

Tribal Legal Justice Systems— Then, Now, and Tomorrow

Despite a tense history of interaction with the federal government, a tribal nation's capable exercise of authority over its own territory and population through the effective functioning of its justice system defends the nation's rights as a sovereign against encroachment by other governments and guarantees the future of tribal people.

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Following an era requiring tribes to assimilate to Anglo norms, the federal government has evolved its attitude toward encouraging tribes to govern themselves. Most tribes today have adopted their own constitutions, drafted their own codes, and developed their own courts.¹ Today's tribal courts increasingly are integrating traditional tribal values, symbols, and customs into their heavily Anglo-influenced jurisprudence.² The quality of tribal court systems and the prestige and respect accorded to them continue to rise, and the future of tribal legal justice systems appears promising.

I. THE PAST

Most tribes had some sort of dispute-resolution process in place before the Anglo-Americans arrived. Although there was great variety of traditional justice systems, indigenous justice was more concerned with the collective rights of the community rather than formal legal boundaries to protect individuals from each other.³ Peacemaking, a process in which respected community members assisted disputing parties to find a compromise to their dispute, was the primary method of dispute resolution traditionally found in indigenous communities.⁴

The first formal federal intervention in tribal justice systems on reservations came in 1883 with the Courts of Indian Offenses.⁵ These became known as CFR

¹ Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1-2 (1997).

² *Id.*

³ Carrie E. Garrow & Sarah Deer, *Tribal Criminal Law and Procedure*, in 2 TRIBAL

LEGAL TEXTBOOK SERIES 10 (Jerry Gardner ed., 2004).

⁴ Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231 (1989).

⁵ Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and*

Courts because they operated under the Code of Federal Regulations, not tribal law or customs. The United States federal government sent Indian Agents to reservations, who then would exert influence over the tribe and appoint a judge.⁶ The CFR Courts served to regulate law and order on the reservations by enforcing the Code of Indian Offenses, which criminalized the actions of tribal government and made participation in cultural practices such as dances, medicine men, and other ceremonies illegal.⁷

The federal government attempted to depart from the assimilationist policies that led to the CFR Courts by passing the 1934 Indian Reorganization Act (IRA).⁸ This offered tribes an opportunity to restructure their governments and replace the CFR Courts with tribal court systems, subject to federal approval.⁹ Tribal courts began to adopt the structures and procedures of state and federal courts in order to merit federal approval.¹⁰ Still, the IRA signified a key change in the federal government's existing policy from assimilation to self-determination. Eventually, nearly 200 tribes adopted IRA constitutions.¹¹

Congress passed the Indian Civil Rights Act of 1968 (ICRA), and this statute extended many of the individual liberty guarantees of the Bill of Rights against tribal governments. Federal case law reinforces that the individual statutory

rights of the ICRA do not bring the tribes under the umbrella of the U.S. Constitution.¹² However, the ICRA limited the sovereignty of tribes because it insisted upon a form of government not necessarily of their own choosing. Tribes have responded to the ICRA in their laws and courts differently. Some tribal courts look to the ICRA as a federal statute, and others have incorporated the statute into their own constitutions and law and order codes in order to incorporate the concept of due process into tribal customs and traditions.¹³

The Indian Tribal Justice Act (ITJA), enacted in 1994, was intended to provide funding for and otherwise strengthen tribal court systems. The ITJA recognizes that "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes"¹⁴ and that tribal justice systems may include "traditional methods and forums for dispute resolution."¹⁵ Congress explicitly renounced any intention to interfere with the methods in which Indian nations dispense justice.¹⁶

II. THE PRESENT

Tribal justice systems today are as varied in tradition, appearance, and procedure as the tribes themselves. Despite the ability to do so, tribes generally have not recreated traditional justice systems because they have virtually no memory of these systems due to interruptions in customary Indian existence.¹⁷ Based upon

Congressional Imperative, 18 MICH. J. OF RACE & L. 317, 340 (2013).

⁶ *Id.*

⁷ *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888).

⁸ 25 U.S.C. §§ 461-79.

⁹ Donald L. Burnett, Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. ON LEGIS. 557, 565 (1972).

¹⁰ Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998).

