Striving for the Independence of Native American Tribal Courts

By Kirke Kickingbird

Popular notions of Indian justice systems owe more to films such as *Last of the Mohicans* than to historical reality. They conjure up images of a heroic frontiersman or maiden tied to a stake surrounded by blazing logs. No matter the version presented, the idea is clear: Indian legal systems are patently unfair.

Yet shortly after Europeans arrived in the New World, reports acknowledged that a complex system of justice governed relations among Indians. The Spanish referenced magistrates, laws, and schools for public service among the Incas and the Aztecs. In later years, the English recognized the sophisticated, confederated governmental system of the Iroquois.

Subsequent centuries witnessed long periods of the suppression and negation of independent tribal courts, and even today such courts have neither the independence nor self-sufficiency that most Native Americans would prefer. That said, in the last several decades sophisticated tribal justice mechanisms and judiciaries have once again arisen and are expanding. Only in these decades has the development of tribal legal expertise begun to flourish and be applied in a more widespread manner that serves the needs of Indian communities. Nonetheless, tribal judiciaries are still limited in their jurisdiction and decision making, and a fair and impartial tribal judiciary remains largely unrecognized even as we begin the twenty-first century. But before we look to the future, perhaps we need to revisit the past.

Early History of Indian-American Relations

Initially, Indian military superiority made it unwise for the English colonists to interfere with the tribal justice systems. After 1776, the United States adopted the English policy of avoiding conflict with the Indian nations. Legislation in the 1790s required a passport to enter Indian Country and vested federal courts with authority over crimes U.S. citizens committed against Indians. The U.S. government was concerned about stable relations rather than justice and viewed Indian societies as primitive, disordered, savage, and inferior. Federal legislation in 1817 continued federal authority over non-Indian crime and included crimes by Indians against non-Indians.

In *Worcester v. Georgia*, 31 U.S. 515 (1832), the U.S. Supreme Court declared states had no jurisdiction in Indian Country. This left the federal and tribal governments as authority in Indian Country. American territorial expansion left tribes relocated and their lands reduced in size. The related U.S. Indian assimilation policy left tribal institutions, society, culture, and justice systems under assault. Shortly after *Worcester,* commissioners of Indian Affairs were recommending a written legal code be developed for the tribal governments.

The costs of the U.S. Civil War and the continuing power of tribal governments forced the U.S. Congress to authorize the Great Peace Commission to pursue treaties of peace and friendship with the Indian nations in 1867–68. Yet power relationships changed dramatically after that date, and tribal governmental institutions, including the warrior police and judicial forums, were neutralized and dismantled.

By 1878, the Bureau of Indian Affairs attempted to establish Indian police forces and local Indian courts to replace the tribal institutions that had been destroyed, similar to what the United States is now doing in Iraq, except the tribes had treaties as allies. During this era, the U.S. Supreme Court decided *Ex parte Crow Dog*, 109 U.S. 557 (1883), concluding that the tribe, rather than the United States, had jurisdiction in an Indian murder of another Indian. Yet the same year the Bureau of Indian Affairs created the Court of Indian Offenses, with civil and criminal jurisdiction over Indians as a substitute for the moribund tribal judicial systems.

Moving into the Twentieth Century

The federal government developed policies to change Indian life, supposedly for the better, but major studies in the 1920s showed the many failures of U.S. Indian policies since the 1880s. With the election of President Franklin Delano Roosevelt, there were New Deal proposals for tribes in the Indian Reorganization Act (IRA) in 1934 (25 U.S.C. § 461 et seq.) and the Oklahoma Indian Welfare Act in 1936 (25 U.S.C. § 501 et seq.). These were intended to stop the breakup of reservations and revitalize Indian economies and governmental institutions. The written constitutions for tribes under the IRA could also include judicial systems that mirrored the formats of the federal and state systems. Not all tribes included courts in their new constitutions, and the outbreak of World War II suspended all tribal government and court development.

The postwar world was different. Congress was in a penurious mood and turned law enforcement and judicial responsibilities for Indians over to five states and offered the same opportunity to all other states. Indian affairs had always been a federal responsibility since the foundation of the United States, but federal dollars did not come with the authority, and states were not interested in unfunded mandates.

The world had changed for Indian veterans. They brought back new experiences, new ideas, and old ambitions of self-government, including tribal judiciaries. Congress tried to dump its Indian responsibilities by withdrawing recognition of tribal governments in a policy called "termination." By the late

Published in *Human Rights*, Volume 36, Number 1, Winter 2009.

1950s, tribes had fought the policy to a standstill.

