) Ghana shall be included in the expression "self-governing dominion" for the purposes of subsection (2) of section twenty-five and subsection (3) of section twenty-six of that Act (which relate to reciprocity with self-governing dominions having their own copyright law), and the said subsection (2) shall have effect in relation to Ghana as if that Act, so far as it remains part of the law of Ghana or of any part of Ghana, had been passed by the Parliament of Ghana;

(c) this sub-paragraph shall not apply to any provision of that Act which continues to have effect as part of the law of the United Kingdom by virtue only of paragraph 40 of the Seventh Schedule to the Copyright Act, 1956.

(3) If at the date of the repeal or amendment any provision of the Copyright Act, 1956, has come into operation but does not extend to all parts of Ghana by virtue of an Order in Council made before the appointed day under section thirty-one of that Act and has not been applied in the case of Ghana by an Order in Council made on or after that day under section thirty-two of that Act, any reference in that provision to countries to which that provision extends shall, notwithstanding anything in sub-paragraph (2) of paragraph 39 of the Seventh Schedule to that Act, not be construed as if that provision extended to Ghana or any part thereof.

* * *

TABLE: Statutes referred to in this Act

Short Title: Colonial Laws Validity Act, 1865
Session and Chapter: 28 & 29 Vict. c. 63.

Short Title: Naval Discipline Act, 1866
Session and Chapter: 29 & 30 Vict. c. 109.

Short Title: Interpretation Act, 1889
Session and Chapter: 52 & 53 Vict. c. 63.

Short Title: Colonial Courts of Admiralty Act, 1890
Session and Chapter: 53 & 54 Vict. c. 27.

Short Title: Merchant Shipping Act, 1894
Session and Chapter: 57 & 58 Vict. c. 60.

Short Title: Copyright Act, 1911
Session and Chapter: 1 & 2 Geo. 5. c. 46.

Short Title: Import Duties Act, 1932
Session and Chapter: 22 & 23 Geo. 5. c. 8.

Short Title: Isle of Man (Customs) Act, 1932
Session and Chapter: 22 & 23 Geo. 5. c. 16.

Short Title: Visiting Forces (British Commonwealth) Act, 1933
Session and Chapter: 23 & 24 Geo. 5. c. 6.

Short Title: Colonial Stock Act, 1934
Session and Chapter: 24 & 25 Geo. 5. c. 47.

Short Title: Whaling Industry (Regulation) Act, 1934
Session and Chapter: 24 & 25 Geo. 5. c. 49.

Short Title: Emergency Powers (Defence) Act, 1939
Session and Chapter: 2 & 3 Geo. 6. c. 62.

Short Title: Ships and Aircraft (Transfer Restriction) Act, 1939
Session and Chapter: 2 & 3 Geo. 6. c. 70.

Short Title: Merchant Shipping Act, 1948
Session and Chapter: 11 & 12 Geo. 6. c. 44.

Short Title: British Nationality Act, 1948
Session and Chapter: 11 & 12 Geo. 6. c. 56.

Short Title: Merchant Shipping (Safety Convention) Act, 1949
Session and Chapter: 12, 13 & 14 Geo. 6. c. 43.

Short Title: Income Tax Act, 1952
Session and Chapter: 15 & 16 Geo. 6. & 1 Eliz. 2. c. 10.

Short Title: Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952.
Session and Chapter: 15 & 16 Geo. 6. & 1 Eliz. 2. c. 18.

Short Title: Visiting Forces Act, 1952
Session and Chapter: 15 & 16 Geo. 6. & 1 Eliz. 2. c. 67.

Short Title: Army Act, 1955
Session and Chapter: 3 & 4 Eliz. 2. c. 18.

Short Title: Air Force Act, 1955
Session and Chapter: 3 & 4 Eliz. 2. c. 19.

Short Title: Revision of the Army and Air Force Acts (Transitional Provisions) Act, 1955
Session and Chapter: 3 & 4 Eliz. 2. c. 20.

Short Title: Copyright Act, 1956
Session and Chapter: 4 & 5 Eliz. 2. c. 74.

Appendix K:

The Ghana (Constitution) Order in Council, 1957

1957 No. 277

The Ghana (Constitution) Order in Council, 1957

Made: 22nd February, 1957
Laid before Parliament: 22nd February, 1957
Coming into Operation Sections 77, 90, 91 and, Second Schedule: 23rd February, 1957
Remainder: The appointed day for the purposes of the Ghana Independence Act, 1957*

At the Court at Buckingham Palace, the 22nd day of February, 1957 Present, The Queen's Most Excellent Majesty in Council

Whereas, by the Ghana Independence Act, 1957(x), provision is made for and in connection with the attainment by the Gold Coast of fully responsible status within the British Commonwealth of Nations under the name of Ghana with effect from a day (hereinafter referred to as "the appointed day") which, by virtue of section 5 of the said Act is the sixth day of March, nineteen hundred and fifty-seven, unless before that date Her Majesty has, by Order in Council, appointed some other day to be the appointed day for the purposes of that Act:

Now, therefore, Her Majesty, by virtue and in exercise of the powers conferred upon Her by the British Settlements Acts, 1887 and 1945(b), the Foreign Jurisdiction Act, 1890(c), the Ghana Independence Act, 1957, and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows : -

PART I

Preliminary

1. (1) In this Order, unless the context otherwise requires: –

"Act" and "Act of Parliament" mean an Act of the Parliament of Ghana;

* * *

FOOTNOTES:

* 6.3.57
(a) 5 & 6 Eliz c.6.
(b) 50 & 51 Vict. c. 54 and 9 & 10 Geo. 6. c. 7.
(c) 53 & 54 Vict. c. 37.

"Ashanti" means the territories defined as such by the Ashanti (Boundaries) Order in Council, 1950;

"the Assembly" means the National Assembly constituted under this Order;

"the Cabinet" means the Cabinet of Ministers constituted under this Order;

"citizen of Ghana" means any person who, by the law of Ghana, has the status of a citizen of Ghana and, pending the enactment of such a law, means a British subject or a British protected person;

"Consolidated Fund" means the Consolidated Fund of Ghana established under section 58 of this Order;

"election" means the election of Members of Parliament and " elector " means an elector for any such election;

"the existing Orders" means the Gold Coast (Constitution) Orders in Council, 1954 to 1956(a);

"the Gazette" means the official Gazette of Ghana;

"Ghana" has the same meaning as in the Ghana Independence Act, 1957

"the Ghana Independence Act, 1957" means the Act bearing that short title enacted by the Parliament of the United Kingdom;"

"the Governor-General" means the Governor-General and Commander-in-Chief of Ghana and includes the Acting Governor-General;

"Governor" means the person holding the office of Governor and Commander in Chief of the Gold Coast within the meaning of the existing Orders;

"judicial officer" means the holder of any judicial office of emolument in the public service and includes the holder of the office of Chief Registrar but does not include a Judge of the Supreme Court or an officer who exercises all or any of the functions of a judicial office by virtue of an appointment to some other office in the public service;

"meeting" means any sitting or sittings of the Assembly commencing when the Assembly first meets after being summoned at any time and terminating when the Assembly is adjourned sine die or at the conclusion of a session;

"Member" means a Member of Parliament;

"the Northern Territories" means the territories defined as the Northern Territories of the Gold Coast by the Northern Territories of the Gold Coast Orders in Council, 1950 and 1954(b);

"Northern Togoland" means the territories defined as the Northern Section of Togoland under United Kingdom Trusteeship by the Togoland under United Kingdom Trusteeship Orders in Council, 1949 to 1954(c);

"Parliament" means the Parliament constituted under this Order; "the Prime Minister" means the person appointed as such under this Order;

"public office" means any office of emolument in the public service;

* * *

FOOTNOTES:

(a) S.I.1954/551,1955/1218, 1219, 19561997 (1954 II, p. 2788; 1955 II, p. 3150, 3150).
(b) S.I. 1950/2095, 1954/553 (1950 II, p. 96; 1954 II, p. 2825).
(c) S.I. 1949/1997, 1950/2096, 1954/552 (1949 I, p. 1892;1950 IT, p. 1036;1954 I1 p. 2827).

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"public officer" means the holder of any public office and includes any person appointed to act in any such office;

"Public Seal" means the Public Seal of Ghana;

"the public service" means the service of the Crown in right of the Government of Ghana;

"Region" means a Region constituted by section 63 of this Order;

"session" means the sittings of the Assembly commencing when; when the Assembly first meets on or after the appointed day or after its prorogation or dissolution at any time, and terminating when the Assembly is prorogued or is dissolved without having been prorogued;

"sitting" means a period during which the Assembly is sitting continuously without adjournment, and includes any period during which the Assembly is in Committee;

"Southern Ghana" means the territories which immediately before the appointed day were included in the Gold Coast Colony;

"the Speaker" and "the Deputy Speaker" mean respectively the Speaker and the Deputy Speaker of the Assembly;

"Togoland" means that part of Togoland which immediately before the appointed day was under United Kingdom Trusteeship;

"the United Kingdom" means the United Kingdom of Great Britain and Northern Ireland.

(2) Where in this Order reference is made to any officer by the term designating his office, such reference shall unless the context otherwise requires be construed as a reference to the officer for the time being lawfully discharging the functions of that office.

(3) Where, by or under this Order, a power is conferred to make any appointment, the person or authority having power to make the appointment shall have power, exercisable in the like manner

(a) to suspend the appointment of any person appointed;

(b) in the case of a power to make an appointment to a public office, to direct that a person other than the person appointed, shall, during any period that the person appointed is unable to perform the functions of his office owing to absence or inability to act from illness or any other cause, perform the functions of that office;

(c) in the case of a power to make an appointment to a public office, to appoint another person substantively to such an office, 'notwithstanding that there is already a substantive holder' thereof, when that substantive holder is on leave of absence pending relinquishment of his office;

(d) in the case of a power to make an appointment to a public office, to direct that a person shall perform the functions of that office when no person has been appointed thereto, either until a contrary direction shall be given by the person or authority having power to make the appointment or until a person shall have been appointed substantively thereto, whichever shall be the earlier.

(4) For the purposes of this Order, a person shall not be considered to hold a public office by reason only that he is in receipt of a pension or other like allowance in respect of service in any such office, and if it shall be declared by any law in force in Ghana that an office shall not be a public office for all or any of the purposes of this Order, this Order shall have effect accordingly.

(5) Where, under the provisions of this Order, any matter is required to be, or may be, prescribed or determined by Act of Parliament, it shall suffice for the third reading of any such Act of Parliament to be passed by a majority of the Members present and voting, unless such Act relates to a matter in regard to which legislation is, by the provisions of this Order, required to be made in some other manner or by some other procedure.

(6) Save as in this Order otherwise provided, or required by the context, the Interpretation Ordinance(a) shall apply for the interpretation of this Order as it applies for the interpretation of an Ordinance.

Citation and commencement

2.(1) This Order may be cited as the Ghana (Constitution) Order in Council, 1957.

(2) Save where otherwise provided, this Order shall come into operation on the appointed day.

Revocation and amendment

3.(1) The Gold Coast (Constitution) Order in Council, 1954(b) as amended by the Gold Coast (Constitution) (Amendment) Order in Council, 1955(c), the Gold Coast (Constitution) (Amendment No. 2) Order in Council, 1955(d) and the Gold Coast (Constitution) (Amendment) Order in Council, 1956(e) is revoked to the extent set out in the second column of Part I of the First Schedule to this Order, but without prejudice to anything lawfully done thereunder.

(2) The amendments set out in Part II to the First Schedule to this order shall be effected to the Fourth Schedule of the said Gold Coast (Constitution) Order in Council, 1954.

(3) The Northern Territories of the Gold Coast Orders in Council, 1950 and 1954(f) and the Togoland under United Kingdom Trusteeship Orders in Council, 1949 to 1954(g) shall cease to have effect but without prejudice to any thing lawfully done thereunder.

(4) The continued operation of any law in force in Ghana or any part thereof immediately before the appointed day shall not be affected by reason only of the provisions of this section.

(5) The jurisdiction of any court, having jurisdiction before the appointed day in any part of Ghana, shall not be affected by reason only of the provisions of this section.

* * *

FOOTNOTES:

(a) Laws of the Gold Coast, Rev. 1951, Chapter 1.
(b) S.I. 1954/551 (1954 II, p. 2788).
(c) S.I. 1955/1218 (1955 II, p. 3150).
(d) S.I. 1955/1219 (1955 II, p. 3156).
(e) S.I. 1956/997.
(f) S.I. 1950/2095, 1954/553 (1950 II, p. 96;1954 II, p. 2825).
(g) S.1. 1949/1997, 1950/2096, 1954/552 (1949 I, p. 1892; 1950 II, p. 1036; 195411, p. 2827).

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GHANA
PART II
The Governor-General

Appointment of Governor-General

4. (1) The Governor-General shall be appointed by Her Majesty and shall have and may exercise in Ghana during Her Majesty's pleasure such powers, authorities and functions as Her Majesty may be pleased to assign to him or as may be vested in him under the provisions of this Order or by any other law for the time being in force.

(2) All powers, authorities and functions vested in Her Majesty the Queen or the Governor-General shall, except in so far as provision is made in this Order or in any other law for the time being in force for such powers, authorities and functions to be exercised on the advice of some person or authority, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty:

Provided that no act or omission on the part of Her Majesty or the Governor-General shall be called in question in any court of law or otherwise on the ground that the foregoing provisions of this subsection have not been complied with.

(3) Where the Governor-General is, by this Order or by any other law for the time being in force in Ghana, directed to exercise any power, authority or function on the advice of any person or authority other than the Cabinet, he shall exercise such power, authority or function in accordance with such advice.

Salaries of Governor-General, Acting Governor-General and Governor-General's staff

5. (1) The Governor-General shall receive such salary as may from time to time be provided by the Assembly.

(2) During any period in which the office of Governor-General is vacant or the Governor-General is absent from Ghana or is from any cause prevented from, or incapable of, acting in the duties of his office, the Acting Governor-General shall receive a salary calculated at the rate of three-quarters of the salary of the Governor-General and shall not be entitled to receive during that period any salary in respect of any other office.

(3) The salary of the Governor-General or of the Acting Governor General shall be charged on the Consolidated Fund and shall not be diminished during his continuance in office.

(4) In the assessment of any income tax which may be payable under any law, no account shall betaken of the salaries provided by this section for the Governor-General and for the Acting Governor-General or of the annual value of any official residence occupied by either of them as such.

