

# **ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM**

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## **Native American Topic-Specific Monograph Series**

### **Purpose**

The purpose of the Native American Topic-Specific Monograph project is to deliver a variety of booklets that will assist individuals in better understanding issues affecting Native communities and provide information to individuals working in Indian Country. The booklets will also increase the amount and quality of resource materials available to community workers that they can disseminate to Native American victims of crime and the general public. In addition to the information in the booklet, there is also a list of diverse services available to crime victims and resources from the Department of Justice.

### **Acknowledgements**

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CCAN believes that the information contained herein is factual and that the opinions expressed are those of the consultants/writers. The information is not however, to be taken as warranty or representations for which the Center on Child Abuse and Neglect assumes legal responsibility. Any use of this information must be determined by the user to be in accordance with policies within the user's organization and with applicable federal, state, and tribal laws and regulations.

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## **ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM**

### ***OVERVIEW***

This monograph will discuss the role of Indian tribal courts and Courts of Indian Offenses in resolving disputes that arise between persons, Indian and non-Indian, on the various Indian reservations in the United States. Tribal courts are operated by Indian tribes under laws and procedures that the Tribe has enacted or made one of their laws, which often differ from the laws and procedures in federal and state courts. Most Tribes receive funding from the Department of Interior to operate their court systems, although many supplement this funding with their own resources. Courts of Indian Offenses are courts operated by the Department of Interior, Bureau of Indian Affairs, on certain reservations. Those courts operate under federal regulations contained in Volume 25 of the Code of Federal Regulations<sup>1</sup> and for this reason are often referred to as “CFR” courts. At present there are approximately 150 tribal courts in operation in the United States and approximately 20 CFR courts.<sup>2</sup> Although there are various other methods which Native people resort to in resolving disputes, including traditional dispute resolution methods some of which are included into tribal justice systems, this paper will primarily focus on the formal justice systems that have been set up by Indian tribes and the Bureau of Indian Affairs.

This paper will begin by exploring the history of tribal justice systems that Indian tribes use. Many tribal justice systems evolved from courts set up by the Bureau of Indian Affairs on reservations in an attempt to assimilate Native people into the predominant Anglo legal system. As a result of this, many Indian tribal courts mirror the justice systems that exist in states and the federal system and use very similar procedures and rules. Other Indian tribal courts have attempted to bring back traditional dispute resolution techniques by adding these methods into their court systems. As a result, these courts and their procedures may differ dramatically from the procedures of a state or federal court.

After an examination of the history of tribal courts, this monograph will explore the authority of tribal courts and compare that authority to state and federal courts. Indian tribal courts are relatively new institutions and

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<sup>1</sup> See 25 CFR 11.1 et seq.

<sup>2</sup> See *The Duro Decision*; *Criminal Misdemeanor Jurisdiction in Indian Country*; Hearing on HR 972 Before the House Committee on Interior and Insular Affairs, 102nd Cong. 1st Sess. 9 (1991).

questions continually arise as to their authority and what degree of respect other courts should grant tribal courts. That section will examine issues such as:

- the types of disputes tribal courts can resolve;
- whether tribal courts can only resolve disputes between members of the tribe or others also;
- the types of procedures tribal courts utilize in civil and criminal hearings;
- the rights of the accused and victims of crime in tribal courts;
- whether tribal court judgments are honored by other court systems under full faith and credit<sup>3</sup>;
- the various personnel involved in most tribal courts and their roles;
- the types of cases most Indian tribal courts hear (family disputes, criminal, housing, etc.); and
- how tribal courts and law enforcement interact to protect victims of crime in Indian Country.

In discussing these various issues this paper will examine the role of federal law in shaping the authority of tribal courts, especially in the areas of prosecution of crime<sup>4</sup>, the procedures utilized in tribal courts,<sup>5</sup> and full faith and credit.<sup>6</sup>

Finally, this monograph will examine some of the issues facing victims of crime and violence in tribal courts and why tribal courts are so vital to

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<sup>3</sup> "Full faith and credit" is a legal term which means that one court system will honor and enforce court decisions from other court systems. State courts must honor each other's court decisions under the United States Constitution and federal and state courts must honor each other's decisions under federal law. See 28 USC 1738. Tribal courts are not mentioned in the United States Constitution, however, and as a result it is still unclear whether other courts must honor and enforce tribal court decisions. One exception is the Indian Child Welfare Act which, at 25 U.S.C. § 1911, does require state courts to grant full faith and credit to tribal court child custody orders.

<sup>4</sup> The United States Supreme Court has declared that Indian tribal courts cannot prosecute crimes committed by non-Indians on Indian reservations, see *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), or crimes committed by Indians from other reservations. See *Duro v. Reina*, 495 US 676 (1990). Congress reacted to this latter decision by giving Indian tribal courts the authority to prosecute all Indians who commit crimes within Indian Country.

<sup>5</sup> In 1968, in an attempt to ensure all persons in tribal courts certain rights, Congress passed the Indian Civil Rights Act, 25 USC 1301, which gives persons in tribal courts some of the same rights guaranteed persons in federal and state courts under the Bill of Rights.

<sup>6</sup> Congress has recently passed federal laws requiring state and tribal courts to honor and enforce each other's child support orders, see 28 USC 1738B, and domestic violence protection orders, see 18 USC 2265. Previously, Congress enacted legislation requiring state courts to honor tribal child custody orders as part of the Indian Child Welfare Act. See 25 U.S.C. §1911.

ensuring protection and seeking recovery for victims in Indian Country.

