

# Using Tradition and Custom to Promote Healing in Tribal Courts

Exploring the Impact of Federal Law on the Development of Tribal Courts

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## Historical Background

Every Indian tribe had its own customs for resolving disputes, its own system of justice. Most tribes relied on “community peacemaking,” in which the persons involved in the dispute, together with their families and often with members of the community, agreed on a solution in everyone’s best interests.

Example: the incident that led to *Ex parte Crow Dog*, decided by the Supreme Court in 1883.

### **Ex Parte Crow Dog, 109 U.S. 556 (1883)**

“[O]ur government has always recognized [the Indians] as exempt from our laws . . . and, in regard to their domestic government, left to their own rules and traditions.”

“[T]o uphold the jurisdiction exercised in this case . . . requires a clear expression of the intention of congress [to confer that authority on the federal government], and that we have not been able to find.”

### **Talton v. Mayes, 163 U.S. 376 (1896)**

“[Whether the fifth amendment applies here] depends upon whether the powers of local government exercised by the Cherokee Nation are federal powers created by and springing from the constitution of the United States [or are tribal powers springing from the tribe’s sovereignty].”

The Court held that the powers exercised by the tribe are inherent powers long predating the United States.

“[Because] the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment.”

## **Imposing White Man's Law on Tribes**

1. 1878: Began placing police on Indian reservations.
2. 1883: Creation of "CFR" courts

## **Imposing White Man's Law on Tribes (cont.)**

Letter from Secretary Teller to Commissioner Price (Dec. 2, 1882)

"SIR: I desire to call your attention to what I regard as a great hindrance to the civilization of the Indians, viz, the continuance of the old heathenish dances, such as the sun-dance, scalp-dance, & c. These dances, or feasts, as they are sometimes called, ought, in my judgment, to be discontinued, and if the Indians now supported by the Government are not willing to discontinue them, the agents should be instructed to compel such discontinuance."

## Imposing White Man's Law on Tribes (cont.)

“Many of the judges in these court systems were the local BIA superintendents whose objectives were to absorb Native people into the non-Indian world and to suppress any activities that interfered with this integration goal. A majority of these courts and the Codes under which they operated did not reflect Native values and customs, but instead were efforts to change those values into the values the dominant society found important.”

--BJ Jones, “Role of Indian Tribal Courts in the Justice System” (2000) pp. 4-5

## Imposing White Man's Law on Tribes (cont.)

3. 1885: Major Crimes Act (in response to *Ex parte Crow Dog*)
4. 1887: General Allotment Act
5. 1934: Indian Reorganization Act
6. 1953-1966: Termination

## Imposing White Man's Law on Tribes (cont.)

7. 1968: Indian Civil Rights Act (in response to *Talton v. Mayes*)

ICRA confers on all persons subject to tribal authority nearly all the rights contained in the Bill of Rights, including freedom of speech, press, and assembly; protection against unreasonable search and seizure; due process and equal protection of the law; the right to bail; and protection against cruel and unusual punishment.

## ICRA (cont.)

Some people argued for the total adoption of the Bill of Rights into the ICRA. As enacted in 1968, the ICRA omits 6 civil liberties contained in the Constitution:

1. Establishment Clause (1<sup>st</sup> Amendment)
2. Discrimination in voting (15<sup>th</sup> Amendment)
3. Jury trials in civil cases (7<sup>th</sup> Amendment)
4. Grand Jury indictments (5<sup>th</sup> Amendment)
5. Right to counsel in criminal cases (6<sup>th</sup> Amendment)
6. Right to bear arms (2<sup>d</sup> Amendment)

## **Imposing White Man's Law on Tribes: Recent Supreme Court Decisions**

### 1. *Oliphant v. Suquamish Indian Tribe* (1978)

“Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status.”

### 2. *Duro v. Reina* (1990)

### 3. *Nevada v. Hicks* (2001)

## **Promoting Tribal Self-Government**

### 1. The “Duro Fix” (1990) and *United States v. Lara* (2004)

### 2. Tribal Law and Order Act of 2010 (TLOA)

### 3. Violence Against Women Act of 2013 (VAWA)

## **Tribal Courts Today**

“Persons with little knowledge of tribal courts may be surprised at how similar tribal court procedures are to those in state and federal courts. . . .Because [the ICRA] guarantees many of the same rights that the Bill of Rights does, not surprisingly criminal proceedings in tribal courts are very similar to those in state and federal courts.”

--BJ Jones, *supra*, pp. 7, 10.

## **Tribes Can Use Healing Courts**

“Indian tribes are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government. . . .They have the power to make their own substantive law in internal matters, and to enforce that law in their own forums.”

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (internal citations omitted).

## **Tribes Can Use Healing Courts**

“Tribal courts have broad leeway to adopt their own procedures to deal with civil cases heard in tribal courts, provided these procedures provide basic fairness to all parties. . . .[Tribal courts] perform vital functions in assuring harmony and safety for the reservation communities they serve.”

--BJ Jones, *supra*, pp. 12, 14-15.

## **Tribes Can Use Healing Courts**

### UN Declaration on the Rights of Indigenous Peoples (2007)

#### *Article 34*

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, judicial systems or customs, in accordance with international human rights standards.