(5) The salaries of all members of the Governor-General's office and of his personal staff shall be determined by Parliament and shall be charged on the Consolidated Fund.

PART III
The Executive

Executive Power

6. The executive power of Ghana is vested in the Queen and may be exercised by the Queen or by the Governor-General as Her representative.

The Cabinet

7.(1) There shall be a Cabinet of Ministers of not less than eight persons, being Members of Parliament, who shall be charged with the general direction and control of the Government of Ghana and who shall be collectively responsible to Parliament.

(2) The Ministers (one of whom shall be styled "the Prime Minister") shall be appointed by the Governor-General by Instrument under the Public Seal.

(3) Any Minister (other than the Prime Minister) may be removed from office by the Governor-General acting on the advice of the Prime Minister, by Instrument under the Public Seal.

(4) If at any time the Assembly shall pass a motion in express words of no confidence in the Government, the Governor-General shall, unless he is advised by the Prime Minister within three days of the passing of such motion to dissolve the Assembly, terminate the appointment of the Prime Minister.

Vacation of Office

8.(1) Whenever the office of Prime Minister has become vacant and a person has been appointed to be Prime Minister in accordance with the provisions of section 7 of this Order, the offices of all the other Ministers shall become vacant.

(2) The office of a Minister shall in any case become vacant

(a) if he shall cease to be a Member of Parliament, or
(b) if he shall be absent from Ghana without written permission given by the Governor-General acting on the advice of the Prime Minister

Provided that, if a Minister shall cease to be a Member of Parliament by reason of a dissolution of the Assembly, he shall not on that account vacate his ministerial office until such time as the Governor-General shall have appointed a Prime Minister in accordance with the provisions of section 7 of this Order.

(3) A Minister may by writing under his hand, addressed to the Governor-General resign his ministerial office, and upon the receipt of such resignation by the Governor-General, the office of such Minister shall become vacant.

(4) Whenever, by reason of illness or absence from Ghana with the written permission of the Governor-General, the Prime Minister is temporarily prevented from discharging his functions in Ghana, the Governor-General may, by Instrument under the Public Seal, appoint another Minister to discharge such functions of the Prime Minister until such time as the Prime Minister is capable of again discharging those functions or has vacated his office.

(5) The Governor-General may, by Instrument under the Public Seal, declare a Minister to be by reason of illness temporarily incapable of discharging his functions as a Minister; and thereupon such Minister shall not discharge any of the functions of his office or sit or vote in the Cabinet until he is declared in manner aforesaid again to be capable of discharging his said functions.

Official Oath

9. Every Minister shall, before entering on the duties of his office, take and subscribe before the Governor-General the official oath or make before the Governor-General the appropriate affirmation in lieu thereof in accordance with the provisions of the Oaths Ordinance(a) or any law repealing and re-enacting with or without modification, or amending, the provisions of that Ordinance.

Precedence of Ministers

10. Ministers shall take precedence amongst themselves as Her Majesty the Queen may specially assign and, if precedence be not so assigned, as follows:

First, the Prime Minister.

Secondly, the other Ministers according to the length of time for which they have been continuously Ministers, Ministers who have' been continuously in such office for the same length of time taking precedence according to age. Any interval between the vacation by a Minister of his office in consequence of a dissolution of the Assembly and the date of his appointment as a Minister upon the first formation of the Cabinet following such dissolution shall not be taken into account in determining the length of time for which a person shall have been continuously a Minister.

Summoning of Cabinet

11. The Cabinet shall be summoned by the Prime Minister or, in the absence of the Prime Minister, by such Minister as the Prime Minister shall appoint.

Presiding in the Cabinet

12. The Prime Minister shall, so afar as is practicable, attend and preside at all meetings of the Cabinet and in the absence of the Prime Minister such Minister as the Prime Minister shall appoint shall preside.

Transaction of business in the Cabinet, quorum and voting

13. (1) Subject to the provisions of subsection (2) of this section the Cabinet shall not be disqualified for the transaction of business by reason of any vacancy among the Ministers; and any proceedings of the Cabinet shall be valid notwithstanding that some person who was not entitled to do so sat or voted in the Cabinet or otherwise took part in the proceedings.

(2) No business except that of adjournment shall: be transacted in the Cabinet if objection is taken by any Minister, present that there are less than four Ministers present besides the Minister presiding.

(3) Where any matter is dependent upon the decision of the Cabinet, any decision shall be regarded as the decision of the Cabinet if a majority of votes of the Ministers present and voting is cast in its favour.

* * *
FOOTNOTES:

(a) Laws of the Gold Coast, Rev. 1951, Chapter 258.
* * *

Each Minister shall have an original vote and, if upon any question the votes shall be equally divided, the Minister presiding may exercise a casting vote.

Assignment of responsibilities to Ministers

14. (1) The Prime Minister may by directions in writing

(a) charge any Minister with the responsibility for any department or subject; and
(b) revoke or vary any directions given under this subsection.

(2) The Prime Minister may retain in his charge any department or subject.

(3) A Minister shall, while charged with the responsibility for any department or subject under the provisions of subsection (1) of this section, be styled a Minister with portfolio.

(4) A Minister who is not charged with responsibility for any department or subject aforesaid, shall be styled a Minister without portfolio. Attorney-General

15. (1) The Attorney-General shall be a person who is a public officer and he shall be vested with responsibility for the initiation, conduct and discontinuance of prosecutions for criminal offences triable in courts constituted under the provisions of the Courts Ordinance(a) or any Act repealing and re-enacting with or without modification, or amending, the provisions of that Ordinance.

(2) The assignment to a Minister of responsibility for the department of the Attorney-General shall confer responsibility only for submitting to the Cabinet questions referring to that department and conducting, Government business relating to that department in the Assembly, and shall have effect without prejudice to the provisions of subsection (1) of this section.

Parliamentary Secretaries

16. (1) The Governor-General, acting on the advice of the Prime Minister, may, from among the Members of Parliament appoint Parliamentary Secretaries to assist the Ministers in the exercise of their ministerial duties and may likewise at any time revoke the appointment of a Parliamentary Secretary

Provided that the number of Parliamentary Secretaries shall not at any time exceed by more than two the number of Ministers.

(2) Any Parliamentary Secretary may at any time resign his office by notice in writing addressed to the Governor-General and upon the receipt of such resignation by the Governor-General the office of such Parliamentary Secretary shall become vacant.

(3) No person shall continue to hold the office of Parliamentary Secretary if he shall cease to be a Member of Parliament

Provided that if a Parliamentary Secretary shall cease to be a Member of Parliament by reason of a dissolution of the Assembly he shall not on that account vacate his office of Parliamentary Secretary until such time as the Governor-General shall have appointed a Prime Minister in accordance with the provisions of section 7 of this Order.

* * *

FOOTNOTES:

(a) Laws of the Gold Coast, Rev. 1951, Chapter 4.

* * *

(4) A person appointed to be a Parliamentary Secretary shall, before entering on the duties of his office, take and subscribe before the Governor-General the official oath or make before the Governor General the appropriate affirmation in lieu thereof in accordance with the provisions of the Oaths Ordinance or any law repealing and reenacting with or without modification, or amending, the provisions of that Ordinance.

Permanent Secretaries

17. (1) There shall be for each Ministry a Permanent Secretary who shall be a person who is a public officer.

(2) Each Permanent Secretary shall, subject to the general direction and control of his Minister, exercise supervision over the department or departments assigned to his charge.

(3) For the purposes of this section the department of the Attorney-General and of the Auditor-General, and the office of the Secretary to the Cabinet and of the Clerk to the Assembly shall be deemed not to be departments of Government.

Secretary of the Cabinet

18. There shall be a Secretary of the Cabinet who shall be a person who is a public officer.

Duties of Secretary of the Cabinet

19. The Secretary of the Cabinet shall have charge of the Cabinet office and shall, in accordance with such instructions as may be given to him by the Prime Minister, arrange the business for, and keep to minutes of, meetings of the Cabinet, and convey the decisions of the Cabinet to the appropriate person or authority.

PART IV
Parliament

Parliament

20. (1) There shall be a Parliament in and for Ghana which shall consist of Her Majesty the Queen and the National Assembly.

(2) The National Assembly shall consist of a Speaker and, not less than one hundred and four Members to be known as Members of Parliament; but the number of Members may be increased from lime to time by the creation of further electoral districts under the

provisions of sections 33, 70 and 71, but in any event the total number of Members shall not exceed one hundred and thirty.

Speaker

21. (1) The Speaker shall be a person, not being either the holder of any public office or a Minister or Parliamentary Secretary, elected by the Members of Parliament.

(2) The election of the Speaker shall take place before the despatch of any other business at the first sitting of the Assembly after every dissolution of the Assembly.

(3) A person holding office as Speaker may, by writing under his hand addressed to the Governor-General resign the office of Speaker; and upon receipt of such resignation by the Governor-General the office of Speaker shall become vacant.

(4) A person holding office as Speaker shall, unless he earlier resigns his office, vacate his office on the dissolution of the Assembly.

(5) Whenever the office of Speaker shall become vacant otherwise than as a result of a dissolution of the Assembly, the Assembly shall at its first sitting after the occurrence of the vacancy, elect another person to be Speaker.

(6) A person shall, if qualified, be eligible for re-election to the office of Speaker from time to time.

Deputy Speaker

22. (1) The Assembly shall

(a) at its first sitting in every session, and
(b) at its first sitting after the occurrence of a vacancy in the office of Deputy Speaker, or as soon thereafter as may be convenient, elect as Deputy Speaker of the Assembly one of its own Members, who shall not be a Minister or Parliamentary Secretary.

(2) A person shall, if qualified, be eligible for re-election to the office of Deputy Speaker from time to time.

(3) The Deputy Speaker shall, unless he earlier vacates his office under the provisions of this Order, hold office until some other person is elected as Deputy Speaker under paragraph (a) of subsection (1) of this section.

(4) (a) A person shall vacate the office of Deputy Speaker
(i) upon ceasing to be a Member of Parliament; or
(ii) upon becoming a Minister or Parliamentary Secretary.

(b) The Deputy Speaker may by writing under his hand addressed to the Speaker or, in the absence of the Speaker or if there shall be no Speaker, to the Clerk of the Assembly, resign his office; and upon receipt of such resignation by the Speaker or by the Clerk of the Assembly, as the case may be, the office of Deputy Speaker shall become vacant.

Voting at elections of Speaker and Deputy Speaker

23. In any election of a Speaker or a Deputy Speaker the votes, of the Members of Parliament shall be given by ballot in such manner as not to disclose how any particular Member shall have voted.

Qualifications for membership

24. Subject to the provisions of section 25 of this Order, any person who

(a) is a citizen of Ghana; and
(b) is of the age of twenty-five years or upwards; and,
(c) is able to speak and, unless incapacited by blindness or other physical cause, to read the English language with a degree of proficency sufficient to enable him to take an active part in the proceedings of the Assembly;

shall be qualified to be elected as a Member of Parliament, and no other person shall be qualified to be so elected or, having been so elected, shall sit or vote in the Assembly.

Disqualifications for Members

25. No person shall be qualified to be elected as a Member of Parliament who

(a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State; or

(b) holds, or is acting in, any public office:
Provided that for the purposes of this paragraph the office of Minister or Parliamentary Secretary shall not be deemed to be a public office; or

(c) holds the office of Speaker; or

(d) is a party to, or is a partner in a firm which is a party to, any contract with the Government of Ghana for or on account of the public service, and has not, within one month before the day of election, published in the English language in the Gazette a notice setting out the nature of such contract, and his interest, or the interest of any such firm therein; or

(e) is an undischarged: bankrupt, having been adjudged or otherwise declared bankrupt under any law for the time being in force in Ghana; or

(f) being a person possessed of professional qualifications, is disqualified (otherwise than at his own request) in Ghana, from practising his profession by order of any competent authority made in respect of him personally

Provided that if five years or more have elapsed since the disqualification referred to in this paragraph, the person shall not be disqualified for membership of the Assembly by reason only of the provisions of this paragraph; or

(g) is a person adjudged to be of unsound mind or detained as a criminal lunatic under any law in force in Ghana; or

(h) has, in Ghana, been sentenced to death or to imprisonment (by whatever name called) for a term exceeding twelve months, or has been convicted of any offence involving dishonesty, and has not been granted a free pardon

Provided that if five years or more have elapsed since the termination of the imprisonment or, in the case of conviction of an offence involving dishonesty in respect of which no sentence of imprisonment has been passed, since the conviction, the person shall not be disqualified from membership of the Assembly by reason only of such sentence or conviction; or

(i) is not qualified to be registered as an elector under the provisions of any law for the time being in force in Ghana ; or

(j) is disqualified for election by any law for the time being in force in Ghana by reason of his holding, or acting in, any office the functions of which involve any responsibility for, or in connection with, the conduct of any election, or any responsibility for the compilation or revision of any electoral register; or

(k) is disqualified for membership of the Assembly by any law for the time being in force in Ghana relating to offences connected with elections.

Constitution

Tenure of office of Members

26. (1) Every Member of Parliament shall in any case cease to be a Member at the next dissolution of the Assembly after he has been elected or previously thereto if his seat shall become vacant under the provisions of this Order.

(2) The seat of a Member of Parliament shall become vacant

(a) upon his death; or

(b) if he shall be absent from two consecutive meetings of the Assembly, without having obtained from the Speaker, before the termination of either of such meetings permission to be or to remain absent therefrom; or

(c) if he shall cease to be a citizen of Ghana; or shall take any oath, or make any declaration or acknowledgment, of allegiance, obedience or adherence to any foreign Power or State; or shall do, concur in or adopt any act done with the intention that he shall become a subject or citizen of any foreign Power or State; or

(d) if he shall be appointed to, or to act in, any public office Provided that for the purposes of this paragraph the office of Minister or Parliamentary Secretary shall not be deemed to be a public office; or

(e) if he shall be elected to be Speaker; or

(f) if he shall become a party to any contract with the Government of Ghana for or on account of the public service, or if any firm in which he is a partner shall become a party to any such contract, or if he shall become a partner in a firm which is a party to any such contract

Provided that, if in the circumstances it shall appear to them to be just so to do, the Assembly may by Act of Parliament exempt any Member from vacating his seat under the provisions of this paragraph, if such Member shall, before becoming a party to such contract as aforesaid or before, or as soon as practicable after, becoming interested in such contract as partner in a firm, disclose to the Speaker the nature of such contract and his interest or the interest of any such firm therein; or

(g) if he shall be adjudged or otherwise declared bankrupt under any law for the time; being in force in Ghana; or

(h) if he shall, in Ghana, be sentenced by a court to death or to imprisonment (by whatever name called,) for a term exceeding twelve months, or be convicted of any offence involving dishonesty; or

(i) if he shall, become subject to any of the disqualifications specified in paragraphs (f), (g), (i), (j) or (k) of section 25 of this Order.