¹¹ Nat'l Am. Indian Ct. Judges Ass'n., *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project* (David H. Getches & Orville N. Olney eds., 1978).

¹² *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

¹³ Newton, *supra* n.10, at 343.

¹⁴ 25 U.S.C. § 3601.

¹⁵ 25 U.S.C. § 3602.

¹⁶ 25 U.S.C. § 3611(d).

¹⁷ O'Connor, *supra* n.1.

the means used to create the courts and the law that the courts administer, tribal courts today can generally be divided into three categories: traditional justice systems, CFR courts, and tribally authorized courts.

Traditional tribal justice systems follow the practices developed by the tribes before European contact, following customary law and utilizing an informal means of dispute resolution. This type of justice system today is used in some of the smaller southwestern Pueblo tribes,¹⁸ and only roughly twenty of these purely traditional courts remain.¹⁹

Twenty-three tribes currently have CFR Courts which operate pursuant to applicable federal regulations and tribal law.²⁰ Generally, a tribe may choose this type of court either because the tribe's constitution and codes do not provide for a tribal court, or because it does not have the resources to operate its own courts.²¹ CFR courts can hear neither internal tribal issues, unless the tribe enacts a rule to the contrary, nor cases involving non-Indians, unless the parties consent to the court's power.²²

Most tribes have created their own courts and justice systems through tribal constitutions or tribal legislative enactments.²³ Some tribes have a highly structured judicial system that consists of multiple courts with multiple judges, while others have part-time single-judge

courts, and still others are members of a regional inter-tribal court system that adjudicates cases for many member tribes in a particular region.²⁴ Generally, today's tribal justice systems are comprised of a trial court, which may include a traditional dispute resolution tribunal, and an appellate court.²⁵ Similar to an Anglo-American mediator, these traditional dispute resolution tribunals do not subscribe to the "win-lose" approach of Anglo-American litigation systems, but rather they have adopted a restorative approach, focusing on keeping harmonious relations among the members of the community.²⁶ Among others, the Navajo and Hopi tribes have their own independent appeals courts, but the majority of smaller tribes do not.²⁷

The judges presiding over the cases in many tribal courts today are either elected by members of the tribe or appointed by the tribal council.²⁸ The requisite degree of legal training varies across tribes for both judges and individuals arguing before the court, but some tribes impose additional requirements to be part of the justice system. For example, the Navajo Nation requires tribal judges be an enrolled member of the tribe and fluent in the tribe's native language, and to practice in their tribal courts, one must pass the tribe's bar exam.²⁹ Many tribes have bar associations that operate much like state bar associations. Thus, the traditional methods of dispute resolution often

¹⁸ Barbara A. Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 592 (2000).

¹⁹ DAVID E. WILKINS, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* (2d ed. 2007).

²⁰ National Tribal Justice Resource Center, *Tribal Court History*, <http://web.archive.org/web/20070816162731/www.ntjrc.org/tribalcourts/history.asp>.

²¹ WILKINS, *supra* n.19, at 154-55.

²² Cohen's Handbook of Federal Indian Law

§ 4.04 (Nell Jessup Newton et al. eds., 2005).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ O'Connor, *supra* n.1, at 2-3.

²⁷ Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 49 (2008).

²⁸ Cohen's Handbook, *supra* n. 22.

²⁹ *Id.*

appear to coexist with Anglo-American influences.

A tribal court's jurisdiction today arises from the inherent sovereignty that the tribes enjoy by virtue of their status as a sovereign nation. Unless the federal government has imposed limitations, tribes have broad authority to adjudicate all criminal and civil matters that develop in Indian country. Generally, a tribal court's jurisdiction over criminal and civil cases is contingent upon whether the parties are Indian and whether the alleged crime or dispute took place in Indian country.³⁰

Thanks to Congress' contemporary hands-off approach to the administration of Native American justice, combined with the approval of billions of dollars in funding to improve and enhance tribal law enforcement and court systems, much has changed in the state of tribal legal justice systems. There has been a rapid increase in the construction of new tribal courthouses and jails, as well as significant investments in technology, communications, and public safety programs.³¹ Hundreds of millions of dollars in additional funding was approved to train tribal court judges, lawyers, paralegals, and other court personnel.³² In fact, in 2012 the National Council of Juvenile and Family Court judges recognized the Mississippi Band of Choctaw court as a model court for its state-of-the-art complex and ability to handle all manner of criminal, civil, youth, and peacemaking courts.³³ Given these

successes, the federal policy of self-determination has played a significant role in strengthening tribal justice systems, governments and communities of the present.

