Indigenous Precedent: Where Is Our Meaningful Access to Tribal Case Law?

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The Tension

• Dominant narratives have been frequently used to oppress tribal governments and marginalize tribal rights
  • E.g. Doctrine of Discovery

• Presently, the narrative is that tribal courts are illegitimate and unfair, because they are unknowable
  • Tribal common law is so far from Anglo-American common law as to be unrecognizable to non-Indians
  • Tribal law is inaccessible

• Yet, tribes are also fighting to re-indigenize their tribal law
Origin of Tribal Judiciaries

• Divergence of Values: Tribal Councils and Chiefs more likely to serve a dispute resolution role, rather than executive or legislative duties
  • Goal was mediation as opposed to ascertaining guilt
  • Facilitator as opposed to decision-maker

• Courts of Indian Offenses
  • 1849 - Creation of the Interior Department
  • 1883 - CFR Courts are institutionalized, *Ex Parte Crow Dog*
  • Heightened need for inter-tribal/Indian-non-Indian dispute resolution
  • Staffed by Indian judges, but served at the pleasure of the Indian agent
Modern Tribal Courts

- 1934 - Indian Reorganization Act
  - Many tribes assumed judicial functions, replacing CFR courts
- Opportunity
  - For a system that is more responsive to tribal needs and under tribal control
  - To resurrect traditions and customs
- But for many, traditional methods, often rooted in religious ceremonies, were lost
<table>
<thead>
<tr>
<th>Truly a Third Sovereign?</th>
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<td>Tribal court development has been sanctioned by Congress, yet tribes fight for comity for tribal court orders*</td>
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<td>Tribal sovereignty precedes the U.S. Constitution, yet is often critiqued against and entangled with</td>
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<td>Tribes are treated as a single unit, in which deficiencies are assumed, and responded to with diminished authority</td>
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<td>Tribal authority has only be Congressionally re-expanded conditionally and piece-meal</td>
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<td>Support for tribal court development has been minimal</td>
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Critique 1: Tribal Customary Law is Unknowable
Fear that tribal courts use “customs and traditions”

The underlying reason for rejecting tribal court jurisdiction over nonmembers is because tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.'”

- *Duro v. Reina*, 495 U.S. 676, 693 (1990)

“Tribal law is still frequently unwritten, being based instead on the ‘values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,’ and is often ‘handed down orally or by example from one generation to another’ . . . The resulting law applicable in tribal courts is a complex ‘mix of tribal codes and federal, state, and traditional law,’... which would be unusually difficult for an outsider to sort out.”

Dollar General

• *Dollar General Corp. v. Mississippi Band of Choctaw Indians* confirmed these fears remain

• “The elements of Doe's claims under Indian tribal law are unknown to Dolgencorp and *may very well be undiscoverable by it*. Choctaw law expressly incorporates, as superior to Mississippi state law, the ‘customs and usages of the tribes.’ Choctaw Tribal Code § 1-1-4.”

  • Hon. Smith, dissenting, in *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 419–24 (5th Cir. 2013)
The Embrace of Custom is Itself Fearsome

• Attacks on tribal law’s embrace of custom point to no specific instance in which litigants, particularly nonmembers
  • Received an unexpected outcome
  • Received an unfair outcome

• Instead, concern with the potential for embracing different
It’s true

• Tribal courts actively embrace tribal customary law, many mandated to do so
• Common law should reflect the community’s values
  • Just as Anglo law reflects Anglo values
• Resistances to assimilation and acculturation have frequently been accomplished through reliance on customary beliefs, preserving the old and creating the new
• Self-determination demands that we articulate our own law
  • Christine Zuni Cruz
An Unenviable Judicial Task

• Tribal court judges are tasked with harmonizing tribal customs and traditions with the modern needs of Indian people

• The peril is in how –
  • Careless use of intertribal common law
  • Applying pan-Indian customs
  • Treating traditions as timeless/immutable, that require unquestioning deference
  • Treating elders as immutable lawmakers
  • Require too burdensome of a process to hear elders
Tribal legislatures provide many different hierarchies and procedures in their choice-of-law provisions.