(3) A Member of Parliament may by writing under his hand addressed to the Speaker, resign his seat in the Assembly, and upon receipt of such resignation by the Speaker or Deputy Speaker the seat of such Member shall become vacant.

(4) Any person whose seat in the Assembly has become vacant may, if qualified, again be elected as a Member of Parliament from time to time.

Decision of questions as to membership

27. All questions which may arise as to the right of any person to be or remain a Member of Parliament shall be referred to and determined by the Supreme Court of Ghana in accordance with the provisions of any law in force in Ghana.

Reporting and filling of vacancies

28.(41) Whenever the seat of a Member of Parliament becomes vacant under the provisions of subsection (2) or (3) of section 26 of this Order, the Speaker shall, by writing under his hand, report such vacancy to the Governor-General.

(2) As occasion may require, a report under subsection (1) of this section may be made by the Deputy Speaker.

(3) Whenever, in pursuance of the provisions of this section, a report is made that, the seat of a Member of Parliament has become vacant, the Governor-General shall, within one month of the receipt of such report, by notice in the Gazette, order the holding of an election to fill the vacant seat.

Penalty for unqualified person sitting or voting

29. (1) Any person who

(a) having been elected as a Member of Parliament but not having been, at the time when he was so elected, qualified to be so elected shall sit or vote in the Assembly, or,

(b) shall sit or vote in the Assembly after his seat therein has become vacant or he has become disqualified from sitting or voting therein, knowing, or having reasonable grounds for knowing, that he was so disqualified, or that his seat has become vacant, as the case may be, shall be liable to a penalty not exceeding twenty pounds for every day upon which he so sits or votes.

(2) The said penalty shall be recoverable by action in the Supreme Court of Ghana at the suit of the Attorney-General.

Staff of the National Assembly

30. (1) There shall be a Clerk of the National Assembly who shall be a person who is a public officer.

(2) The staff of the Clerk of the National Assembly shall consist of persons who are public officers.

PART V

Legislation and Procedure in the Assembly Power to make laws

31.(1) Subject to the provisions of this Order, it shall: be lawful for Parliament, to make laws for the peace, order and good government of Ghana.

(2) No law shall make persons of any racial community liable to disabilities to which persons of other such communities are not made liable.

(3) Subject to such restrictions as may be imposed for the purposes of preserving public order, morality or health, no law shall deprive any person of his freedom of conscience or the right freely to profess, practise or propagate any religion.

(4) Any laws in contravention of subsection (2) or (3) of this section on 34 of this Order shall to the extent of such contravention, but not otherwise, be void.

(5) The Supreme Court shall have original jurisdiction in all proceedings in which the validity of any law is called in question and if any such question arises in any lower court, the proceedings in that court shall be stayed and the issue transferred to the Supreme Court for decision.

Special procedure for passing Bills relating to the Constitution and other important matters

32.(1) No Bill for the amendment, modification, repeal or re-enactment of the constitutional provisions of Ghana (other than a Bill to which section 33 of this Order applies) and no Bill to which paragraph (b) of subsection (2) of this section applies shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof at the third reading in the Assembly amounted to not less than two, thirds of the whole number of Members of Parliament. For the purposes of this subsection, the expression "constitutional provisions" means this Order, the existing Orders and any Act (or instrument made under an Act) that amends, modifies, re-enacts (with or without any amendment or modification) or makes different provision in lieu of any provision of this Order, the existing Orders or any such Act (or instrument) previously made.

(2) Without prejudice to the provisions of subsection (1) of this section, no Bill for

(a) the enactment, modification, repeal or re-enactment (with or without any amendment or modification) of any of the provisions of this Order specified in the Third Schedule to this Order; or

(b) abolishing or suspending any Regional Assembly or diminishing the functions or powers of any Regional Assembly, shall be presented for the Royal Assent unless it has endorsed on it a certificate (in addition to the certificate required under subsection (1) of this section) under the hand of the Speaker that the Bill has been referred to all the Regional Assemblies and, in the case of a Bill to which paragraph (a) of this section applies, to all Houses of Chiefs in accordance with the provisions of subsection (3) of this section and has been approved by not less than two-thirds of the total number of the Regional Assemblies (including, in the case of a Bill to which paragraph (b) of this subsection applies, any Regional Assembly affected by the Bill) and, if amendments have been made to the Bill by the National Assembly since it was so approved by the Regional Assemblies, that such amendments have been made and are not, in the Speaker's opinion, amendments of substance.

(3) Any Bill to which the provisions of subsection (2) of this section apply, shall, on report after the committee stage in the National Assembly be referred by the Speaker to each Regional Assembly and, in the case of a Bill, to which paragraph (a) of that subsection applies, to each House of Chiefs and thereupon the following provisions shall have effect with regard to the procedure to be observed:

(a) in the case of a Bill to which paragraph (a) of subsection (2) of this section applies such Bill shall not be considered by a Regional

Assembly less than one month from the date of the reference by the Speaker. Within such period the House of Chiefs of Region may communicate their views on the Bill to the Regional Assembly. Any such views of the House of Chiefs shall be into consideration by the Regional Assembly when reaching decision on the Bill.

(b) subject to paragraphs (c) and (d) of this subsection, a Bill shall not be deemed to be approved by a Regional. Assembly for purposes of subsection (2) of this section unless a resolution expressing approval of the Bill is passed by a majority of members of the Regional Assembly present and voting at a meeting duly convened for the purpose and a certificate to that effect and, in the case of a Bill to which paragraph (a) of subsection (2) this section applies, to the effect that paragraph (a) of this subsection has been complied with, under the hand of the person presiding at that meeting is transmitted to the Speaker.

(c) If within a period of three months of a Bill being referred by the Speaker to any Regional Assembly in pursuance of the provisions of this section, the Speaker is not informed whether such Bill has been duly approved or otherwise by such Assembly, the Bill shall nevertheless be deemed, for the purposes of subsection (2) hereof, to have been approved by that Assembly.

(d) Where a Bill to which paragraph (b) of subsection (2) of this, section applies is not approved by a Regional Assembly. affected, by the Bill, the Governor-General may, by notice in the Gazette, order that the Bill be submitted to the registered electors of the Region by referendum in the prescribed manner and, if in any such referendum a majority

of those voting are in favour of the Bill, it shall for the purposes of subsection (2) of this section be deemed to have been approved by the Regional Assembly of that Region. The Governor-General shall make regulations prescribing the manner in which a referendum shall be held in pursuance of this paragraph and, in particular, shall make such regulations as will ensure the secrecy of the ballot and that the issues on which the electors are invited to vote are clearly expressed.

(4) Every certificate of the Speaker under subsection (1) or (2) of this section or of a person presiding over a Regional Assembly under paragraph (b) of subsection (3) of this section shall be conclusive for all purposes and shall not be questioned in any court of law.

Alteration of Regional boundaries and names of Regions

33.(1) No Bill for effecting any alteration in the boundaries of a Region which seeks to transfer an area or areas containing less than ten thousand registered electors, other than a Bill which creates anew Region, shall be introduced in the Assembly unless the alteration to which the Bill seeks to give effect has been approved by a majority of members present and voting at a meeting of the Regional Assembly of every Region whose boundaries will be affected.

(2) No Bill for effecting any alteration in the boundaries of a Region which seeks to transfer an area or areas containing: not less than ten thousand registered electors shall be introduced in the Assembly unless the alteration to which the Bill seeks to give effect has been approved by referendum in every Region from which it is proposed to transfer any area and by a majority of members present and voting at a meeting of the Regional Assembly of any Region in which it is proposed to incorporate any part of the area transferred.

(3) No Bill for effecting any alteration in the boundaries of a Region which involves the creation of a new Region shall be introduced in the Assembly unless the alteration to which the Bill seeks to give effect has been approved by referendum in every Region whose boundaries Will be affected and thereafter by a majority of members present and voting at meetings of the Regional Assemblies or Interim Regional Assemblies of such number of Regions as with the Region or Regions in which a referendum has been held will amount to not less than two-thirds of the total number of Regions.

(4) No Bill for effecting the purposes mentioned in subsection (1), (2) or (3) of this section shall be introduced in the National Assembly unless it contains such provisions in accordance with section 70 of this Order as may be necessary for the delimitation of new electoral districts or the adjustment of existing electoral districts, consequent upon the other alterations which the Bill seeks to effect.

(5) Any proposal for an alteration in the boundaries of a Region, which is required by subsection (2) or (3) of this section to be approved by referendum shall be submitted in

the prescribed manner to the electors qualified to vote for the election of Members of Parliament in the area concerned and if a majority of those voting are in favour of the proposal, it shall be deemed to be approved by referendum for the purposes of this section. The Governor-General shall make regulations prescribing the manner in which a referendum shall be held in pursuance of this section and, in particular, shall make such regulations as will ensure the secrecy of the ballot and that the issues on which the electors are invited to vote are clearly expressed.

(6) Where a proposal has received approval in accordance with the provisions of subsection (1), (2) or (3) of this section, a Bill seeking to give effect to such proposal shall not be introduced and read a first time in the National Assembly, unless a clause is inserted in the Bill reciting that the requirements of subsection (1), (2) or (3) of this section, as the case may be, have been complied with.

(7) The provisions of section 32 of this Order shall not apply to any Bill by reason only that it provides for the alteration of the name of any Region or to any amendment, modification, repeal or re-enactment of the definition of "Ashanti", "the Northern Territories", "Togoland" or "Region" or (the provisions of section 63 of this Order which may be contained in any such Bill as is referred to in the preceding subsections of this section and which is a necessary consequence of the alteration of boundaries sought to be effected by that Bill.

Compulsory acquisition of property

34.(1) No property, movable or immovable, shall be taken possession of or acquired compulsorily except by or under the provisions of a law which, of itself or when read with any other law in force in Ghana

(a) requires the payment of adequate compensation therefor;

(b) gives to any person claiming such compensation a right of access, for the determination of his rights (if any), including the amount of compensation, to the Supreme Court of Ghana;

(c) gives to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court original jurisdiction.

(2)(a) Nothing in this section shall affect the operation of an existing law.

(b) In this subsection the expression "existing law" means a law in force in Ghana prior to the date of commencement of this sect and includes a law made after that date which amends or replaces any such law as aforesaid (or such a law as from time to time amended or replaced in the manner described in this paragraph) and which does not,

(i) add to the kinds of property which may be taken possession of or acquired; or

(ii) add to the purposes for which or circumstances in which such property may be taken possession of or acquired; or

(iii) make the conditions governing entitlement to any compensation or the amount thereof less favourable to any person owning, or interested in the property; or

(iv) deprive any person of any right such as is mentioned in paragraph (b) or paragraph (c) of subsection (1) of this section.

(3) It is hereby declared that nothing in this section shall be construed as affecting any general law

(a) for the imposition or enforcement of any tax, rate or due; or

(b) for the imposition of penalties or forfeitures for breach of the law whether under civil process or after conviction of an offence; or

(c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts; or

(d) relating to the vesting and administration of the property of persons -adjudged bankrupt or otherwise declared insolvent, of persons of unsound mind, of deceased persons, and of companies, other corporate bodies and unincorporated societies in the course of being wound up; or

(e) relating to execution of judgments or orders of Court's; or,

(f) providing for the taking of possession of property which is in a dangerous state or is injurious to the health of human beings, plants or animals; or

(g) relating to enemy property; or

(h) relating to trusts and trustees; or

(i) relating to the limitation of actions; or

(j) relating to property vested in statutory corporations; or

(k) relating to the temporary taking of possession of property for the purposes of any examination, investigation or inquiry; or

(l) providing for the carrying out of work on land for the purpose of soil conservation.

(4) The provisions of this section shall apply to the compulsory taking of possession or acquisition of property, movable or immovable, by or on behalf of the Crown.

Bills affecting Chiefs

35. When any Bill affecting the traditional functions or privileges of a Chief is introduced into the Assembly and is read a first time, the Speaker shall forthwith refer such Bill to the House of Chiefs of the Region in which the Chief exercises his functions as such and no motion shall be moved for the second reading of the Bill in the Assembly until three months after the day on which the Bill was introduced into the Assembly.

Standing Orders

36. Subject to the provisions of this Order, the Assembly may from time to time make, amend and revoke Standing Orders for the regulation and orderly conduct of its own proceedings and the despatch of business, and for the passing, intituling and numbering of Bills, and for the presentation thereof to the Governor-General for assent.

Presiding in the Assembly

37. The Speaker, or in his absence the Deputy Speaker, or in their absence a Member of Parliament (not being a Minister or Parliamentary Secretary) elected by the Assembly for the sitting, shall preside at the sittings of the Assembly.

The Assembly may transact business notwithstanding vacancies

38. The Assembly shall not be disqualified for the transaction of business by reason of any vacancy among the Members of Parliament including any vacancy not filled at a General Election; and any proceedings therein shall be valid notwithstanding that some person who was not entitled so to do sat or voted in the Assembly or otherwise took part in the proceedings.

Quorum

39. No business except that of adjournment shall be transacted in the Assembly if objection is taken by any Member present that there are less than twenty-five Members present besides the Speaker or Member presiding.

Voting

40.(1) Save as otherwise provided in this Order, all questions proposed for decision in the Assembly shall be determined by a majority of the votes of the Members present and voting; and if, upon any question before the Assembly, the votes of the Members shall be equally divided the motion shall be lost.

(2)(a) The Speaker shall have neither an original nor a casting vote; and

(b) any other person, including the Deputy Speaker, shall when presiding in the Assembly, have an original vote but no casting vote.

Introduction of Bills

41.(1) Save as is provided in subsection (2) of this section, and subject to the provisions of this Order and of the Standing Orders of the Assembly, any Member may introduce any Bill, or propose any motion for debate in, or may present any petition to, the Assembly and the same shall be debated and disposed of according to the Standing Orders of the Assembly.

(2) Except with the recommendation or consent of the Governor General signified thereto, the Assembly shall not proceed upon any Bill, motion or petition which, in the opinion of the Speaker or Member presiding, would dispose of or charge the Consolidated Fund or other public funds of Ghana, or revoke or alter any disposition thereof or charge thereon, or impose, alter or repeal any rate, tax or duty.

Assent to Bills

42.(1) No Bill shall become a law until Her Majesty has given Her assent thereto.