III. THE FUTURE

Tribal legal justice systems anticipate continuing strengthening. A trend exists among a number of traditional law schools to offer specialized programs in tribal law, and some schools even offer tribal or indigenous law clinics.³⁴ Further, Diné College, a Navajo college in Arizona, hopes to establish the country's first tribal law school, envisioning a program that goes beyond what is taught at traditional law schools to better prepare students to practice within tribal courts.³⁵

However, as tribes experience more success exercising self-governance, this triumph can be expected to drive unpredictable changes in public perception. Although most perceive these advancements positively, the consequences of instituting more tribal legal education programs may present diametrically opposed consequences. On the one hand, it has the potential to better equip tribal court practitioners, provide an appealing avenue for aspiring lawyers, and reshape any negative misconceptions on the sophistication of tribal legal justice. On the other hand, the current lack of knowledge surrounding tribal justice systems causes lawyers, judges, and lawmakers to act with excessive caution when interacting with tribal courts.³⁶ In turn, this extreme cautiousness allows for

³⁰ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 125 (4th ed. 2004).

³¹ Suzette Brewer, *Tribal Justice on Trial: Dollar General Part II*, INDIAN COUNTRY MEDIA NETWORK (Nov. 24, 2015), <https://indiancountrymedianetwork.com/news/politics/tribal-justice-on-trial-dollar-general-part-ii/>.

³² *Id.*

³³ *Id.*

³⁴ Karen Sloan, *First Law School for Tribal Attorneys in Nascent Stages*, Law.com (January 16, 2020), <https://www.law.com/texaslawyer/2020/01/16/first-law-school-for-tribal-attorneys-in-nascent-stages/>.

³⁵ *Id.*

³⁶ See Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311

self-governing tribes to continue taking into account the goals and traditions of their own tribal societies without direct regard for, or further influence from, Anglo-American ideals. Thus, there exists an unclear future of how publicity from continued success may affect current tribal justice systems.

Finally, a number of critical policy and legal issues facing Indian Country will have impact on the tribal justice systems of tomorrow. The U.S. Supreme Court recently denied review of the Alabama-Coushatta tribe's challenge to a Fifth Circuit ruling that Texas law bars the tribe from offering bingo.³⁷ However, a bipartisan bill that recognizes these gaming rights has passed in the U.S. House of Representatives and awaits

movement in the Senate.³⁸ Were it to pass in the Senate, the Act would redress the Alabama-Coushatta tribe's grievances regarding gaming-related sovereignty. The Supreme Court will decide whether to uphold a Tenth Circuit decision that Oklahoma lacked jurisdiction to prosecute a 1999 homicide because Congress never disestablished the Muscogee (Creek) reservation.³⁹ Finally, tribal nations will be watching how Congressional appropriations bills, like the Special Diabetes Program for Indians, may impact self-governance programs, which in turn affect improvements in their communities' infrastructures.⁴⁰ Although the future of tribal legal justice systems remains hopeful amid obstacles, upcoming federal actions may impact tribal sovereignty.

(2000) (discussing litigants' preference for state court so as to avoid difficulties in having state judges enforce tribal judgments).

³⁷ *Alabama-Coushatta Tribe turns to Congress after hitting end of road at Supreme Court*, Indianz.com (January 27, 2020), <https://www.indianz.com/IndianGaming/2020/01/27/alabamacoushatta-tribe-turns-to-congress.asp>.

³⁸ *Id.*

³⁹ Donald Pongrace, Allison Binney, et al., *A Wide Range of Legal Priorities for Tribes in 2020*, Law360 (January 15, 2020), <https://www.law360.com/articles/1233382/a-wide-range-of-legal-priorities-for-tribes-in-2020>.

⁴⁰ *Id.*