

## Native Nations Justice Systems

(October 8, 2016)

### **Traditional dispute resolution systems**

- Institutions of indigenous self-governance
- Predated both state and federal courts
- Based on custom and tradition (tribal common law)
- Included all interested persons in a “talking out” process
- Utilized consensus (non-adversarial)
- Healed the injury (victim oriented)
- Restored the community to harmony

### **Differences in Justice Paradigms**

Holistic (circle of justice)	Vertical hierarchy
Fluid communications	Rehearsed communications
Oral customary law	Written statutory law
Law and justice combined	Separation of powers
Spirituality included	Separation of church and state
Talk and discussion	Argumentative
Consensual (win-win)	Adversarial (win-lose)
Comprehensive	Fragmented, compartmentalized
No time limits	Time oriented
Inclusive, egalitarian	Limited participation
Represented by extended family	Represented by strangers
Focus on victim, community	Focus on individual rights
Corrective	Punitive
Customary sanctions	Prescribed penalties
Traditional “probation officers”	Officers of the state
Reparations, restoration	Vindication
Original dispute resolution	Alternative dispute resolution
Confession and remorse	Innocent until proven guilty
Cleansing, healing	Incarceration

### **Courts of Indian Offenses (created by BIA in 1883)**

- Established under general powers of Commissioner of Indian Affairs – no statutory authority
- Federal purpose was to “educate” and “civilize” Tribes.
- Operated on about two thirds of Indian Reservations.

- BIA Law and Order Code prohibited “barbarous” acts such as ceremonial dances, practices of medicine men, "immorality."
- Staffed by Indian judges who were chosen by and served at the pleasure of the Indian agent, not the community.
- Patronage system rewarded Indians who assimilated ("friendlies") rather than those who were more traditional ("hostiles").
- Ultimate decision rested with the Indian agent (a non-Indian beneficiary of the patronage system).

### **Allotment Act Era (1887-1934)**

- Federal policy was to destroy tribal self-governance and communal land holdings.
- Powerful negative effect on Tribal governments and traditional justice forums.
- 1923: Navajo courts were initially formed by the BIA in response to requests by oil companies for exploration leases on reservation

### **Tribal Courts established by Indian Reorganization Act**

- Federal policy in 1934 (Indian Reorganization Act) was to restore tribal self-government.
- Model constitutions created tribal courts to replace CFR Courts.
- Model codes limited criminal jurisdiction of tribal courts to minor offenses, subjected tribal laws to Department of the Interior/BIA approval, limited sentencing power of tribal courts to a maximum of 6 months imprisonment for criminal offenses (and up to \$500 fines).
- Most Tribes assumed responsibility for judicial functions (some CFR courts continued to operate). Contemporary Navajo tribal courts were established by tribal law in 1958.

### **Termination Era (1953-1968)**

- Federal policy was to terminate the government-to-government relationship (and federal trust responsibility) and transfer jurisdiction to states.

### **Current Federal Policy**

- 1968 Indian Civil Rights Act (ICRA) reaffirmed Tribal powers of self-government, including court systems.
- Current federal policy is to support Tribal self-government.

## Justice Systems (October 8, 2016)

Federal Court System (organized under the U.S. Constitution and federal laws with limited jurisdiction which is defined by federal law)

- District Courts (trial courts)
- Courts of Appeal (regional circuit courts)
- Supreme Court
- Other specialized courts (e.g., bankruptcy, tax courts, Court of Claims)
- Federal rules of procedure
- Federal licensing of attorneys
- Judges are licensed attorneys

State Court Systems (organized under state laws)

- Trial Courts (e.g., Colorado has 22 judicial districts)
- Appellate Court (not all states have an intermediate appellate court)
- Supreme Court
- Other specialized courts (e.g., small claims)
- State rules of procedure
- State licensing of attorneys, including continuing legal education
- Judges are licensed attorneys

Tribal Justice Systems (organized under tribal law, custom and tradition)

- Tribal Courts
- Peacemaking is often an integral aspect of the tribal justice system (e.g., Tribal Court may refer a case to peacemaking if all parties agree. A peacekeeping resolution may be entered as a tribal court decree.)
- Traditional peacemaking requires voluntary participation (based on traditional justice principles with peacemakers from the community)
- The Navajo Nation Peacemaking Program has peacemaker liaisons in each of the twelve judicial districts and certified peacemakers in 110 Chapters.
- Some tribes have councils of elders ("keepers of Tribal encyclopedia") or community councils who hear and resolve disputes within the community.
- Some pueblos have a contemporary secular court + traditional religious ct.
- In Pacific NW, fishing tribes have traditional courts that handle only disputes related to rivers.