(2) When a Bill has been passed by the Assembly it shall be presented to the Governor-General who may assent thereto in Her Majesty's name or refuse such assent.

(3) A law assented to by Her Majesty as herein provided shall be known as an Act of Parliament and shall come into operation on the date of its publication in the Gazette, or, if it shall be enacted, either in such law or in some other law (including any law in force on the appointed day) that it shall come into operation on some other date, on that date.

Words of enactment

43. In every Bill presented to the Governor-General, the words of enactment shall be as follows:

"Be it enacted by the Queen's Most Excellent Majesty; by and with the advice and consent of the National Assembly of Ghana in this present Parliament assembled, and by the authority of the same as follows – ".

Oath of Allegiance

44. Except for the purpose of enabling this section to be complied with, no Member of Parliament shall sit or vote in the Assembly until he shall have taken and subscribed

before the Assembly the Oath of Allegiance or have made before the Assembly the appropriate affirmation in lieu thereof as provided in the Oaths Ordinance or any law repealing and re-enacting, with or without modification, or amending, the provisions of that Ordinance

Provided that if, between the time when a person becomes a Member of Parliament and the time when the Assembly next meets thereafter, a meeting takes place of any Committee of the Assembly of which such person is a member, such person may, in order to enable him to attend the meeting, and take part in the proceedings, of the Committee, take and subscribe the said oath or make the appropriate affirmation before a Judge of the Supreme Court of Ghana; and the taking and subscribing of the oath, or the making of the appropriate affirmation, as the case may be, in such manner shall suffice for all purposes of this section. In any such case the Judge shall forthwith report to the Assembly through the Speaker or, as occasion may require, through the Deputy Speaker that the person in question has taken and subscribed the said oath or made the affirmation before him.

Privileges of the Assembly and Members

45. It shall be lawful, by laws enacted under this Order, to determine and regulate the privileges, immunities and powers of the Assembly and its Members; but no such privileges, immunities or powers shall exceed those of the Commons' House of Parliament of the United Kingdom or of the Members thereof.

Sessions of the Assembly

46.(1) There shall be a session of the Assembly once at least in every year, so that a period of twelve months shall not intervene between the last sitting of the Assembly in one session and the first sitting thereof in the next session.

(2) The sessions of the Assembly shall be held in such places and mall commence at such times as the Governor-General may from time to time by Proclamation or notice in the Gazette appoint

Prorogation and dissolution

47.(1) The Governor-General may at any time, by Proclamation bushed m the Gazette, prorogue or dissolve the Assembly.

(2) Notwithstanding that the Assembly may have been prorogued after the introduction of any Bill to which subsection (2) of section 32 of this Order applies, the Assembly may in the next session proceed to of take any remaining stages of any such Bill as if such Bill had been introduced into the Assembly during that session.

(3) The Governor-General shall dissolve the Assembly at the expiration of five years from the date of the first sitting of the Assembly after the last preceding general election, if it shall not have been sooner, dissolved.

(4) If at any time after the dissolution of the Assembly, the Governor General is satisfied that an emergency has arisen of such a nature that an early meeting of the Assembly is necessary, the Governor-General may by Proclamation summon the Assembly which has been dissolved. Notwithstanding any other provisions of this Order, such Assembly shall, for all purposes, be deemed to be the National Assembly for the time being and may meat and. be kept in session until the meeting of the new Assembly.

General Elections

48. There shall be a general election at such time within two months after every dissolution of the Assembly as the Governor-General shall by Proclamation published in the Gazette appoint.

PART VI

The Public Service

Interpretation

49.(1) For the purposes of this part of this Order, the expression "the public service" shall not include service otherwise than in a civil capacity the expression "public office" shall not include an office the remuneration of the holder of which is calculated on a daily rate and which in respect of normal hours of work does not amount annually to a sum exceeding £300 and the expression "public officer" shall be construed accordingly.

(2) For the purposes of this Part of this Order, a person shall not be considered to be a public officer or otherwise to hold office of emolument in the public service by reason of the fact that he is in receipt of a salary or other emoluments or any allowance in respect of his tenure of the office of Governor-General, Acting Governor General, Speaker, Deputy Speaker, Minister, Parliamentary Secretary, Member of Parliament or personal assistant of a Minister or in respect of his employment as a member of the personal staff of the Governor-General or the Prime Minister.

The Public Service Commission

50.(1) There shall be, in and for Ghana, a Public Service Commission which shall consist of persons appointed by the Governor-General, acting on the advice of the Prime Minister. The Governor-General, acting on the advice of the Prime Minister, shall nominate one of the members of the Commission to be the Chairman.

(2) No person shall the appointed as, or shall remain, a member of the Public Service Commission if he is or becomes a Member of Parliament.

(3) Every person who, immediately before his appointment as a member of the Public Service Commission, is a public officer shall; when such appointment takes effect, cease to hold any office of emolument previously held by him in the service of the Crown in right of the Government of Ghana, and shall accordingly cease to be a public officer for the purposes of this Order; and he shall be ineligible for further appointment as a public officer

Provided that any such person shall, until he ceases to be a member of the Public Service Commission or, while continuing to be such a member, attains the age at which he could, if he were a public officer, be required to retire, be deemed to hold a pensionable office in the service of the Crown in right of the Government of Ghana for the purposes of any law relating to the grant of pensions, gratuities or other allowances in respect of such service.

(4) Subject to the provisions of subsection (6) of this section, every person who is appointed to be a member of the Public Service Commission shall, unless he earlier resigns his office or is removed therefrom, hold office for a period of five years from the date of his appointment and shall be eligible for reappointment.

(5) The Governor-General, acting on the advice of the Prime Minister, may for cause assigned remove any member of the Public Service Commission from his office.

(6) The Governor-General, acting on the advice of the Prime Minister, may grant leave from his duties to any member of the Public Service Commission, and may appoint a person qualified to be a member of the Public Service Commission to be a temporary member for the period of such leave.

(7) A member of the Public Service Commission shall be paid such salary as may be determined by the Assembly. The salary payable to any such member shall be charged on the Consolidated Fund and shall not be diminished during his term of office.

Public Officers

51.(1) Subject to the provisions of this Order, the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers is hereby vested in the Governor-General acting on the advice of the Public Service Commission.

(2) Appointments, promotions and transfers to a special post, not being an overseas post, shall be made by the Governor-General acting on the advice of the Prime Minister, after the Prime Minister has consulted with the Public Service Commission.

(3) The appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of the holders of overseas posts is hereby vested in the Governor-General, acting on the advice of the prime Minister.

(4) (a) For the purposes of this section the expression "special post" means the post of Permanent Secretary or of a corresponding or higher grade (other than the post of Attorney-General) in the public service; and the expression "overseas post" means a post, the occupant of which is normally required to reside outside Ghana when on duty and for which the salary is not less than one thousand and eight hundred pounds per annum.

(b) In this section the expression "transfer" means the conferment, whether permanently or otherwise, of some public office other than that to which the officer was last substantively appointed, not being a promotion; but the posting of a public officer to occupy a like office in a different location shall not be regarded for this purpose as the conferment of a different public office.

(5) The power given by subsection (1) of this section to terminate the appointment of, or dismiss, or inflict any other punishment on a public officer shall not be exercised on the grounds of any act done or omitted to be done by that officer in the exercise of a judicial function conferred upon him except with the concurrence of the Judicial Service Commission.

Regulations regarding Public Service Commission

52. The Governor-General, acting on the advice of the Public Service Commission, may make regulations for all or any of the following matters:

(a) the exercise by such Commission of any of its functions;

(b) consultation by such Commission with persons other than members of the Commission;

(c) the appointment, tenure of office and terms of service of staff to assist such Commission in the performance of its functions;

(d) the delegation to any member of such Commission of all or any of the powers or duties of the Commission;

(e) the definition and trial of offences connected with the functions of such Commission and the imposition of penalties for such offences;

Provided that no such penalty shall exceed a fine of one hundred pounds and imprisonment for a term of one year;

(f) the protection and privileges of members of the Commission in respect of the performance of their duties and the privilege of communications to and from the Commission and its members in case of legal proceedings;

(g) the delegation to any authority or to any public officer, acting with or without the advice of the Commission, subject , to such conditions as may be prescribed by regulations; of any of the powers vested in the Governor-General by subsection (1) of section 51 of this Order:

Provided that no powers shall be delegated hereunder to any authority or public officer

(a) to appoint, promote or transfer to,

(i) any public office in the Police Force of a rank or grade higher than that of an Inspector of Police, or,

(ii) any other public office that carries an initial salary exceeding the initial salary of a Higher Executive Officer; or,

(b) to terminate any appointment to or to dismiss from,

(i) any public office in the Police Force of a substantive rank or grade higher than that of an Inspector of Police, or,

(ii) any other public office, held substantively, that carries a salary exceeding the initial salary of a Higher Executive Officer. .

Pensions and gratuities charged on the Consolidated Fund

53. There shall be charged on and paid out of the Consolidated Fund all pensions, gratuities and other like allowances granted in respect of public service.

PART VII
The Judicature

Judges of the Supreme Court

54.(1) The Chief Justice of the Supreme Court of Ghana shall be appointed by the Governor-General, acting on the advice of the Prime Minister: Puisne Judges of the Supreme Court shall be appointed by the Governor-General, acting on the advice of the Judicial Service Commission.

(2) Upon provision being made by any law for the appointment to the Supreme Court of one or more Justices of Appeal such Justices shall be appointed by the Governor-General, acting on the advice of the Prime Minister, after the Prime Minister has consulted with the Chief Justice. References in this Order to Judges of the Supreme Court shall be deemed to include references to Justices of Appeal except in subsections (1) and (5) of this section.

(3) A Judge of the Supreme Court shall not be removable except by the Governor-General on an address of the Assembly carried by not less than two-thirds of the Members thereof, praying for his removal from office on the ground of stated misbehaviour or of infirmity of body or mind.

(4) The Chief Justice or a Justice of Appeal shall retire when he attains the age of sixty-five years

Provided that:

(i) the Governor-General may permit the Chief Justice or a Justice of Appeal who has reached the age of sixty-five years to continue in office for a further specified period, subject to continued mental and physical fitness; and

(ii) nothing done by the Chief Justice or a Justice of Appeal shall be deemed to be invalid by reason only that he has attained the age at which he is required by this subsection to retire.

(5) A Puisne Judge of the Supreme Court shall retire when he attains the age of sixty-two years

Provided that:

(i) the Governor-General may permit a Judge of the Supreme court who has reached the age of sixty-two years to continue in office for a further specified period, subject to continued mental and physical fitness; and

(ii) nothing done by a Judge in the exercise of his office shall be deemed to be invalid by reason only that he has attained the age at which he is required by this subsection to retire.

(6) Any Judge of the Supreme Court may resign his office by writing under his hand addressed to the Governor-General.

(7) The salaries of Judges of the Supreme Court shall be determined by the Assembly and shall be charged on the Consolidated Fund and shall not be diminished during their terms of office.

The Judicial Service Commission

55. (1) There shall be a Judicial Service Commission which shall consist of

(a) the Chief Justice;
(b) the Attorney-General ;

(c) the senior Puisne Judge;
(d) the Chairman of the Public Service Commission;
(e) a person who is, or shall have been, a Judge of the Supreme Court, appointed by the Governor-General, acting on the advice of the Prime Minister:

Provided that, upon provision being made by law for the appointment to the Supreme Court of one or more Justices of Appeal, paragraph (c) of this subsection shall thereupon be revoked and replaced by the following paragraph

"(c) the Justice of Appeal or if there is more than one, the senior Justice of Appeal;".

(2) In subsection (1) of this section, the expression "senior" means senior according to the date of substantive appointment, or, if in any case two persons were appointed substantively on the same date, according to age.

(3) The Governor-General, acting on the advice of the Judicial Service Commission, may make regulations for all or any of the following matters:

(a) the exercise by the Judicial Service Commission of any of its functions;

(b) consultation by such Commission with persons other than members of the Commission;

(c) the appointment, tenure of office and terms of service of staff other than the secretary to assist such Commission in the performance of its functions;

(d) the delegation to any member of such Commission of all or any of the powers or duties of the Commission other than the powers conferred and the duties imposed by subsection (l) of section 54 and subsection (1) of section 56 of this Order;

(e) the definition and trial of offences connected with the functions of such Commission and the imposition of penalties for such offences provided that no such penalty shall exceed a fine of one hundred pounds and imprisonment for a term of one year;

(f) the protection and privileges of members of the Commission in respect of the performance of their duties and the privilege of communications to and from the Commission and its members in a case of legal proceedings.

(4) The Governor-General, acting on the advice of the Judicial Service Commission, may appoint a secretary to the Judicial Service Commission.

Appointment to other judicial office

56.(1) The appointment, promotion, transfer, termination of appointment, dismissal and disciplinary control of judicial officers is hereby vested in the Governor-General, acting on the advice of the Judicial Service Commission.

(2) Any judicial officer may resign his office by writing under his hand addressed to the Governor-General.

(3) In subsection (1) of this section, the expression "transfer" means the conferment, whether permanently or otherwise of some judicial office, other than that to which the officer was last substantively appointed, not being a promotion; but the posting of a judicial officer to occupy a like office in a different location shall not be regarded for this purpose as the conferment of a different judicial office.

Judges' pensions charged on the Consolidated Fund

57. There shall be charged on and paid out of the Consolidated Fund, all pensions, gratuities and other like allowances granted in respect of public service as a Judge (including the Chief Justice) of the Supreme Court.

PART VIII
Finance

The Consolidated Fund

58. The funds of Ghana not allocated by law to specific purposes shall form one Consolidated Fund into which shall be paid the produce of all taxes, imposts, rates and duties and all other revenues of Ghana not allocated to specific purposes.

Authorisation of expenditure

59. (1) The Minister responsible for finance shall cause to be prepared annually estimates of revenue and expenditure for public services during the succeeding financial year which, when approved by the Cabinet, shall be laid before the Assembly.

(2) The proposals for all expenditure contained in the estimates (other than statutory expenditure) shall be submitted to the vote of the Assembly by means of an Appropriation Bill, which shall contain estimates under appropriate heads for the several services required.

(3) Whenever

(a) any expenditure is incurred or is likely to be incurred in any financial year upon any service which is in excess of the sum provided for that service by the Appropriation law relating to that year, or

(b) any expenditure (other than statutory expenditure) is incurred or is likely to be incurred in any financial year upon any new service not provided for by the Appropriation law relating to that year,

a Supplementary Appropriation Bill, which shall contain that expenditure under appropriate heads, shall be introduced in the Assembly.

