



TRIBAL COURTS: SOVEREIGNTY, DUE PROCESS AND DISPUTE RESOLUTION

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INTRODUCTION

- As an exercise of their inherent sovereignty, each tribe in Oregon, and the majority of tribes around the United States, have established tribal court systems.
- These tribal courts are set up to handle various types of civil disputes: tort claims, contract disputes, landlord-tenant, child custody, domestic relations.
- Federal court decisions and Congressional action have resulted in some substantial re-shaping of tribal courts' jurisdiction and authority.
- There are a number of misconceptions about tribal courts that may lead some non-tribal parties to fear having their case heard in such a forum.

INTRODUCTION

- More and more, however, non-tribal entities are learning about tribal courts and agreeing to have disputes resolved in those forums.
- There are actually a number of benefits of having cases heard in a tribal court as opposed to the state or federal systems.
- In my remarks, I will focus on three areas:
 - A summary of the law and history regarding tribal courts
 - Some of the misconceptions about tribal courts
 - Advantages of dispute resolution in tribal court

Tribal Court Law and History

- The basis of Tribal Court jurisdiction is each tribe's inherent sovereignty: the tribe's right to "make its own laws and be governed by them."
- Tribal sovereignty is in fact recognized (albeit indirectly) in the United States Constitution as one of the three sources of sovereignty (along with State and Federal sovereignties) within the territories of the United States:
 - Art. I, Sec. 8, cl. 3 (Commerce Clause)
 - Art. II, Sec. 2, cl. 2 (Treaty power, as exercised for first 100 years)

Tribal Court Law and History

- Some of the earliest legal disputes involving Indian tribes concerned court jurisdiction
- 1830s: Cherokee Nation cases involved arrest and prosecution by State of Georgia of non-Indians on Cherokee lands
- In 1832, the Court issued **Worcester v. Georgia** **31 U.S. 515 (1832)**, holding that that by submitting to the stronger power of the US, the tribe did not give up all of its sovereignty, but it continued to have governmental powers.

Tribal Court Law and History

- Provided detailed history of relations between tribes and England and then the United States:
- “The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”

Tribal Court Law and History

- Held: Prosecution of non-Indians on Cherokee land in State court was beyond authority of State.
- President Andrew Jackson's famous quotation concerned this case:
 - “[Chief Justice] John Marshall has made his decision. Now let him enforce it.”
 - Set the stage for continuing conflicts between tribes, states, and United States over jurisdiction

Tribal Court Law and History

- **Ex Parte Crow Dog, 109 U.S. 556 (1883):** Crow Dog was a member of the Brule band of the Lakota (Sioux), who shot and killed Spotted Tail, a Lakota chief (allegedly for collaborating with U.S. authorities against the Tribe).
- The Tribe dealt with the incident according to Sioux tradition of restitution rather than punishment.
- Non-Indians expressed outrage. U.S. authorities then prosecuted Crow Dog for murder in a federal court. He was found guilty and sentenced to hang.

Tribal Court Law and History

- In 1883 Court ruled that in the absence of federal laws to the contrary, tribes had exclusive power to apply criminal laws to tribal members. Crow Dog's conviction was overturned.
- Two years later Congress imposed some federal criminal laws on Indians within reservations with the Major Crimes Act, removing those crimes from jurisdiction of tribal courts.
- The Court subsequently held that Congress has the power to do so. **United States v. Kagama, 118 US 375(1886).**

Tribal Court Law and History

- In 1896, the Supreme Court ruled that because “the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution,” tribes were not bound by its limitations. **Talton v. Mayes, 163 US 376 (1896).**
- Bill of Rights protections therefore did not apply to tribes and tribal courts.

Tribal Court Law and History

- **Dawes Act of 1887** (also known as the **General Allotment Act** or the **Dawes Severalty Act of 1887**), dividing of tribal lands into allotments for individual Indians.
- Through the allotment process communal tribal lands were divided into individual parcels and distributed to tribal members.
- The balance of land was declared "surplus" and sold to non-Indians.

Tribal Court Law and History

- Over 90 million acres of Indian land (65%) were transferred to non-Indians through this process.
- Result was “checkerboarding” of reservations, with blocks of non-Indian owned land interspersed with tribal-owned land and Indian-owned allotments.
- Significant implications for tribal court jurisdiction – what authorities do tribes have over non-Indians on those non-Indian owned lands, and non-Indians on reservation generally?

Tribal Court Law and History

- **Termination Policy: 1950's and 1960's**
- Congress unilaterally determined that certain Indian tribes' recognition should be terminated, their lands sold off, and their members declared no longer to be Indians.
- Hit Oregon tribes particularly hard: more tribes terminated in Oregon (62) than in all other states combined.

Tribal Court Law and History

- **Public Law 280: 1954**
- Congress unilaterally determined that State courts should have criminal and civil jurisdiction over certain Indian reservations.
- Oregon one of the States (except for Warm Springs reservation) where Public Law 280 applies.

Tribal Court Law and History

- **1950's and 1960's seen as low point in Indian tribal sovereignty and court authority**
- Courts and Congress subsequently began moving in opposite direction in what is known as “modern era” of Indian law.
- **Williams v. Lee, 358 US 217 (1959)**, held an Indian tribe had exclusive jurisdiction over a contract dispute arising on the reservation between an Indian and a non-Indian. (PL 280 did not apply to this reservation.)