- Tribal Healing to Wellness Courts use a team approach to achieve the physical/spiritual healing of participant + restore community well-being.
- Some tribes have a court of appeals. There are also intertribal courts of appeals (e.g., Northern Plains, Southwest, Northwest, Northern California) which offer appellate services to Native Nations within their area.
- 2002: Navajo Nation Council codified Dine fundamental laws (tradition and custom) to guide all aspects of government operations, including the Navajo Nation justice system.
- Some Tribes require licensing of attorneys and Tribal Court advocates
- Membership in a tribal bar may require passage of a bar exam and may include Tribal Court Advocates who are often tribal members.
- Some Tribes require custom and tradition training for attorneys/ advocates.
- Tribal rules of procedure
- Unwritten traditional law may be applied by tribal courts (e.g., child custody, property distribution, religious objects).
- Unique tribal remedies include exclusion and removal (banishment).
- Tribal Court judges may not be licensed attorneys, may have other requirements (e.g., may be required to speak the Tribal language).

Sovereign Immunity from suit is a principle with origins in English common law that the sovereign is immune from suit without the sovereign's consent (“The King can do no wrong”)

- States. The 11<sup>th</sup> Amendment to the U.S. Constitution prohibits suits against states in federal court. Seminole Tribe v. Florida, (1996).
- Federal government. The federal government cannot be sued without the consent of Congress.
- Tribes. Tribal sovereignty (+ sovereign immunity) has been recognized by U.S. Supreme Court. US v. Winans, (1905).

#### Waivers of sovereign immunity

- Federal Tort Claims Act (1946) waived federal sovereign immunity for certain purposes (e.g., government negligence).
- Congress has “plenary” power to waive tribal sovereign immunity, but must be explicit.
- Tribal waivers of sovereign immunity in Indian Country:
  - waiver into tribal court
  - waiver to the extent of tribal insurance coverage
  - waiver limited to injunctions/declaratory relief (no money damages)

## Jurisdiction in Indian Country (October 8, 2016)

- I. **Three separate types of sovereigns**
  - A. Native Nations (aboriginal nations which predate the U.S.)
  - B. United States: federal government (1789 U.S. Constitution)
  - C. States (1789 U.S. Constitution)
  
- II. **What is Anglo-American jurisdiction?**
  - A. Legal authority over:
    - 1. Geographical area (territorial jurisdiction);
    - 2. Persons (personal jurisdiction); *and*
    - 3. Types of cases (subject matter jurisdiction).
  - B. Types of legal authority:
    - 1. Legislative: authority to *enact* laws
    - 2. Judicial: authority to *interpret* laws
    - 3. Executive: authority to *carry out* laws
  - C. Types of jurisdiction:
    - 1. Exclusive (only one sovereign has jurisdiction)
    - 2. Concurrent (two sovereigns have the same jurisdiction)
  
- III. **Geographical area**
  - A. Reserved homelands (“Reservations”) may include the following:
    - 1. Tribal lands held in trust by US
    - 2. Tribal lands owned in fee simple
    - 3. Tribal member allotments held in trust by US
    - 4. Tribal member lands owned in fee simple
    - 5. Land owned by non-Indians within Reservation boundaries
  - B. Traditional homelands no longer part of the Reservation:
    - 1. Treaty reserved hunting, fishing and gathering rights for tribal members on aboriginal homelands no longer part of the Reservation.
    - 2. Tribal member allotments that have never gone out of trust (e.g., Colville allotments located on the former “north half” of the Reservation).

#### **IV. Persons**

- A. Tribal members
- B. Non-member Indians (members of other Tribes)
- C. Non-Indians (U.S. citizens)
- D. Non-U.S. citizens
- E. Eastern Band of Cherokee v. Torres, (Cherokee Sup.Ct., 2005)

#### **V. Subject Matter**

- A. Criminal cases
  1. General Crimes Act: authorized federal court jurisdiction for *non-Indian* crimes against *Indians* in Indian Country.
  2. Major Crimes Act: authorized federal court jurisdiction for major *Indian* crimes against *Indians* in Indian Country.
  3. Misdemeanors: “lesser” criminal acts
- B. Civil cases (e.g., hunting, fishing, contracts, tax, environment, zoning, marriage, divorce, probate, tribal membership, adoptions)

#### **VI. Jurisdiction in Indian Country**

- A. U.S. treaties, executive orders, contracts with Native Nations
- B. Federal law
  1. Annual appropriations acts and riders (e.g., 1871 rider ending treaty-making with Indian Tribes)
  2. General Crimes Act (1817)
  3. Major Crimes Act (1885) Tribal courts have concurrent jurisdiction with federal courts.
  4. Indian Reorganization Act (1934) [tribal court: 6 months + \$500]
  5. P.L. 83-280 (1953) [Created some state jurisdiction in Indian Country without Tribal consent.]
  6. Termination Acts of Congress
  7. Restoration Acts of Congress
  8. Indian Civil Rights Act (1968)
    - Reaffirmed Tribal powers of self-government.
    - Required Tribal courts to provide some, but not all due process rights in the U.S. Constitution.
    - Habeas corpus action allowed in federal court to review the legality of tribal detention.

