



110 W. Choctaw  
Tahlequah, Oklahoma 74464  
Phone: (918) 456-5581  
Fax: (918) 458-5415  
[www.institutefornativejustice.org](http://www.institutefornativejustice.org)

## Incorporating Culture into Tribal Courts: A Victim-Centered Approach

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Presented by Justice Darrell Dowty, Director, Institute  
for Native Justice TRACES Project.

## Failure to Recognize the Importance of Culture and Tradition Leads to Injustice for Crime Victims

### A Case Example

## Tribes define the Relationships Between Traditional and Substantive Law

- **Section 2-1-7. Law to be Applied**
- The Courts shall first apply the Tribal Constitution and this Code, as amended hereafter. In matters not covered by such law, the Courts shall apply traditional tribal customs and usages, which shall be called the Tribal Common Law. When in doubt as to the Tribal Common Law, the Courts may request the advice of counselors and tribal elders familiar with it.

Law and Order Code – Prairie Band Potawatomi Tribe

- Section 4. Force of the Tribal Common Law
- The customs and traditions of the Tribe, to be known as the Tribal Common Law, as modified by the Tribal Constitution and statutory law, judicial decisions, and the condition and wants of the people, shall remain in full force and effect within the Tribal jurisdiction in like force with any statute of the Tribe insofar as the common law is not so modified, but all Tribal statutes shall be liberally construed to promote their object.

Code of Civil Procedure, Sac and Fox Nation

- It is not the intention of these ordinances to undermine or eliminate unwritten law within us and that we have abided by as aboriginal people. Unwritten traditional laws have always been in place and this Code is not to displace the application of our unwritten custom law. We will continue to value and implement the knowledge of those customs and beliefs that cannot be written. Unwritten traditional shall be the highest form of law for our Tribe, and if written law conflicts with it, unwritten traditional law shall prevail.

Kotlik Tribal Code, Chapter 1, Sec. 1.

## Barriers to Effective Recognition of Culture and Tradition in Tribal Court

- Tribal Judges have lost touch with their culture and tradition
- Judges are not Tribal members or Non-Indian
- Judicial positions are contracted part-time
- Judges follow the “Western” model
- Those who practice before Tribal courts have no training in Tribal history, culture and tradition

## How Do We Incorporate Our Culture and Tradition in Tribal Court Systems

- Require that Elders serve on the Bench
- Maintain and Elders Council/Circle for consultation
- Make Cultural training a requirement for Tribal Judges and Bar members

## Example of Tribal Policy Criminal Sentencing

- **Statement of Policy.** The sentencing policy of the Nation in criminal cases is to
- strive toward restitution and reconciliation of the offender and the victim and Nation. While one goal of sentencing is to impress upon the wrongdoer the wrong committed, **the paramount goal is to restore the victim and Nation to the position that existed prior to the commitment of the offense, and to restore the offender to harmony with them and the community by requiring the offender to right the wrongdoing.** Therefore, with consideration of these goals in mind, the provisions of this Chapter shall govern tribal sentencing for criminal offenses

Law and Order Code – Prairie Band Potawatomi Nation, Ch. 16-4-3

## Balancing the Rights of the Accused and the Rights of the Victim

No Indian tribe in exercising powers of self-government shall –

- subject any person for the same offense to be twice put in jeopardy;
- compel any person in any criminal case to be a witness against himself;
- take any private property for a public use without just compensation;
- deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- require excessive bail, impose excessive fines, inflict cruel and unusual punishments

## Rights of the Victim

- Waiver of Filing and Service Fees
- No Ordered Mediation or joint counseling
- Court shall advise victim of available Tribal services
- Court should not deny relief because of delay in filing
- Court should not grant or deny relief because of victim status
- Address protection

## What Can Be Done in the Courtroom

- Understand and be Sensitive to Cultural and Traditional Influences
- Allow victim support personnel in the courtroom and near the victim at all times
- Provide for separation and safety
  - Grant the reasonable right of confrontation
  - Control the courtroom



Darrell Dowty, Director TRACES Project,  
Institute for Native Justice  
[dowtyd@sbcglobal.net](mailto:dowtyd@sbcglobal.net)  
(918) 458-4790

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