(4) Statutory expenditure, which shall not be submitted to the vote of the Assembly for the purposes of this section means

(a) the expenditure charged on the Consolidated Fund by virtue of the provisions of section 5, subsection (7) of section 50, section 53, subsection (7) of section 54, section 57, subsection (4) of section 61, section 75 and subsection (2) of section 77 of this Order.

(b) the interest on the public debt, sinking fund payments and the costs, charges and expenses incidental to the management of the public debt (which is hereby also charged upon the Consolidated Fund and other public funds and assets of Ghana), and,

(c) such other expenditure as may by law be charged upon the Consolidated Fund or the general revenue and assets of Ghana and in such law be expressly stated to be statutory expenditure.

(5) The Assembly may approve or refuse its approval to any head of estimates or expenditure contained in an Appropriation or Supplementary Appropriation Bill but may not vote an increased amount, a, reduced amount or an alteration in its destination.

Meeting expenditure from the Consolidated Fund

60.(1) No expenditure shall be met from the Consolidated Fund or other public funds except upon the authority of a warrant under the hand of the Minister responsible for finance.

(2) Subject to the provisions of subsection (3) of this section, no such warrant shall be issued unless such expenditure has been authorised, for specified public services for the financial year to which the warrant relates by resolution of the Assembly or of a Committee thereof appointed for that purpose by the Assembly or by any law.

(3) If an Appropriation Bill has not become a law by the first day of the year to which it relates, the Minister responsible for finance may, with the prior approval of the Cabinet, unless the Assembly shall already have made provision therefor, authorise the meeting of such expenditure from the Consolidated Fund or other public funds as he may consider essential for the continuance of the public services shown in the estimates until the Appropriation Bill becomes law

Provided that the expenditure so authorised for any service shall not exceed one quarter of the amount voted for -that service in the Appropriation law for the preceding year.

The Auditor-General

61.(1) There shall be an Auditor-General who shall be appointed by the Governor-General, acting on the advice of the Prime Minister, and who shall not be removable except by the Governor-General on an address of the Assembly carried by not less than two-thirds of t Members thereof, praying for his removal on the ground of stated misbehaviour or of infirmity of body or mind.

(2) The maximum age for the retirement of the Auditor-General shall be fifty-five years or such higher age as may be prescribed by Act of Parliament.

(3) The Auditor-General may resign his office by writing under the hand addressed to the Governor-General.

(4) The salary of the Auditor-General shall be determined by the Assembly, shall be charged on the Consolidated Fund and shall not A be diminished during his term of office.

Audit of Accounts

62.(1) The accounts of all departments and offices of Government, including the offices of the Clerk to the Assembly, the Secretary to the Cabinet, the Public Service Commission and the Judicial Service Commission, and of the Supreme Court, shall be audited by the Auditor-General who, with his deputies, shall at all times be entitled to have access to all books, records, or returns relating to such accounts.

(2) The Auditor-General shall report annually to the Assembly on the exercise of his functions under this Order.

PART IX
Regional Organisation, Local Government and Chiefs

Regions and Heads of Regions

63.(1) The whole of Ghana shall be divided into the following Regions:

(a) the Eastern Region, which shall comprise those parts of Ghana which on the first day of January, 1957, were comprised the Eastern and Accra Regions of the Gold Coast;

(b) the Western Region, which shall comprise that part of Ghana which on the first day of January, 1957, was comprised in the Western Region of the Gold Coast;

(c) the Ashanti Region which shall comprise the whole of Ashanti;

(d) the Northern Region, which shall comprise the whole of.'the Northern Territories and Northern Togoland ;

(e) the Trans-Volta/Togoland Region, which shall comprise that part of Ghana which on the first day of January, 1957, was comprised in the Trans-Volta/Togoland Region of the Gold Coast.

(2) In each Region there shall be a Head of the Region, who, except in the case of the Ashanti Region, shall be chosen by the House of Chiefs of the Region and shall hold office for such period as may be prescribed by Act of Parliament. The Asantehene shall be the Head of the Ashanti Region.

Regional Assemblies

64.(1) For the purpose of fulfilling the need for a body: at regional level with effective powers in specified fields, a Regional Assembly shall be established by Act of Parliament in and for each Region.

(2) A Regional Assembly shall have ana exercise authority and powers to such extent as may be prescribed by Act of Parliament relating to

(a) Local Government;
(b) Agriculture, Animal Health and Forestry;
(c) Education;
(d) Communications;
(e) Medical and Health services;
(f) Public Works;
(g) Town and Country Planning;
(h) Housing;
(i) Police; and
(j) such other matters as Parliament may from time to time determine.

(3) Provision shall be made by legislation under this section for the simultaneous dissolution of all Regional Assemblies at the expiration of stated periods which shall not exceed three years and for new Assemblies to be brought into being in the manner prescribed by law; and to meet within three months of such dissolution

Provided that power shall be conferred on the Governor-General to extend the life of the Regional Assemblies by Proclamation for a period not exceeding three months if it is in the public interest to do so.

Membership of local government councils

65.(1) No member of a local government council shall, without prejudice to his re-election or re-appointment, hold office for more than four years provided that any member of a local government council whose tenure of office was, prior to the appointed day, extended, beyond a term of three years, may, without prejudice to his re-election or reappointment, continue in office for not more than one year after the appointed day.

(2) For the purposes of this section, "local government council" means a local government council established by any law for the time being in force relating to local government and until other provision is made, includes a Municipal Council established under the Municipal Councils Ordinance, 1953(a), a District Council, an Urban Council or a Local Council established under the Local Government Ordinance (b).

Chiefs

66. The office of Chief in Ghana, as existing by customary law and usage, is hereby guaranteed.

Houses of Chiefs

67. (1) Within twelve months of the appointed day or as soon thereafter as may be practicable, a House of Chiefs shall be established by Act of Parliament in and for each Region.

(2) A House of Chiefs shall have power to consider any matter referred to it by a Minister or the Assembly.

(3) A House of Chiefs may at any time offer advice to any Minister.

* * *
FOOTNOTES:

(a) Laws of the Gold Coast, 1952-54, Sup. Rev. Ed., Vol. 11, p. 1.
(b) Laws of the Gold Coast, Rev. 1951, Chapter 64,

* * *

(4) A House of Chiefs at any time, may, and where the Governor General or the Assembly so requests, shall submit to the Gover General or the Speaker, as the case may be, a written declaration of what in its opinion is the customary law relating to any subject, force in any part of the area of its authority.

Determination of matters of a constitutional nature

68.(1) On the establishment of a House of Chiefs in and for any Region other than the Ashanti Region, provision shall be made by Act of Parliament for the determination by a

State Council of all matters, of a constitutional nature arising within the area of its authority involving a Chief (whether Paramount or subordinate) and for an appeal from any decision of a State Council to the appropriate House of Chiefs, which shall refer all such appeals within a period to be prescribed to an Appeal Commissioner whose decision, subject to any clarification which may be required by the House of Chiefs, shall be final.

(2) On the establishment of a House of Chiefs in and for the Ashanti Region, provision shall be made by Act of Parliament

(a) for the determination by a committee of the House of Chiefs of all matters of a constitutional nature arising within the Region involving a Paramount Chief and for an appeal from any decision of such committee to the Head of the Region who shall refer all such appeals within a period to be prescribed to an Appeal Commissioner whose decision, subject to any clarification which may be required by the Head of the Region, shall be final; and

(b) for the determination of all matters of a constitutional nature arising within the Region involving a subordinate chief in accordance with the provisions of subsection (1) of this section.

(3) Provision shall be made in every such Act of Parliament enabling an Appeal Commissioner to sit with or without assessors as he may think fit and to call upon any person to give him advice on local laws and customs and for every decision of an Appeal Commissioner, after clarification if required, to be forwarded by the House of Chiefs or the Head of the Region, as the case may be, within two months of the date of the decision of the Appeal Commissioner, to the appropriate Minister far publication in the Gazette.

(4) Appeal Commissioners shall be appointed by the Judicial Service Commission and shall be public officers.

(5) For the purposes of this section, "matter of a constitutional nature" means a cause, matter, question or dispute relating to

(a) the nomination, election or installation of any person as a Chief or the claim of any person to be elected or installed as a chief or

(b) the tenure of office, deposition or abdication of any Chief; or

(c) the right of any person to take part in the election or installation " of any person as a Chief or in the deposition of any Chief; or

(d) the recovery or delivery of Stool property or Skin property in connection with any such election, installation, deposition or abdication; or

(e) political or constitutional relations under customary law between Chiefs.

6) For the purposes of subsection (5) of this section –

(a) "Skin property" includes the Skin or Stool itself and all the insignia, and such other properties including land as were handed, over or declared as Skin or Stool property to a Chief on his installation, and property (other than private property) acquired, or made and enjoyed, by such Chief or his Skin or Stool during his occupancy of the Skin or the Stool;

(b) "Stool property" includes the Stool itself and all the insignia, and such other properties including land as were handed over or declared as Stool property to a Chief on his installation, and property (other than private property) during or made and enjoyed, by such Chief or his Stool during his occupancy of the Stool.

PART X

Elections and the Delimitation of Electoral Districts Voting at elections for Members o f Parliament

69.(1) Voting for the election of Members of Parliament shall be by secret ballot on the basis of adult suffrage.

(2) Every citizen of Ghana, without distinction of religion, race or sex, who –

(a) is not less than twenty-one years of age; and

(b) is subject to no legal incapacity as defined by Act of Parliament on the grounds of non-residence, unsoundness of mind, crime, or corrupt or illegal practices or non-payment of rates or taxes; and

(c) either owns immovable property within, or-has, for a period of not less than six months out of the twelve months preceding the date of an application to be registered, resided within, the electoral district in respect of which application is made,

shall be entitled to be registered as an elector for the election of Members of Parliament.

Electoral Districts

70.(1) For the purposes of the election of Members of Parliament, each Region of Ghana shall be divided into areas, which shall be known as electoral districts. The total number of electoral districts shall not be less than one hundred and four or more than one hundred and thirty. Electoral districts shall be so delimited that the number of persons resident In each such district at the time of delimitation is, as nearly as practical considerations admit, the same, but, in dividing any Region into electoral districts, regard shall be had to the physical features of the Region and its transport facilities and no electoral district

shall be partly in one Region and partly in another Region. Each electoral district shall return one Member to Parliament.

(2) Until other provision is made in pursuance of section 33 or 71 of this Order, the number of electoral districts in the whole of Ghana shall be one hundred and four and the allocation of electoral districts between the various parts of Ghana shall remain as it was immediately before the appointed day.

Delimitation Commissions

71.(1) Within two years of the taking of each general census in Ghana, the Governor-General shall, in the manner prescribed in subsection (5) of this section, appoint a body to be known as the General Electoral Delimitation Commission (in this section referred to as the "General Commission") which shall review the delimitation of the electoral districts existing at the time of its appointment and shall submit a report to the Governor-General regarding the number of persons then residing in each electoral district together with recommendations as the Commission deems necessary for a fresh delimitation of electoral districts in accordance with the provisions of section 70 of this Order.

(2) In addition, the Governor-General may, in the manner prescribed in subsection (5) of this section, appoint for any specified area in Ghana, a body to be known as an Area Delimitation Committee (in this section referred to as an "Area Committee") which, in the area for which it is appointed, shall carry out such duties as may be assign to it by the General Commission for the purpose of assisting the General Commission in the preparation of its report and the formulation of its recommendations.

(3) If, after the taking of a general census, a period of fourteen years shall elapse without the taking of a further general census, the Governor-General shall forthwith appoint a General Electoral Delimitation Commission and thereupon the other provisions of this section shall apply as if that Commission had been appointed after the taking of a general census. For the purposes of the first appointment of a General Commission after the appointed day in pursuance of this subsection, the last general census in Ghana shall be deemed to have been taken on the 8th day of February, 1948.

(4) If, at any time before the appointment of the first General Commission or during the period between the appointment of one General Commission and the appointment of the next General Commission under subsection (1) or (3) of this section, it shall be made to appear to the Governor-General that the number of persons resident in an electoral district in any Region is greatly in excess of the average number of persons resident in all the other electoral district then existing in Ghana, the Governor-General shall, in the manner prescribed in subsection (5) of this section, appoint a body to be known as an Interim Electoral Delimitation Commission (in this section referred to as an "Interim Commission") to enquire into the matter. If such Interim Commission is satisfied that the number of persons resident in such electoral district is, on the basis of the best available information, in excess of one hundred and seventy per centum of the average number of

persons resident in each of all other electoral districts, the Interim Commission shall submit a report to the Governor-General together with a recommendation for the division of the said electoral district into two electoral districts. If the creation of two electoral districts in this manner would increase the total number of such districts beyond' the maximum prescribed in subsection (1) of section 70 of this Order, the Interim Commission shall instead recommend a fresh delimitation of some or all of the electoral districts in the Region, as nearly as may be in accordance with the requirements of section 70 hereof.

(5) Each General Commission, Area Committee or Interim Commission shall consist of three persons appointed by the Governor-General who shall select persons who he is satisfied are not actively engaged in politics. In each case, the Governor-General may appoint one of such persons to be Chairman.

(6) If any member of a General Commission, Area Committee or Interim Commission shall die or resign or, if the Governor-General satisfied that any such member has become incapable of discharging his functions as such, the Governor-General shall, in accordance with the provisions of subsection (5) of this section, appoint another person place.

(7) On receipt of , any such reports and recommendations as are referred to in subsections (1) and (4) of this section, the Governor-General shall forthwith cause the same to be published in the Gazette and, within a period of three months from the date of such publication, objections may be submitted to the Commission making the report and recommendations. Such Commission shall hear any such objections in public and as soon as may be after the expiration of the period of three months shall either confirm to the Governor-General its previous report and recommendations or submit to him a revised report and fresh recommendations.

(8) Upon the receipt of such confirmation or fresh recommendations from the Commission, the Governor-General shall forthwith, by proclamation published in the Gazette, delimit any electoral districts in accordance with the recommendations of the Commission with effect from the next dissolution of the Assembly. The appointment of the Commission which made the recommendations shall be deemed to be terminated upon the publication of such proclamation, without prejudice, however, to the re-appointment of any members to other Commissions or Committees in pursuance of this section.

(9) In the event of a difference of opinion among the members of any General or interim Commission, the opinion of the majority of the members shall prevail and where each member of a Commission is of a different opinion, the recommendations of the Chairman shall be deemed to be the recommendations of the Commission.