A Consistent Movement toward Autonomy

The 1960s ushered in the era of "self-determination." It fostered Indian control of their programs through contracts, tribal consultation, and Indian self-governance. As the policy gathered momentum, tribal government regained its footing. By the mid-1970s, tribal courts were acknowledged to have jurisdiction over Indians for misdemeanors committed on reservations. Tribes were expanding their authority to hear cases involving non-Indians through the use of implied consent ordinances and signs posted at reservation boundaries. In 1978, the Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, that tribal courts did not have jurisdiction over non-Indians for criminal misdemeanor offenses.

Changes likewise occurred in available legal resources. The National American Indian Court Judges Association had been working since 1969 to enhance tribal judicial systems through training and other support programs. In 1968, the University of New Mexico (UNM) started an Indian law program, and Indian graduates started enrolling at UNM and other universities. In 1971, Indian attorneys organized the American Indian Lawyers Association, which later became the National Native American Bar Association. Legal Service Corporation–funded programs could take tribal court cases. Resources were improving to support tribal court system needs for court clerks, paralegals, judges, and lawyers.

The availability of adequate funding has long been recognized as one of the key ingredients for the development of effective Indian tribal government, and particularly for tribal justice systems. In 1941, Commissioner of Indian Affairs John Collier noted the lack of adequate financial support for tribal courts in Indian Country. In its final report issued in 1977, the American Indian Policy Review Commission, created by Congress, noted the importance of tribal justice systems and urged that Congress provide sufficient funding for their establishment and development.

In 1991, the U.S. Commission on Civil Rights, reporting on the implementation of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq., noted the need for adequate funding for tribal justice systems. It reasserted the same problem in a 2003 report. In 1993, Congress enacted the Indian Tribal Justice Act, 25 U.S.C. § 3601 et seq., to provide support for Indian tribal courts, but funding has never been sufficient to meet the needs across Indian country.

The Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3651 et seq., authorized funding through the Departments of Justice and Interior for criminal and legal assistance, and for the development, implementation, enhancement, and continuing operation of tribal justice systems.

The Situation Today

About 275 Indian tribes now have their own court systems. Federal laws prevent these courts from prosecuting non-Indians. Cases involving non-Indian offenders must be referred to federal or state prosecutors who often lack the time, resources, or interest to pursue them.

General William T. Sherman allegedly defined a reservation as "a parcel of land set aside for Indians and surrounded by thieves." With the rise of Indian gaming since 1988, that century-old definition is probably just as relevant today. Financing Indian gaming facilities, machines, hotels, restaurants, resorts, and related business requires access to capital. There is a potential for problems at casinos and restaurants and their related parking facilities, whether theft, assaults and mugging, or drug operations. Tribes need clear authority to arrest and try such law breakers, especially because these offenses hold little interest for the federal or state authorities.

The skepticism of two centuries ago has no foundation today. Tribal judges are law trained. Trials take place at tribal court facilities. Tribes often have bar associations that an attorney must join before practicing before the tribal court. And gaming revenues are supporting many tribal government responsibilities and programs, including tribal courts.

In Resolution 117A, adopted at the Annual Meeting in 2008, the American Bar Association affirmed that tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities and urged increased funding and enhancement of tribal justice systems. The primary vehicles for that support would be Congress reauthorizing the Indian Tribal Justice Technical and Legal Assistance Act and the Indian Tribal Justice Act.

What has become clear to tribal government is that development of governmental infrastructure and economic projects requires Indian law expertise because of the complex issues that arise in applying its many doctrines. Concerns expressed by tribal members; by non-Indians visiting Indian Country; and by businessmen, corporations, and lenders who want to do business in Indian Country center around assurances that tribal authority is enforceable. Likewise, tribal governments need an appropriate forum to address the conflicts affecting tribal members, whether the issue is a domestic matter such as child welfare or a dispute involving major business operations and related financing. Yet, the authority of tribal governments has become more controversial as tribes have engaged in more extensive use of their authority.

Tribal government leaders are fully aware of the questions their governments face. They recognize that they have to balance the use of sovereignty against self-preservation and social and economic well-being. They are engaged daily in learning how to use tribal governmental authority and federal Indian law in the most effective fashion. Tribes are fully aware that they must structure or restructure their

institutions to satisfy their needs and to protect tribes' long-term economic, social, and cultural interests. In some instances, this means amending tribal constitutions. In others, it requires developing or revising tribal laws to meet twenty-first century tribal economic needs. In all cases, it means improving their tribal courts to address civil and criminal matters. Tribes want to provide and be seen as providing a fair and impartial judiciary.

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