Tribal Court Law and History

- **Indian Civil Rights Act of 1968**, officially ended termination and Public Law 280 era (though it did not reverse either of those acts).
- Extended many of the bill of rights and constitutional limitations to tribal governments, but limited federal review of tribal actions.
- Key law for due process protections in tribal court (discussed further below)

Tribal Court Law and History

- **The Indian Self-Determination Act (1975)**
(permitted tribes to contract for and provide federal services – including tribal courts, many of which were operated by BIA).
- **The Indian Child Welfare Act (1978)** (confirmed and clarified tribal court jurisdiction over child welfare matters)
- **Restoration Acts (1970s through 1989)** (restored federal recognition to a number of terminated tribes)

Tribal Court Law and History

- **Terminated Tribes restored in Oregon**
 - Confederated Tribes of Siletz (1977)
 - Cow Creek Band of Umpqua Indians (1982)
 - Confederated Tribes of Grand Ronde (1983)
 - Confederated Tribes of Coos, Lower Umpqua, and Siuslaw (1984)
 - Klamath (1986)
 - Coquille (1989)
- Had to rebuild their governments and court systems from the ground up.

Tribal Court Law and History

- **Meanwhile, federal courts continued to refine tribal court jurisdiction and authority (sometimes in inconsistent ways)**
- **Oliphant v. Suquamish Tribe, 435 US 191 (1978)** (tribes do not have criminal jurisdiction over the actions of non-Indians on the reservation).
- **Duro v. Reina, 495 US 676 (1990)** (tribes do not have criminal jurisdiction over nonmember Indians on reservation – result was reversed by Congress).



Tribal Court Law and History

- **Montana v. United States, 450 US 544 (1981).**
Holding that despite inherent tribal sovereignty, Indian tribes did not have civil jurisdiction over the actions of non-Indians that occurred on non-Indian owned fee land within the boundaries of the reservation. (Impact of Allotment Acts)
- The Court did note, however, two exceptions to this rule: (1) where the non-Indians had consensual relationships with the tribe and its members, or (2) where the conduct at issue threatened the political integrity, economic security, or the health and welfare of the tribe.

Tribal Court Law and History

- **Strate v. A-1 Contractors, 520 U.S. 438 (1997).** Tribal court did not have jurisdiction over case involving automobile accident that occurred on-reservation, but involved non-Indians on a state highway.
- **Nevada v. Hicks, 533 U.S. 353 (2001).** The Court held that a tribal court did not have jurisdiction over a civil rights lawsuit brought against a non-Indian, state police officer who committed the alleged civil rights violations against a tribal member on trust land within the reservation boundaries.

Misconceptions

- **“Tribal Courts are not professional courts”**
- Oregon tribes have spent much time and resources to develop highly professional court systems
- Nearly all employ law-trained judges
- Civil procedures generally mirror those found in state and federal courts (impact of federal case law, as well as funding)
- Training from National Judicial College (along with judges from federal and state courts)

Misconceptions

- “Non-Indians shouldn’t be subject to jurisdiction of a ‘foreign’ court where they don’t have right to vote”
- If you do business in another state or another country, you are subject to jurisdiction of those courts
- Congress rejected this argument in expanding jurisdiction to non-Indians under recent Violence Against Women Act (VAWA) amendments

Misconceptions

- **“No ‘due process’ in Tribal Courts”**
- Indian Civil Rights Act of 1968 required adherence to Bill of Rights provisions from U.S. Constitution – including right to “due process”
- **Santa Clara Pueblo v. Martinez, 436 US 49 (1978).**
tribal courts are the forums for reviewing claims raised under the Indian Civil Rights Act
- Tribal courts have developed an extensive due process case law (can now find and search these cases online).

Misconceptions

- **“Non-Indians will not be treated fairly in Tribal Courts”**
- Due to federal law (Indian Civil Rights Act) there are now requirements that apply to Tribal Courts, guaranteeing due process and equal protection.
- Judges are law-trained, and a number of judges are non-Indian themselves.

Misconceptions

- “Tribal Court will do what the Tribal Council wants”
- Tribes take pains to ensure separation of powers.
- Based on court cases and federal statutes, Tribal Court systems more often resemble federal and state courts in this way.
- Some tribes elect their judges separately from Council.
- Others hire on contract with specific terms.

Misconceptions

- **“Tribal Court won’t be fair”**
- This is the basic concern, addressed in other points.
- Tribes are increasingly sophisticated stakeholders in business and investment world.
- Understand, at both the Tribal Council and Tribal Court level, the importance of an independent and impartial judiciary.
- The “invisible hand” of the market a corrective force.

Advantages

- **Timeliness**
- Federal and state court dockets are backed up, and with funding cuts and resulting decrease in personnel, more delays are likely.
- With smaller caseloads and more targeted resources, Tribal Courts can move forward more quickly to a resolution.

Advantages

- **Better Understanding of the Issues**
- Because they tend to be smaller and located in smaller communities, Tribal Courts will likely be more familiar with the issues involved in a particular case.
- Also, with regard to construction and business development disputes, they will understand better the impact on the community from long delays in resolving the case.

Advantages

- **Sovereign Immunity**
- Tribes have sovereign immunity from suit.
- Like states and like the federal government, they are more comfortable waiving that immunity when it is to a court within their jurisdiction.
- Thus, more likely to have a forum where a dispute can be resolved through litigation.

Advantages

- **Alternative Dispute Resolution**
- Many tribes have a “peacekeeper” or other alternative dispute resolution process that can provide a “win-win” solution rather than a “winner takes all” litigation posture.
- Approaches that are now being developed and explored in non-Indian courts long a fixture of tribal systems (see Crow Dog case)
- More conducive to long-term business and financing relationships.

Advantages

- **Enforcement of Arbitration Award**
- Many tribes will be willing to negotiate arbitration as the dispute resolution mechanism in a commercial or financing agreement.
- But will insist on enforcement of any arbitration award in Tribal Court.
- An increasingly common means of structuring the relationship.

Conclusion

■ Questions?

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