(10) The Governor-General may from time to time make regulations for the conduct of the business of every or any Commission or Committee, the lodging and hearing of

objections and in regard to any other matter for the better carrying out of the provisions of this section.

PART XI

Transitional Provisions

Tenure of office of Ministers and Secretaries to continue

72.(1) Any person appointed as a Minister under the provisions of the existing Orders and holding office immediately prior to the appointed day shall be deemed to have been duly appointed thereto in pursuance of this Order.

(2) Any person appointed as a Ministerial Secretary under the provisions of the existing Orders and holding office immediately prior to the appointed day shall be deemed to have been duly appointed as a Parliamentary Secretary in pursuance of this Order.

First National Assembly

73.(1) The Legislative Assembly constituted under the existing Orders and in being immediately prior to the appointed day shall continue in being thereafter as the first National Assembly of Ghana within the meaning of subsection (2) of section 20 of this Order and the Members of such Legislative Assembly and the Speaker thereof in office immediately prior to the appointed day shall be deemed to have been duly elected in pursuance of thus Order.

(2) The first session of the said first National Assembly shall commence within three months of the appointed day.

(3) Notwithstanding any other provisions of this Order, the date of the first sitting of the said first National Assembly shall for the purposes only of subsection (3) of section 47 of this Order be deemed to be the thirtieth day of July, 1956.

(4) The Standing Orders of the Legislative Assembly constituted under the existing Orders and in force immediately prior to the appointed day, shall, subject to the other provisions of this Order, deemed to be the Standing Orders of the first National Assembly and may be amended or revoked in pursuance of section 36 of this Order.

(5) Notwithstanding that the Legislative Assembly may have been prorogued immediately prior to the appointed day, the first National Assembly may, in its first session held in pursuance of this section, proceed to take any remaining stages of any Bill introduced into the Legislative Assembly prior to the appointed day as if such Bill had been introduced into the National Assembly during its first session.

(6) The person holding the office of Clerk to the Legislative Assembly and the persons on the staff of the Legislative Assembly immediately prior to the appointed day, shall on that day be deemed to have been appointed respectively as Clerk of the National Assembly and as members of his staff under section 30 of this Order.

Tenure of office of certain persons to continue

74.(1) Save as otherwise provided by this Order, any person appointed to any office under the provisions of the existing Orders and holding that office immediately prior to the appointed day shall be deemed to have been duly appointed thereto in pursuance of this Order.

(2) The persons to whom the provisions of this section apply shall be deemed to have complied with the requirements of any law for the, time being in force relating to the taking of oaths on appointment to any office.

Compensation, etc., under existing Orders

75. All compensation, pensions, gratuities and other like allowances granted in accordance with the provisions of section 58 and the Fourth Schedule of the Gold Coast (Constitution) Order in Council, 1954 shall be charged on and paid out of the Consolidated Fund.

The Supreme Court

76.(1) On and after the appointed day, the Supreme Court of the Gold Coast shall be known as the Supreme Court of Ghana and such Court shall, subject to any law for the time being in force, continue to have throughout Ghana the same jurisdiction and powers as heretofore.

(2) Until a Seal of the Supreme Court of Ghana has been provided and brought into use, any instrument which, on or after the appointed day, is sealed with the Seal of the Supreme Court of the Gold Coast and the duplicates thereof in use immediately prior to the appointed day shall be deemed for all purposes to be lawfully sealed.

(3) The Chief Justice and other Judges of the Supreme Court appointed to office prior to the appointed day and in office on that date shall, subject to the provisions of section 77 of this Order, be deemed to have been duly appointed to the Supreme Court of Ghana and to have taken the necessary oaths and all such Judges shall be subject to all the provisions of section 54 of this Order, including subsection (3) thereof.

Application of Second Schedule to certain Judges

77.(1) The provisions contained in the Second Schedule to this Order shall apply to the Judges (including the Chief Justice) referred to in the said Schedule in respect of their

retirement from office and the grant to them of compensation, pensions, gratuities and other like allowances.

(2) All compensation, pensions, gratuities and other like allowances granted in accordance with the provisions of subsection (1) of this section and the Second Schedule shall be charged on and paid out of the Consolidated Fund.

(3) This section and the Second Schedule shall come into operation on the day after the day on which this Order shall have been laid before both Houses of Parliament in the United Kingdom.

Judicial officers to continue in office

78. Subject to the provisions of section 58 of the Gold Coast (Constitution) Order in Council, 1954, every judicial officer appointed to office prior to the appointed day and in office on that date, shall be deemed to have been duty appointed thereto and to have taken the necessary oaths and all such judicial officers shall be subject to all the provisions of section 56 of this Order.

Adaptations of existing laws

79. In any law (other than this Order) in force in Ghana on the appointed day the following provisions shall, subject to this Order and unless the context otherwise requires, have effect until other provision is made by a law enacted in pursuance of this Order, that is to say –

(a) every reference to "the Govern or the Secretary of State" or "a Secretary of State" shall be read and construed as a reference to "the Governor-General";

(b) every reference to "the Gold Coast" and to "the Gold Coast Colony" shall be read and construed as a reference to "Ghana" and to "Southern Ghana" respectively;

(c) every reference to the "Legislative Assembly" shall be read and construed as a reference to the "National Assembly"; and

(d) any provision in any such law that the Governor shall exercise a function in his discretion or after consultation with or on the recommendation of any person or authority, shall be read and construed as requiring the Governor-General to exercise such function in accordance with the provisions of subsection (2) of section 4 of this Order.

Laws previously enacted but not brought into operation before the appointed day

80. Where any Ordinance or other instrument of a legislative character was prior to the appointed day, enacted or made and the coming into operation thereof was suspended, such Ordinance or instrument may, on or after the appointed day, come into operation on

the date specified therein or as may be specified by the Governor-General or other authority empowered to bring it into operation and in such case, the Ordinance or instrument shall from that date take effect as part of the law of Ghana.

General saving

81. Save as expressly provided by this Order, nothing in this Order shall be construed as affecting the validity or continued operation of any Proclamation, Order, Regulation or other instrument made under the existing Orders and in force immediately prior to the appointed day without prejudice however to any power to amend, revoke or replace the same.

Legislation in case of an Emergency

82.(1) The Emergency Powers Order in Council, 1939 (hereinafter referred to as "the said Order"), as amended by the Emergency Powers (Amendment) Order in Council, 1956 [Footnote (a)], shall, subject to the other provisions of this section, continue in force in Ghana for a period of twelve months from the appointed day and thereafter shall cease to be of any effect whatever in Ghana.

(2) Nothing contained in subsection (1) of this section shall derogate from the right of the Parliament of Ghana, prior to the expiration of twelve months from the appointed day, to vary, revoke or replace the said Order by Act of Parliament.

(3) In its application to Ghana, in pursuance of this section, the rid Order shall be modified in the following manner:

(a) "Governor-General" shall be substituted for "Governor" wherever that word appears in the said Order.

(b) The definition of "law" in section 2 of the said Order shall not include any constitutional provision within the meaning` assigned to that expression by subsection (1) of section 32 of this Order.

(c) Whenever a Proclamation is issued bringing the provisions of Part II of the said Order into operation, the occasion therefor shall forthwith be communicated to Parliament, and, if Parliament is then separated by such adjournment or prorogation as will not expire within ten days, a Proclamation shall be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit upon the day appointed by that Proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.

(d) Any regulations made under any Proclamation referred to in paragraph (c), shall be laid before Parliament as soon as practicable after they have been made and, unless

approved in their original or amended form by Resolution of Parliament before the expiration of twenty-eight days of being so laid; shall cease to be of any legal effect.

* * *
FOOTNOTES:

(a) S.I. 1956/731 (1956 1, p: 152).
* * *

(e) The expiry or revocation of any regulations so made shall not be deemed to affect the previous operation thereof and the validity of any action taken thereunder or of any penalty or punishment incurred in respect of any contravention or failure to comply therewith or any proceedings or remedy in respect of any such punishment or penalty.

Regulations regarding the Public Service Commission and Judicial Service Commission

83. The Regulations made under the existing Orders by the Governor in regard to the Public Service Commission and the Judicial Service Commission and in force immediately prior to the appointed day shall respectively continue in force as if made by the Governor-General under sections 52 and 55 of this Order, until amended or revoked by regulations made under this Order.

Public Seal

84. Until the Public Seal of Ghana has been provided and brought into use, any instrument which, on or after the appointed day, is sealed with the Public Seal of the Gold Coast in use immediately prior to the appointed day shall be deemed for all purposes to be lawfully sealed.

Interim Regional Assemblies

85.(1) The Members of Parliament representing electoral districts within a Region shall constitute and are hereby constituted an Interim Regional Assembly for that Region.

(2) The Speaker shall as soon as conveniently may be after the appointed day convene a meeting of each Interim Regional Assembly and shall preside as Chairman at each such meeting until the Interim Regional Assembly has made rules for regulating its own procedure and, appointed its own Chairman.

(3) An Interim Regional Assembly may at any time offer advice to a Minister on any matter affecting the Region.

(4) On the establishment in and for any Region of a-Regional Assembly under the provisions of section 64 of this Order the Interim Regional Assembly constituted for that Region shall thereupon be deemed to be dissolved.

(5) For the avoidance of doubt it is hereby declared that the powers and functions of a Regional Assembly under section 32 and subsections (1) and (2) of section 33 of this Order shall not be exercised by an Interim Regional Assembly.

Police Relations Committees

86.(1) A Police Relations Committee may be established in any Region by the Interim Regional Assembly with the object of encouraging good relations between the Police Force and the public. (2) A Police Relations Committee shall consist of a Chairman and not less than three members appointed by the Interim Regional Assembly, two members appointed by the Commissioner of Police and, if the Minister responsible for the Police so desires, not more than two members appointed by him.

(3) A Police Relations Committee may call upon the senior Police Officer of the Region to assist it in the exercise of its functions and may at any time make such recommendations as it thinks fit to the Minister responsible for the Police.

(4) A Police Relations Committee may in any year prepare a report relating to the exercise of its functions during the preceding year and may send a copy to the Minister responsible for the Police who shall lay a copy of every such report before the National Assembly.

Regional Constitutional Commission

87.(1) The Governor-General shall, within three months after the appointed day, or as soon thereafter as may be possible, appoint a Regional Constitutional Commission consisting of a Chairman who shall be the Chief Justice or a Judge nominated by him, two Commissioners representing each Region who shall be persons nominated by the Interim Regional Assembly of the Region, one Commissioner nominated by the Territorial Council of each Region and not more than six Commissioners appointed by the Governor-General.

(2) The Regional Constitutional Commission shall enquire into and report on the devolution to Regional Assemblies of authority, functions and powers relating to the matters specified in subsection (2) of section of this Order and in particular, and without prejudice to the generality of the foregoing, shall make recommendations as to the composition of each Regional Assembly, the executive, legislative, financial and advisory powers to be exercised by it, the funds required to meet the capital and recurrent expenditure to be incurred by it, the provision of such funds and the legislation required to give effect to its recommendations.

(3) The Commission shall hold at least two meetings in public in each Region and shall consult the Interim Regional Assembly and the Territorial Council of each Region.

(4) In case any Commissioner shall be or become unable or unwilling to act, or shall die, the Governor-General may appoint another Commissioner in his place

Provided that no appointment shall be made in place of a nominated Commissioner except after nomination, in the case of the Chairman, by the Chief Justice, or in the case of a Commissioner representing a Region, by the Interim Regional Assembly of the Region or in the case of a Commissioner nominated by a Territorial Council, by the Territorial Council of the Region.

(5) The validity of any proceedings of the Commission shall not be affected by any vacancy among the Commissioners including any vacancy not filled when the Commission is first appointed or by the absence of any Commissioner provided that the Chairman and seven other Commissioners shall constitute a quorum.

(6) The Commission shall submit its report to the Governor-General within nine months of its appointment, or as soon thereafter as may be practicable, and the report shall forthwith be presented to Parliament.

(7) As soon as conveniently may be after the submission of the Commission's report the Minister responsible for local government shall introduce in the Assembly legislation to give effect to the recommendations of the Commission.

(8) Subject to the preceding provisions of this 'section the Commissions of Enquiry Ordinance [Footnote (a)], other than section 3 thereof, shall apply to the proceedings of the Regional Constitutional Commission.

(9) For the purposes of this section "Territorial Council" means, in relation to the Eastern and Western Regions of Ghana, the Joint Provincial Council constituted under the State Councils (Colony and Southern Togoland) Ordinance, 1952 [Footnote (b)], in relation to the Ashanti Region, the Asanteman Council constituted under the State Councils (Ashanti) Ordinance, 1952 [Footnote (c)], in relation to the Northern Region, the Northern Territories Council constituted under the Northern Territories Council Ordinance, 1952 [Footnote (d)], and in relation to the Trans-Volta/Togoland Region, the Trans-Volta/Togoland Council constituted under the Trans-Volta /Togoland Council Ordinance, 1952 [Footnote (e)].

Appeals pending establishment of Houses of Chiefs

88.(1) Pending the coming into force in any Region of an Act of Parliament as provided in section 68, any appeal from a State Council (or in the case of the Ashanti Region from the Asanteman Council or any State Council) under the State Councils (Ashanti) Ordinance, 1952 the State Councils (Northern Territories) Ordinance, 1952, or the State

Councils (Colony and Southern Togoland) Ordinance, 1952, (which ordinances shall hereafter in this section be called "the said Ordinances") which before the appointed day lay to the Governor shall lie to an Appeal Commissioner appointed in the manner provided by subsection (4) of, section 68 of this Order, whose decision thereon shall be final.

(2) Where an appeal has been preferred before the appointed day to the Governor from the decision of a State Council or the Asanteman Council under any of the said Ordinances and has not been finally disposed of before the appointed day, the following provisions shall apply,

(a) where the Governor has referred the appeal to an Appeal Commissioner, and such Appeal Commissioner gives his decision not later than two months after the appointed day, such decision shall be final ;

(b) in other cases, the appeal shall lie to an Appeal Commissioner appointed in the manner provided by subsection (4) of section 68 of this Order, whose decision thereon shall be final;

(3) An Appeal Commissioner exercising functions in accordance with the provisions of this section shall have all the powers exercisable by an Appeal Commissioner under the Ordinance under which the original proceedings were had and shall, in addition thereto, have the powers exercisable by the Governor under such Ordinance upon consideration of an appeal and the findings of an Appeal Commissioner thereon.