For example:

- Prioritizing customary law over federal or state law
- Ranking customary law on par with “other laws”
- Authorizing consideration of customary law, so long as not in conflict with tribal statutes and federal law
- Authorizing consideration of customary law, but only as a device for interpreting the tribal court code
- Emphasize the use of customary law in certain types of disputes
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians Judicial Ordinance, Chapter VII, Section 6: Law Applicable in Civil Actions

(a) In all civil actions the Tribal Court shall apply this Ordinance, all amendments thereto, all tribal laws enacted hereafter and all customs and usages of the Tribe. In the event any doubt arises as to the customs and usages of the Tribe, the court may request the advice of tribal citizens familiar with tribal customs and usages.
Port Gamble S’Klallam Tribe Law and Order Code

3.06.05 - Applicable Law - In deciding civil actions, the Community Court shall first look at the written law ... The Court may then look to Tribal custom and usage in doing so, the Court may request the advice of persons familiar with Tribal Custom and usage. ...

4.07.01 - Rules of Evidence - “...[T]he Court reserves the right to independently interpret the rules in accordance with the laws, customs, and traditions of the Port Gamble S’Klallam Tribe.”

3.09.52 - Foreign Judgments - When Recognized - “...The Tribal Court need no recognize a foreign judgment if: ...(d) The foreign judgment would serve to violate any federal law, tribal law, custom or tradition, or the Treaty...”
Pleading and Proving Custom

Many tribes now
- Require the judge to notice relevant, generally known custom
- Provide processes for pleading and proving the applicability of custom

But largely, the burden of finding and pleading custom has fallen to elders

Pat Sekaquaptewa calls for
- Tribally institutionally mandated self-studies
- Custom law treaties and archives
- Tribal bar study materials and exams requiring basic custom law knowledge

... But, not every source of customary law is comprehensive or legitimate
The underlying reason for rejecting tribal court jurisdiction over nonmembers is because tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve."

- *Duro v. Reina*, 495 U.S. 676, 693 (1990)
Limited Application of Tribal Customary Law

• Matthew Fletcher argues that concerns of “unknown” tribal customary law are unwarranted, because tribal customary law simply would not be applied to an outsider

• **Intratribal Common Law** - Common law applied by tribal courts in cases arising out of an *indigenous legal construct*
  • Disputes between members involving tribal lands
  • Family law cases involving members or consenting nonmembers
  • Tribal government disputes
  • Constitutional law questions
Intertribal Common Law

- Substantive common law applied by tribal courts in cases arising out of an Anglo-American legal construct
  - May include tribal court’s importation of federal and state court common law

- ICRA interpretation
- Secured Transaction Codes
- Doctrine of sovereign immunity
- Tort claims
- Contract claims, etc.
Critique 2: Tribal Law is Inaccessible
The Critique: Secret “Rules of the Game”

• “[T]he primary reason for [reluctance of off-reservation businesses to trade on Indian reservations] is the difficulty in determining and understanding “the rules of the game.”
  • Brief for Amicus Curiae South Dakota Business Association, in Dollar General Corp. v. Mississippi Band of Choctaw Indians, et. al.

• Tribal court defendants may find that there are "no rules of procedure," and that the rules are "being made up as [the case goes] along."
  • Brief Amici Curiae of the National Association of Criminal Defense Lawyers and Experienced Tribal Court Criminal Litigators in Support of Respondent, in United States v. Michael Bryant, Jr. at 18 (2016).
Particular Concern for Non-Indian Litigants

• Fear of unfamiliarity with tribal law and the tribal judicial system

• “Democratic deficit,” -nonmembers are not allowed to vote in tribal elections, run for tribal office, or serve on tribal juries

• Assumption that tribal law is inherently unfair to nonmembers

• VAWA and TLOA specifically requires publication of laws
Perception of secrecy?

• “[T]ribal law, unlike federal and state law, can be very difficult, if not impossible, to locate.”

• “For a majority of the 56[7] federally recognized tribes in the United States today, no law has been published. Where it is available, tribal law is scattered across web sites, databases, and print publications.”

• Bonnie Shucha, “Whatever Tribal Precedent There May Be”: The Unavailability of Tribal Law (2014)
These critiques sound familiar...

- Testimony before the 1960s Congressional Constitutional Rights Subcommittee included numerous anecdotal complaints about the abuses and incompetence of tribal adjudication - spurring the enactment of ICRA.

- The 1979 “Getches Report” (Indian Courts and the Future: Report of the NAICJA Long Range Planning Project) detailed a lack of tribal law, including constitutional texts, statues, and common law, forcing tribal courts to rely on Anglo law.
Finding Our Written Common Law
Still true today?