- Increased Tribal court sentencing powers: 1 year + \$5,000
  - Amended P.L. 280 to require Tribal consent + authorized retrocession of P.L. 280 jurisdiction.
9. Indian Self-Determination Act and Education Assistance Act (1975) enabled Tribes to contract with the federal government to run their own programs, including Tribal Courts.
  10. Indian Child Welfare Act (1978): State courts required to notify child's Tribe during involuntary Indian child custody proceedings originating in state court. Tribe has right to intervene or transfer the proceeding to Tribal court. ICWA established preferences for foster care + adoptive placements.
  11. Tribal Law and Order Act (2010) amended Indian Civil Rights Act to extend tribal court jurisdiction to 3 years (9 years max.) *so long as* defendants are provided licensed legal counsel, the tribal court judge is licensed + law trained, tribal criminal laws, rules of evidence and procedure are published + there is an audio or video record of the criminal trial.
  12. Violence Against Women Act (2013) allows tribal court jurisdiction over **non-Indians** who commit domestic/dating violence or violate a protection order on reservation.
- C. U.S. Supreme Court decisions
1. Criminal jurisdiction
    - Talton v. Mayes (1896): Cherokee (convicted of murder in tribal court) challenged his conviction, claiming that the Cherokee court didn't comply with the U.S. Constitution. Court said that the U.S. Constitution, including the Bill of Rights, did **not** apply to Tribes; Native Nations are separate sovereigns, not arms of the U.S. government.
    - Ex Parte Crow Dog (1883): one Lakota (Crow Dog) killed another (Spotted Tail) on the reservation. Dispute was resolved by Lakota custom and tradition. No federal court jurisdiction.

- Oliphant v. Suquamish (1978): Native Nations do not have criminal jurisdiction over non-Indians. ("inconsistent with their status")
- Duro v. Reina (1990): Native Nations do not have criminal jurisdiction over non-member Indians. [Reversed by "Duro fix:" Congress amended ICRA definition of "powers of self-government" to add, "the *inherent* power of Indian Tribes, hereby *recognized and affirmed*, to exercise criminal jurisdiction over all Indians."]

## 2. Civil Jurisdiction

- Williams v. Lee (1959) upheld Tribal Court jurisdiction in non-PL 280 states over civil disputes by non-Indians with Indians in Indian Country.
- Mississippi Choctaw v. Holyfield (1989): No state jurisdiction under Indian Child Welfare Act where children are domiciled or reside on reservation. Child's domicile follows domicile of parents.
- U.S. v. Montana (1981): No tribal jurisdiction to regulate hunting and fishing by non-Indians on non-Indian fee land within the reservation) Two exceptions: (1) consent to jurisdiction and (2) Tribes can regulate "conduct which threatens or has some direct effect" on the Tribe's "political integrity, economic security and health or welfare."
- Strate v. A-1 Contractors (1997): Tribes have no jurisdiction over non-Indians in auto accident on state right-of-way through the reservation.

## D. Tribal law and cultural sovereignty

### 1. Tribal constitutions

- Coin v. Mowa (Hopi Appellate Court, 1997) Family matters handled in village; other matters handled in Tribal Court.

### 2. Tribal codified law

### 3. Tribal customary law

- Apache v. Republic Life Insurance Co. (WR-CV-197-82) Based on Navajo customary law, spouse loses right to insurance benefits in event of divorce.



- Russell Means v. District Court of the Chinle Judicial District (NN Sup.Ct., 1999) Defendant consented to criminal jurisdiction as "hadane" (in-law).
- E. State law as authorized by federal law (e.g., P.L. 280, Congressional settlement of Tribal land claims with jurisdiction provisions)

**Chart of Tribal Court *criminal* jurisdiction over *persons* on reservation**

Tribal member	YES	
Non-Member I.	YES	"Duro fix" + U.S. v. Lara
Non-Indian	NO**	Oliphant v. Suquamish

\*\*Domestic violence exceptions in 2013 Violence Against Women Act

**Chart of *criminal* jurisdiction on reservation by three sovereigns:**

	<b>Federal</b>	<b>Tribal</b>	<b>State*</b>
Indian v Indian	YES (Major Crimes Act)	YES	NO
	(General Crimes Act)		
Indian v NonInd.	YES (Major Crimes Act)	YES	NO
NonInd. v Indian	YES (Gen'l Crimes Act)	NO**	NO
NonInd. v NonInd.	NO	NO	YES

\*States with P.L. 280 criminal jurisdiction have *concurrent* jurisdiction with tribal courts

\*\*Domestic violence exceptions in 2013 Violence Against Women Act