(4) Any Appeal Commissioner exercising functions in accordance with the provisions of this section shall forward his decision as soon as may be to the appropriate Minister for publication in the Gazette.

(5) For the purposes of this section, when there. is more than one Appeal Commissioner, the senior shall have power to assign appeals

* * *

FOOTNOTES:

(a) Laws of the Gold Coast, Rev. 1951, Chapter 249.

(b) Laws of the Gold Coast, 1952-54, Supp. Rev. Ed., Vol. 1, p. 267.

(c) Laws of the Gold Coast, 1952-54, Supp. Rev. Ed., Vol. 1, p. 243.

(d) Laws of the Gold Coast, 1952-54, Supp. Rev. Ed., Vol. 1, p. 241.

(e) Laws of the Gold Coast, 1952-54, Supp. Rev. Ed., Vol. 1, p. 306.

* * *

to particular Appeal Commissioners. In this subsection, the "senior" means senior according to the date of substantive appointment, or, if in any case two persons were appointed substantively on the same date, according to age.

(6) Subject to the provisions of this section, any reference to an Appeal Commissioner in any of the said Ordinances shall be deemed to apply to an Appeal Commissioner exercising functions under this section.

Modification of existing laws

89. The Governor-General may, before the expiry of a period of one year from the appointed day, by proclamation published in the Gazette, make such provision as he is satisfied is necessary or expedient in consequence of the provisions of this Order, for modifying, adding, to or adapting any law which refers, in whatever terms to the Governors or to any public officer or authority, or otherwise for bringing any law into accord with the provisions of this Order and of the existing Orders, as amended by this Order, or for giving effect to those provisions.

Removal of difficulties

90.(1) If any difficulty shall arise in bringing into operation any of the provisions of this Order or in giving effect to the purpose thereof, the Secretary of State may, by Order, make such provision. as seems to him necessary or expedient for the purpose of removing the difficulty and may by such Order amend or add to any provision of this Order provided that no Order shall be made under this section on or after the appointed day.

(2) Any Order made under this section may be amended, added to, or revoked by a further Order, and may be given retrospective effect to a date not earlier than the date of this Order.

(3) This section shall come into operation on the day after the day on which this Order shall have been laid before both Houses of Parliament in the United Kingdom.

Exercise before the appointed day of power to summon Parliament

91.(1) For the avoidance of doubt it is hereby declared that, prior to the appointed day, the Governor may, for and in the name of the Governor-General, by Proclamation summon the Parliament of Ghana to meet on or after the appointed day in pursuance of the provisions of this Order and may do all such other things in connection therewith as he may deem necessary or expedient for such purpose.

(2) This section shall come into operation on the day after the day on which this Order shall have been laid before both Houses of Parliament in-the United Kingdom.

W. G. Agnew.

THE FIRST SCHEDULE

(Section 3)

PART I

COLUMN 1

The Gold Coast (Constitution) Order in Council, 1954, [Footnote (a)] as amended by the Gold Coast (Constitution) (Amendment) Order in Council, 1955 [Footnote (b)], the Gold Coast (Constitution) (Amendment No.2) Order in Council, 1955 [Footnote (c)], and the Gold Coast (Constitution) (Amendment) Order in Council, 1956 [Footnote (d)].

COLUMN 2

Sections 4 to 55.
Section 59.
Subsections (1), (2), (3) and (4) or section 60.
Sections 61 to 69.
The words "and the provisions of section 6 of this Order shall apply accordingly to the exercise of such function" where they occur in section 70.
Section 71 to 73.
The First, Second and Third Schedules.

PART II

Amendments to the Fourth Schedule to the Gold Coast (Constitution) Order in Council, 1954

1. In sub-paragraph (a) of paragraph 3, immediately after the words "31st March, 1954" insert the words "but before the date of commencement of the Ghana Independence Act, 1957".

2. In sub-paragraph (b) of paragraph 15 for the words "after consultation with the Public Service Commission" substitute the words "acting on the advice of the Public Service Commission" and for the words "after consultation with the Judicial Service Commission" substitute the words "acting on the advice of the Judicial Service Commission".

3. The following new paragraph shall be inserted immediately after paragraph 17–

"18 (a) An overseas officer, who substantively held a public office on pensionable terms on the day immediately prior to the date' of commencement of the Ghana Independence

Act, 1957, which office ceased to exist on such date by virtue of the revocation of the Gold Coast Colony and Ashanti Letters Patent, 1954 and 1955, shall retire on the date at which any unexpired leave earned at such date expires.

(b) An officer to whom sub-paragraph (a) of this paragraph applies shall be entitled on the date of his retirement to such pension and gratuity or to such gratuity as an " entitled officer " is eligible to receive and in -addition at his option either to compensatory pension or to compensation for loss of career.

An officer to whom sub-paragraph (a) of this paragraph applies shall be deemed to have opted for compensation for loss of career unless within one month after his office ceased to exist he gives notice in writing to the Governor-General of his desire to receive compensatory pension in place thereof.

(c) Compensatory pension or compensation payable to an officer under sub-paragraph (b) of this paragraph shall be calculated at the date on which his office ceased to exist and payment thereof shall be subject to the provisions of paragraph 13 of this Schedule."

* * *
FOOTNOTES:

(a) S.I. 1954/551 (1954 II, p.2788)
(b) S.I.1955/1218 (1955 II, p.3150).
(c) S.I. 1955/1219 (1955 II, p.3156)
(d) S I. 1956/997 (1955 II, p. 3150)
* * *

THE SECOND SCHEDULE

(Section 77)

1. (a) In this Schedule, unless the context otherwise requires: –

"the appropriate law" means, in relation to any officer, the law governing the grant of pensions and gratuities to officers in the public service of Ghana which for the time being applies to that officer;

"compensatory pension" means an addition to earned pension or gratuity calculated at the rate of one hundred and eightieth part of an officer's pensionable emoluments at the date of his retirement for each complete period of one year of actual pensionable service;

"compensation for loss of career" means the lump sum compensation for loss of career calculated in accordance with the provisions of Schedule;

"earned pension or gratuity" means the pension or reduced pension and gratuity or gratuity which an entitled officer may be eligible receive under the provisions of paragraph 2 of this Schedule;

"entitled officer" means any overseas officer who was, on or before the 4th day of May, 1954, appointed a Judge of the Supreme Court of the Gold Coast;

"operative date" means the 1st April, 1957, or the appointed day, whichever shall be the earlier;

"operative period" means the period of four years immediately subsequent to the operative date;

"qualifying service" means service which, under the appropriate law, may be taken into account in determining whether an officer is eligible for a pension or gratuity;

"retire" means retire from the public service of Ghana, and grammatical variations shall be construed accordingly.

(b) For, the purposes of this Schedule, the decision of the Secretary of State given before the appointed day, as to whether or not a person is an overseas officer shall be final.

(c) In this Schedule references to Ghana, the Governor-General and the Judicial Service Commission shall respectively include references to the Gold Coast before the appointed day, the Governor, acting in his discretion before the said date and the Judicial Service Commission constituted under the existing Orders.

2.(a) An entitled officer may retire at any time after the coming into operation of this Schedule.

(b) On the retirement of an entitled officer as aforesaid he shall be granted, whether or not the length of his qualifying service is such that, apart from the provisions of this sub-paragraph, he would be eligible for the grant of a pension under the appropriate law, such pension. or reduced pension and gratuity as may, under the appropriate law, be granted to an officer on his retirement, or, alternatively, at hid option, a gratuity of one-fifth of the aggregate amount of his pensionable emoluments during his service in the public service of Ghana.

3.(1) Every entitled officer shall before the operative date be given, by notice in writing an opportunity to elect whether he will continue to serve on the same terms as a Judge of the Supreme Court appointed under the provisions of section 54 of this Order or whether he will. retire on the operative date, and such election shall be exercised in writing not later than ten days after the receipt of such notice or after the date on which this Schedule comes into operation, whichever shall be the later, and if an officer does not so exercise that election he shall thereupon be deemed to have elected to continue to serve on the

same terms as a Judge of the Supreme Court appointed under the provisions of section 54 of this Order.

No notice given or election exercised for the purposes of this paragraph shall be invalid by reason only that it was given or exercised, as the case may be, before the coming into operation of this Schedule.

4.(a) An entitled officer who, if he elected under paragraph 3 of this Schedule to continue to serve on the same terms as a Judge of the Supreme Court appointed under the provisions of section 54 of this Order, who

(i) if he remained in the office held by him at the date of such election, and

(ii) if he retired immediately after the end of the operative period,

would receive less compensation than if he retired on the operative date or at any time during the operative period, shall, within ten days of the coming into operation of this Schedule or of the receipt of the notice given under the provisions of paragraph 3 of this Schedule whichever shall be the later, require in writing addressed to the Governor-General to be informed whether the Governor-General, after consultation with the Judicial Service Commission, is satisfied that his office is one for which there is a qualified and suitable person, who is not an expatriate, available.

(b) An entitled officer who required the foregoing information shall be informed in writing whether the Governor-General after consultation with the Judicial Service Commission, is satisfied that his office is one for which such a person is available, and if the officer is informed that the Governor-General is so satisfied the officer shall be entitled to re-exercise the right of election given to him by paragraph 3 of this Schedule and his former election shall have no effect.

(c) No request for information for the purposes of sub-paragraph (a) of this paragraph and no reply thereto for the purposes of sub-paragraph (b) of this paragraph shall be invalid by reason only that it was made or sent, as the case may be, before the coming into operation of this Schedule.

5.(1) An entitled officer who has elected to retire on the operative date may retire on the operative date or such later date as herein provided, and on his retirement he shall be granted, in addition to-his earned pension or gratuity, at his option, either –

(a) a compensatory pension of which not more than one-fourth may be commuted, or,

(b) lump sum compensation for loss of career calculated either at the operative date or the date of his retirement, whichever shall be More advantageous to him, in accordance with the provisions of the Table set out in this Schedule.

(2) Where an officer has elected to retire on the operative date, he may retire,

(a) in the case of an officer who is on leave at the time of giving such notice, on the date of the termination of such leave ; and

(b) in other cases, on the date on which his leave terminates after his departure from Ghana or the date on which his leave would terminate had he departed from Ghana utilising a passage of which he was notified by the Chief Justice, whichever shall be the earlier.

6. An entitled officer who fails to require the information. mentioned in paragraph 4 of this Schedule or who is entitled to re-exercise a right of election by virtue of the provisions of paragraph 4 of this Schedule and who does not elect to retire on the operative date shall, on his retirement after giving such notice of his intention to retire as may be required by regulations made by the Governor-General, be granted, in addition to earned pension or gratuity, at his option, either

(a) a compensatory pension, or

(b) lump sum compensation for loss of career calculated at the date of his retirement m accordance with the provisions of the Table set out in this Schedule.

7. An entitled officer who is not entitled to re-exercise a right of by virtue of the provisions of paragraph 4 of this Schedule and who elects to continue to serve as a Judge of the Supreme Court appointed under the provisions of section 54 of this Order shall, on his retirement after giving such notice of his intention to retire as may be required by regulations made by the Governor-General, be granted, in addition to earned pe or gratuity, at his option, either

(a) a compensatory pension, or

(b) lump sum compensation for loss of career calculated in accordance with the provisions of the Table set out in this Schedule –

(i) in the case of an officer retiring, or giving the requisite notice of his intention to retire, before the end of the operative perk at the date prior to his retirement during the operative period which is most advantageous to him, or

(ii) in any other case, at the date of his retirement.

8. The legal personal representative of any entitled officer who has not retired and who dies at any time on or after the operative date, shall be granted at the option of such legal personal representative either the gratuity payable under the appropriate law or a sum equal to the lump sum compensation for which such officer would have been eligible, under the provisions of this Schedule if he had retired at the date of his death.

9. Subject to any express provision in the appropriate law regarding the maximum pension that may be granted to an officer retiring on account of injury, a compensatory pension granted under the provisions of this Schedule shall not exceed the amount which, when added to earned pension, would result in a total pension equal to two-thirds of the highest pensionable emoluments drawn by the officer at any time in the course of his public service. For the purposes of this paragraph "earned pension" shall be deemed to be the pension which an officer would receive under the, appropriate law in the absence of any option to take a reduced pension and gratuity.

10.(a) An officer who is transferred to other public service within the meaning of the appropriate law shall not be eligible to receive compensatory pension or compensation for loss of career.

(b) An officer who has reached the age of sixty before the date of his retirement shall not, unless he had not reached the age of sixty on the operative date and is entitled to have his compensation for loss of career computed with reference to a date other than the date of his retirement, be eligible to receive compensatory pension or compensation for loss of career.

11. An entitled officer shall not be eligible to receive any addition to earned pension or gratuity provided for in the appropriate law in respect of abolition of office if he receives compensatory pension or compensation for loss of career.

12. Nothing in this Schedule shall affect the power to dismiss any Judge of, the Supreme Court.

13. Save as is otherwise provided in this Schedule, the appropriate law shall apply in relation to the grant of pensions the gratuities and to pensions and gratuities granted in pursuance of the provisions of this Schedule; and the provisions of this Schedule shall be construed as one with the provisions of that law:

Provided that the expression "pensionable service" in this Schedule shall not include any service which may not under the appropriate law be counted in full for the purpose of computation of pension.

1. This table applies only where at least ten years' actual service has been rendered.

2. The factor which is set out, opposite the age of an officer on his birthday immediately preceding the date in relation to which his lump sum compensation is to be calculated, shall be applied to the annual pensionable emoluments enjoyed by the officer at such date. The resulting figure or £8,000, whichever shall be the less, shall be the lump sum compensation to which such officer shall be entitled.

THE THIRD SCHEDULE

(Section 32)

The following definitions in subsection (1) of section 1:

"Ashanti"

"the Assembly"

"the Consolidated Fund"

"judicial officer"

"the Northern Territories"

"Northern Togoland"

"public office"

"public officer"

"the public service"

"Region"

Subsections (2), (3), (4), (5) and (6) of section 1

Section 6

Section 20

Subsections (1), (2), (3) and (4) of section 31.

Sections 32 to 35

Subsections (1) and (2) of section 42

Subsection (1) of section 46

Subsection (3) of section 47

Sections 48 to 58

Subsection (1) of section 61

Sections 62 to 64

Sections 66 to 69

This Schedule

EXPLANATORY NOTE

(This note is not part of the Order but is intended to indicate its general purport.)
This Order makes provision for a constitution for Ghana upon its attainment of independence within the British Commonwealth of Nations in pursuance of the Ghana Independence Act, 1957.