- The number of tribal courts has doubled since 1978
- Many courts enjoy greater independence and budgetary support
- Respect for tribal courts is growing amongst local and state partners
- And access to tribal law has significantly improved!
Tribal Constitutions

• 144 Tribes post their Tribal Constitution on their Tribal Website
139 Tribes post all or at least part of their Tribal Codes on their Tribal Websites
60 Tribes post at least some tribal court opinions on their tribal website, or as part of a free online reporter, such as the Northwest Intertribal Court System.
Great Access = Greater Tribal Common Law?
Tribal Court Citations - 1999 Study

  - 56 tribal courts at trial and appellate levels, 359 opinions
  - 79% relied on intra-tribal authority (precedent or legislation)
  - 46% relied on federal law (primarily in a jurisdiction or procedural context)
  - 28% relied on state law
  - 10% relied on inter-tribal court precedent

Tribal Court Citations - 2008 Study

- Study on tribal court decisions applying ICRA to civil rights claims
  - 120 cases
  - 95% relied on federal and state case law

• Study on citation practices in Tribal Courts (2010-2013) (Westlaw)
  • 23 tribal courts at trial and appellate levels, 208 opinions
  • “Tribal court” includes the Inter-Tribal Court of Appeals of Nevada and Oklahoma Tribal Courts

• 69% relied on intra-tribal authority (precedent or legislation)
• 15% relied on federal law (primarily in a jurisdiction or procedural context)
• 14% relied on state law
• .6% relied on inter-tribal court precedent (10 cases)
Limited Inter-Tribal Court Citations

- Tribal courts have difficulty identifying and applying tribal common law.
- Tribal courts rely on Anglo-American common law to decide many, if not most, of the cases before them.

Of the Intertribal Court Citations ->

- Likely to be part of an intertribal court.
- Positive citations likely to be in procedural-type contexts.
Why does this matter?

- American constitutional law derives from a text to which Indian tribes are not, and cannot, be a party.
- The values that underpin legal phrases like “due process” stem from culturally distinct origins.
- Tribes have demonstrated a creativity ability to more effectively and efficiently administer justice in culturally responsive manners.
- **Self-determination demands that we articulate our own law.**

- Looking to each other, we can aid in re-indigenizing tribal justice, as well as improve upon the justice field federally.
Tribal Innovations

• Tribal courts are already developing some of the most creative and progressive strategies including
  • Inter-governmental cooperative agreements
  • Civil remedies for criminal offenders
  • Traditional dispute resolution practices
  • Permanent guardianships and child welfare services
  • Wellness Courts
1979 “Getches Report”, studied 23 tribal courts

Found that while ICRA was generally embraced, it was embraced as “procedural guide” to provide fairness to litigants, rather than as a means to adopt federal civil rights protections unequivocally.

E.g. the Report noted that because the Judge often knew the defendant “personalized attention to the needs of defendants was...common...”
  • This is now considered a best practice in restorative justice
On the practical side

• The power to cite to other courts could help preserve tribal courts’ severely limited resources.

• Citations to prior decisions can replace time-consuming step-by-step legal analysis
  • Better respond to the unique circumstances of each case with more nuance
  • Create a richer tribal common law
  • Better incorporate customary law and tradition
So, what’s the problem?
Tribal Barriers to Accessible Law

- Misconception that tribes are a unified entity, like counties in a state
- Tribal Court Funding
  - Often acknowledged, but then swiftly dismissed
- Lack of Tribal Court staff dedicated to tracking, inputting, and analyzing
Publishing the Law

- **Self-Publishing**
  - Print copies of opinions, and superseded constitutions and legislation, allow for an archive that cannot be overwritten
  - Expensive
    - Can be subsidized by large subscribers, but means only large libraries and firms can afford access to the law
- **Online**
  - Researchers rarely venture farther than their favorite database*
- **Sending Content In**
Availability of Tribal Law
National Indian Law Library (NILL)

TRIBAL LAW GATEWAY

• Find tribal codes, court opinions, and other legal materials by tribe
• More than 300 tribes participating
• More than 100 tribal codes available

The National Indian Law Library (NILL) of the Native American Rights Fund is a law library devoted to federal Indian and tribal law. NILL maintains a unique and valuable collection of Indian law resources and assists people with their Indian law-related research needs. You can find some of our most popular resources below.
This Project is a cooperative effort among the University of Oklahoma Law Center, the National Indian Law Library (NILL), and Native American tribes providing access to the Constitutions, Tribal Codes, and other legal documents.

- Includes archival documents, including:
  - Older versions of Constitutions
  - The 1945 edition of Cohen’s Handbook
  - Treaties
Northwest Intertribal Court System

- Provides tribal court appellate opinions from 30 Indian tribes in the Pacific Northwest, Alaska, and Northern California.
- Cases range from 1981 to present (2017)
- Indexed by subject matter
- Free!
Tribal Justice: 25 Years as a Tribal Appellate Justice

- A web component for Frank Pommersheim’s book *Tribal Justice: 25 Years as a Tribal Appellate Justice*
- Includes links to his tribal court opinions, including from 10 different tribal courts
Print Reporters
Indian Law Reporter

- Published monthly by the American Indian Lawyer Training Program.
- Covers federal, state, and tribal courts, and occasionally administrative tribunals.
- Began covering tribal courts in 1983, publishing selected cases from selected tribal courts.
- $600/annually - print
West’s Tribal Law Reporter

• $192/month
• Includes the full text of reported decisions of the appellate and supreme courts of (~20+) tribal nations (Tribal Court Reporter)
• Also includes decisions from various U.S. courts of appeals and the U.S. Supreme Court that address issues relevant to tribal law.
• Tribal decisions include West editorial enhancements, including synopsis, digest, and topic and key numbers.
Southwest Intertribal Court of Appeals Reporter

- Provided by the American Indian Law Center, Inc.
- Includes cases and opinions issued by the Court dating back to 1990.
- Full set - $75; volumes for $25/each
- New volumes are sent to member courts free of charge
- The Southwest Intertribal Court of Appeals provides an appellate court forum for tribes located in New Mexico, Arizona, southern Colorado, and west Texas.
Commercial Resources
Versus Law

- Covers 22 tribal courts (21 tribes), with over 2800 opinions. VersusLaw and the Tribal Court Clearinghouse have a cooperative agreement.

- Receive free access to VersusLaw Case Law Research in exchange.
Tribal Court Clearinghouse

- Tribal Courts
- Tribal Laws/Codes
- Tribal Constitutions
- Tribal Court Decisions
Legal Code Development Series

TLPI is proud to offer the following Legal Code Development series as part of our organization’s vision to empower Native nations to create and control their own institutions for the benefit and welfare of all community members.

Please visit our Projects and Services page for more information on our various grant projects that allow for free technical assistance to Native nations that are creating or revising legal codes. Additionally, we have a Fee For Service option for projects that are not eligible for free technical assistance under one of our operating grants.

Guide for Drafting or Revising Victim-Centered Tribal Laws Against Sexual Assault and Stalking is designed to assist Native nations interested in developing or revising victim-centered laws on sexual assault and stalking. This resource includes sample language and exercise questions designed to guide discussion on what laws will best reflect tribal values. Originally published in 2008, this resource was revised and updated to reflect innovations in tribal law and new federal requirements. (2017)

Guide for Drafting or Revising Tribal Civil Dependency and Related Laws is designed to assist Native nations in drafting or revising their civil dependency laws as part of the development or reform of their child welfare system. Topics covered range from incorporating custom and tradition, to child-in-need-of-assistance proceedings to foster care in Native nations. (2017)

Guide for Drafting or Revising Tribal Laws to Implement TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction is designed to assist Native nations in drafting or revising their juvenile statutes to implement the Tribal Law and Order Act (TLOA) and Violence Against Women Act (VAWA) enhanced sentencing provisions. (2017)

Guide for Drafting or Revising Tribal Civil Dependency and Status Offense Laws is designed to assist Native nations in drafting or revising their juvenile statutes to implement the Tribal Law and Order Act (TLOA) and Violence Against Women Act (VAWA) enhanced sentencing provisions. (2017)
Resources for Indian Law Research

• Appendix: Tribal Law Collections, in Bonnie Shucha, “Whatever Tribal Precedent There May Be”: The Unavailability of Tribal Law, 106 LAW LIBRARY JOURNAL 199 (2014).


• Rose Carmen Goldberg, No Tribal Court Is an Island? Citation Practices of the Tribal Judiciary, 3 AMERICAN INDIAN L. J. 247 (2014).
What’s missing?
Lack of a Meaningful Repository

- Despite immense gains in constitution and code accessibility, tribal case law is still woefully unattainable.
- We need a resource to aid in the collection and analysis of tribal common law.
- Weary of resources that limit access based on finances, potentially limiting tribal court access to its own cases.