* * *

TABLE:

Lump Sum Compensation per Unit of Salary where Maximum Compensation is £8,000

Age last birthday = 37
Factor =2.69

Age last birthday = 38
Factor = 3.07

Age last birthday = 39
Factor = 3.41

Age last birthday = 40
Factor = 3.69

Age last birthday = 41
Factor = 3.87

Age last birthday = 42
Factor = 3.97

Age last birthday = 43
Factor = 4.00

Age last birthday = 44
Factor = 3.97

Age last birthday = 45
Factor = 3.89

Age last birthday = 46
Factor = 3.79

Age last birthday = 47
Factor = 3.65

Age last birthday = 48
Factor = 3.52

Age last birthday = 49
Factor = 3.39

Age last birthday = 50
Factor = 3.25

Age last birthday = 51
Factor = 3.07

Age last birthday = 52
Factor = 2.89

Age last birthday = 53
Factor = 2.68

Age last birthday = 54
Factor = 2.22

Age last birthday = 55
Factor = 1.74

Age last birthday = 56
Factor = 1.51

Age last birthday = 57
Factor = 1.27

Age last birthday = 58
Factor = 1.01

Age last birthday = 59
Factor = 0.74
* * *

Appendix L:

The Navigation Act of 9 October, 1651

An Act for increase of Shipping, and Encouragement of the Navigation of this Nation. [9 October, 1651.]

For the Increase of the Shipping and the Encouragement of the Navigation of this Nation, which under the good Providence and Protection of God, is so great a means of the Welfare and Safety of this Common wealth ; Be it Enacted by this present Parliament, and the Authority thereof, That from and after the First day of December, One thousand six hundred fifty and one, and from thence forwards, no Goods or Commodities whatsoever, of the Growth, Production or Manufacture of Asia, Africa or America, or of any part thereof ; or of any Islands belonging to them, or any of them, or which are described or laid down in the usual Maps or Cards of those places, as well of the English Plantations as others, shall be Imported or brought into this Commonwealth of England, or into Ireland, or any other Lands, Islands, Plantations or Territories to this Commonwealth belonging, or in their Possession, in any other Ship or Ships, Vessel or Vessels whatsoever, but onely in such as do truly and without fraud belong onely to the People of this Commonwealth, or the Plantations thereof, as the Proprietors or right Owners thereof ; and whereof the Master and Mariners are also for the most part of them, of the People of this Commonwealth, under the penalty of the forfeiture and loss of all the Goods that shall be Imported contrary to this Act; as also of the Ship (with all her Tackle, Guns and Apparel) in which the said Goods or Commodities shall be so brought in and Imported; the one moyety to the use of the Commonwealth, and the other moyety to the use and behoof of any person or persons who shall seize the said Goods or Commodities, and shall prosecute the same in any Court of Record within this Commonwealth.

And it is further Enacted by the Authority aforesaid, That no Goods or Commodities of the Growth, Production or Manufacture of Europe, or of any part thereof, shall after the First day of December, One thousand six hundred fifty and one, be imported or brought into this Commonwealth of England, or into Ireland, or any other Lands, Islands, Plantations or Territories to this Commonwealth belonging, or in their possession, in any Ship or

* * *

SIDENOTES:

Continnance of Act.

No goods shall be imported from Asia, Africa, or America, but in English Ships.

Penalty.

The like for Europe, with Exception.
Ships, Vessel or Vessels whatsoever, but in such as do truly and without fraud belong onely to the people of this Commonwealth, as the true Owners and Proprietors thereof, and in no other, except onely such Forein Ships and Vessels as do truly and properly belong to the people of that Countrey or Place, of which the said Goods are the Growth, Production or Manufacture; or to such Ports where the said Goods can onely be, or most usually are first shipped for Transportation; And that under the same penalty of forfeiture and loss expressed in the former Branch of this Act, the said Forfeitures to be recovered and imployed as is therein expressed.

And it is further Enacted by the. Authority aforesaid, That no Goods or Commodities that are of Forein Growth, Production or Manufacture, and which are to be brought into this Commonwealth, in Shipping belonging to the People thereof, shall be by them Shipped or brought from any other place or places, Countrey or Countreys, but onely from those of their said Growth, Production or Manufacture; or from those Ports where the said Goods and Commodities can onely, or are, or usually have been first shipped for Transportation; and from none other Places or Countreys, under the same penalty of forfeiture and loss expressed in the first Branch of this Act, the said Forfeitures to be recovered and imployed as is therein expressed.

And it is further Enacted by the Authority aforesaid, That no sort of Cod-fish, Ling, Herring, Pilchard, or any other kinde of salted Fish, usually fished for and caught by the people of this Nation; nor any Oyl made, or that shall be made of any hinde of Fish whatsoever; nor any Whale-fins, or Whale-bones, shall from henceforth be Imported into this Commonwealth, or into Ireland, or any other Lands, Islands, Plantations, or Territories thereto belonging, or in their possession, but onely such as shall be caught in Vessels that do or shall truly and properly belong to the people of this Nation, as Proprietors and Right Owners thereof : And the said Fish to be cured, and the Oyl aforesaid made by the people of this Commonwealth, under the penalty and loss expressed in the said first Branch of this present Act; the said Forfeit to be recovered and imployed as is there expressed.

And it is further Enacted by the Authority aforesaid, That no sort of Cod, Ling, Herring, Pilchard, or any other kinde of Salted Fish whatsoever, which shall be caught and cured by the people of this Commonwealth, shall be from and after the First day of February, One thousand six hundred fifty three, exported from any place or places belonging to this Commonwealth, in any other Ship or Ships, Vessel or Vessels, save onely in such as do truly and properly appertain to the .people of this Commonwealth, as Right Owners; and whereof the Master and Mariners are for the most part of them English, under the penalty and loss expressed in the said first Branch of this present Act; the said Forfeit to be recovered and imployed ,es is there expressed.
SIDENOTES:

Goods of Forein growth, how and by whom to be shipped.

No Salt-fish or oyl to be imported but in English Vessels.

No salt Fish to be exported but in English Vessels.
Provided always, That this Act, nor any thing therein contained, extend not, or be meant to restrain the Importation of any of the Commodities of the Straights or-Levant Seas, loaden in the Shipping of this Nation as aforesaid, at the usual Ports or places for lading of them heretofore; within the said Straights or Levant Seas, though the said Commodities be not of the very Growth of the said places.

Provided also, That this Act nor any thing therein contained, extend not, nor be meant to restrain the Importing of any EastIndia Commodities loaden in the Shipping of this Nation, at the usual Port or places for Lading of them heretofore in any part of those Seas, to the Southward and Eastward of Cabo Bona Esperanza, although the said Ports be not the very places of their Growth.

Provided also, That it shall and may be lawful to and for anyof the People of this Commonwealth, in Vessels or Ships to them belonging, and whereof the Master and Mariners are of this Nation as aforesaid, to load and bring in from any of the Ports of Spain and Portugal, all sorts of Goods or Commodities that have come from, or any way belonged unto the Plantations or Dominions of either of them respectively.

Be it also further Enacted by the authority aforesaid, that from henceforth it shall not be lawful to any person or persons whatsoever, to load or cause to be loaders and carried in any Bottom or Bottoms; Ship or Ships, Vessel or Vessels whatsoever, whereof any Stranger or Strangers born (unless . such as be Denizens or Naturalized) be Owners, part Owners, or Master, any Fish, Victual, Wares, or things of what kinde or nature soever the same shall be, from one Port or Creek of this Commonwealth, to another Port or Creek of the same, under penalty to every one that shall offend contrary to the true meaning of this Branch of this present Ac, to forfeit all the Goods that shall be so laden or carried, as althe Ship upon which they shall be so laden or carried, tsame Forfeit to be recovered and imployed as directed in the first Branch of this present Act.

Lastly, That this Act nor any thing therein contained, extend not to Bullion, nor yet to any Goods taken, or that shall be taken by way of Reprizal by any Ship or Ships, having Commission from this Commonwealth.

Provided, That this Act, or any thing therein contained, shall not extend, nor be construed to extend to any Silk or Silk-wares which shall be brought by Land from any parts of Italy, and them bought with the proceed of English Commodities, sold either for Money or in Barter; but that it shall and may be lawful for any of the People of this Commonwealth to ship the same in English Vessels from Ostend, Newport, Roterdam,Middleburgh, Amsterdam, or any Ports thereabouts; the Owners and Proprietors first making Oath by themselves, or other credible Witness, before the Commissioners
SIDENOTES:

Commodities of the Straights or Levant Seas excepted.

East-India Commodities excepted.

Goods from any Port of Spain or Portugal may be imported..

Penalty for any stranger to carry any fish, wares, &c. from one English Port to another.

This Act not to extend to Bullion or prize-goods,

nor to Silk or Silk-Wares brought by Land from Italy.
of the Customs for the time being, or their Deputies, or one of the Barons of the Exchequer, that the Goods aforesaid were so bought for his or their own proper accompt in Italy.

Appendix M:

The Royal Proclomation of 7 October, 1763

BY THE KING. A PROCLAMATION
GEORGE R.

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace, concluded at Paris. the 10th Day of February last; and being desirous that all Our loving Subjects, as well of our Kingdom as of our Colonies in America, may avail themselves with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation, We have thought fit, with the Advice of our Privy Council. to issue this our Royal Proclamation, hereby to publish and declare to all our loving Subjects, that we have, with the Advice of our Said Privy Council, granted our Letters Patent, under our Great Seal of Great Britain, to erect, within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.

First--The Government of Quebec bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John, to the South end of the Lake Nipissim; from whence the said Line, crossing the River St. Lawrence, and the Lake Champlain, in 45. Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

Secondly--The Government of East Florida. bounded to the Westward by the Gulph of Mexico and the Apalachicola River; to the Northward by a Line drawn from that part of the said River where the Chatahouchee and Flint Rivers meet, to the source of St. Mary's River. and by the course of the said River to the Atlantic Ocean; and to the Eastward and Southward by the Atlantic Ocean and the Gulph of Florida, including all Islands within Six Leagues of the Sea Coast.

Thirdly--The Government of West Florida. bounded to the Southward by the Gulph of Mexico. including all Islands within Six Leagues of the Coast. from the River Apalachicola to Lake Pontchartrain; to the Westward by the said Lake, the Lake Maurepas, and the River Mississippi; to the Northward by a Line drawn due East from that part of the River Mississippi which lies in 31 Degrees North Latitude. to the River Apalachicola or Chatahouchee; and to the Eastward by the said River.

Fourthly--The Government of Grenada, comprehending the Island of that name, together with the Grenadines, and the Islands of Dominico, St. Vincent's and Tobago. And to the end that the open and free Fishery of our Subjects may be extended to and carried on upon the Coast of Labrador, and the adjacent Islands. We have thought fit. with the advice of our said Privy Council to put all that Coast, from the River St. John's to Hudson's Streights, together with the Islands of Anticosti and Madelaine, and all other smaller Islands Iying upon the said Coast, under the care and Inspection of our Governor of Newfoundland.

We have also, with the advice of our Privy Council. thought fit to annex the Islands of St. John's and Cape Breton, or Isle Royale, with the lesser Islands adjacent thereto, to our Government of Nova Scotia.

We have also, with the advice of our Privy Council aforesaid, annexed to our Province of Georgia all the Lands Iying between the Rivers Alatamaha and St. Mary's.

And whereas it will greatly contribute to the speedy settling of our said new Governments, that our loving Subjects should be infomed of our Paternal care, for the security of the Liberties and Properties of those who are and shall become Inhabitants thereof, We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under our Great Seal of Great Britain, by which the said Governments are constituted. given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government: And We have also given Power to the said Governors, with the consent of our Said Councils, and the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws. Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies; and in the mean Time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England; for which Purpose We have given Power under our Great Seal to the Governors of our said Colonies respectively to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our Said Colonies for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases. to appeal, under the usual Limitations and Restrictions, to Us in our Privy Council.

We have also thought fit, with the advice of our Privy Council as aforesaid, to give unto the Governors and Councils of our said Three new Colonies, upon the Continent full Power and Authority to settle and agree with the Inhabitants of our said new Colonies or with any other Persons who shall resort thereto, for such Lands. Tenements and Hereditaments, as are now or hereafter shall be in our Power to dispose of; and them to grant to any such Person or Persons upon such Terms, and under such moderate Quit-Rents, Services and Acknowledgments, as have been appointed and settled in our other Colonies, and under such other Conditions as shall appear to us to be necessary and expedient for the Advantage of the Grantees, and the Improvement and settlement of our said Colonies.

And Whereas, We are desirous, upon all occasions, to testify our Royal Sense and Approbation of the Conduct and bravery of the Officers and Soldiers of our Armies, and to reward the same, We do hereby command and impower our Governors of our said Three new Colonies, and all other our Governors of our several Provinces on the Continent of North America, to grant without Fee or Reward, to such reduced Officers as have served in North America during the late War, and to such Private Soldiers as have been or shall be disbanded in America, and are actually residing there, and shall personally apply for the same, the following Quantities of Lands, subject, at the Expiration of Ten Years, to the same Quit-Rents as other Lands are subject to in the Province within which they are granted, as also subject to the same Conditions of Cultivation and Improvement; viz.

To every Person having the Rank of a Field Officer--5,000 Acres.

To every Captain--3,000 Acres.

To every Subaltern or Staff Officer,--2,000 Acres.

To every Non-Commission Officer,--200 Acres .

To every Private Man--50 Acres.

We do likewise authorize and require the Governors and Commanders in Chief of all our said Colonies upon the Continent of North America to grant the like Quantities of Land, and upon the same conditions, to such reduced Officers of our Navy of like Rank as served on board our Ships of War in North America at the times of the Reduction of Louisbourg and Quebec in the late War, and who shall personally apply to our respective Governors for such Grants.

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds.--We do therefore,

with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure. that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments. as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved. without our especial leave and Licence for that Purpose first obtained.

And. We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do. with the Advice of our Privy Council strictly enjoin and require. that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that. if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government. they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And we do. by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects

whatever. provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside. and also give Security to observe such Regulations as We shall at any Time think fit. by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribc as aforesaid.

And we do further expressly conjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever. who standing charged with Treason. Misprisions of Treason. Murders, or other Felonies or Misdemeanors. shall fly from Justice and take Refuge in the said Territory. and to send them under a proper guard to the Colony where the Crime was committed of which they, stand accused. in order to take their Trial for the same.

Given at our Court at St. James's the 7th Day of October 1763. in the Third Year of our Reign.

GOD SAVE THE KING

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