## **HISTORY OF INDIAN TRIBAL COURTS**

### ***EARLY CFR COURTS***

Although Native people had methods of resolving disputes prior to the introduction of Anglo law to the North American continent, formal court institutions are a rather recent development in Indian Country. The development of tribal courts can be traced to a case occurring in the 1880's on what is now the Rosebud Indian reservation in South Dakota when a Lakota named Crow Dog allegedly killed another Lakota, Spotted Tail.<sup>7</sup> At the time of the killing, there was no formal Lakota court system, but instead the Lakota, utilizing traditional methods of resolving disputes, required Crow Dog to provide restitution to Spotted Tail's family by providing necessary provisions to the family. The federal territorial courts, concerned that the Lakota way had resulted in Crow Dog going unpunished, stepped in and prosecuted Crow Dog for murder. The United States Supreme Court held that the federal territorial court could not prosecute Crow Dog for murder because the Lakota had been reserved the right to hand out its own justice in the treaty between the Lakota Sioux and the United States.<sup>8</sup>

The United States government felt that this case showed a lack of law enforcement and justice in Indian Country and quickly acted to bring Indian people who committed serious crimes under federal authority.<sup>9</sup> The United States Department of Interior, the federal agency directing Indian affairs, also acted to set up court systems on Indian reservations called "Courts of Indian Offenses",<sup>10</sup> which could handle less serious criminal actions as well as resolving disputes among tribal members. Non-Indians could not be brought into these courts without their express consent. 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.<sup>11</sup> A majority of these

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<sup>7</sup> For a good discussion of this case see Sydney J. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law and United States Law in the Nineteenth Century*, 1994.

<sup>8</sup> See *Ex parte Crow Dog*, 109 U.S. 556 (1883).

<sup>9</sup> Congress did this by enacting the Major Crimes Act, 18 USC 1153, giving the federal courts the authority to prosecute Indians who commit certain major crimes on reservations, including murder.

<sup>10</sup> See Robert N. Clinton, et al, *American Indian Law*, 207 (1991).

<sup>11</sup> The only qualification to be a judge in one of these courts was that the person not be a polygamist. Many of the types of crimes punishable under these early courts were efforts to force Indians into farming and ranching and to prevent them from practicing their traditional spiritual practices such as the Sun Dance. See William Hagen, *Indian Police and Judges*, 145 (1966).

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.

### **EARLY TRIBAL COURTS**

It was not until 1934 that Indian tribes were allowed to set up their own justice codes and operate court systems enforcing tribal laws enacted by Indian tribes.<sup>12</sup> The creation of those court systems is the result of the inherent authority of tribal nations to enact their own laws and to be governed by them. It is important to remember that unlike federal and state courts, which are created by the United States and state constitutions as a separate, but co-equal, branch of government along with the executive and legislative branches of government, most tribal courts were created under the authority granted them by the tribal governing body. Some argue that this means that tribal courts do not operate separate and apart from tribal government, i.e., they do not have separation of powers, although most tribal codes of justice and constitutions provide for tribal court independence. Most tribal codes of justice lay out the procedures used in tribal court as well as define the different types of cases that can be brought in the court. Other important parts of tribal codes include sections defining the court's authority, or jurisdiction, to hear disputes and where a dispute has to take place for a tribal court to exercise jurisdiction.

Some Indian tribes did not choose to enact their own codes and still operate by the Code of Indian Offenses found in the Code of Federal Regulations.<sup>13</sup> Many smaller tribes could not afford to operate their own court systems and chose to retain the CFR courts operated by the Bureau of Indian Affairs. These courts are similar to tribal courts, except the Bureau of Indian Affairs is financially responsible for administering such courts. Most CFR courts provide for public defenders while many tribal courts do not have public defenders. The types of cases CFR courts can hear, compared to tribal courts, also differ slightly with CFR courts being restricted from hearing internal tribal disputes, such as election disputes or political disputes, and from hearing disputes involving non-Indian parties unless they consent to be subjected to the CFR court's authority.

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<sup>12</sup> This came about as the result of the enactment of the Indian Reorganization Act of 1934 and subsequent federal regulations allowing Indian tribes to enact their own tribal codes and set up their own judicial systems. See 3 Fed. Reg. 952-959 (1938) codified at 25 CFR 11.

<sup>13</sup> Those tribes are listed at 25 CFR 11.100. A majority are located in Oklahoma.

## **PUBLIC LAW 280 STATES**

In some states, tribes do not operate court systems or will operate court systems which hear very limited types of cases, such as violations of a tribe's hunting and fishing code or cases that arise under the Indian Child Welfare Act.<sup>14</sup> In those states, called Public Law 280 states,<sup>15</sup> the state courts prosecute all persons, Indian and non-Indian, who commit crimes on Indian reservations and the state courts hear the private disputes, such as divorces, contract disputes, personal injury cases, and other matters that arise between parties, Indian and non-Indian. Even in those states, however, some tribal courts exist which still hear certain types of disputes. A person should always inquire into the existence of tribal law or the existence of a tribal court for a certain tribe even if the tribe's reservation is located in a Public Law 280 state. (See PL 280 booklet in this series for more information.)

## **PEACEMAKER OR TRADITIONAL COURTS**

A recent trend among several Indian tribes has been to restore the traditional ways Native people settle disputes and to make these methods a part of the tribal court system. On many reservations, Indian tribal courts use methods such as "Peacemaking,"<sup>16</sup> "Sentencing Circles,"<sup>17</sup> or other methods of dispute resolution that more closely resemble the ways disputes were settled among Native people before the non-Indian society stepped in. This trend is very similar to the movement among some state courts for adopting alternative dispute resolution as an alternative to the adversary system the Anglo legal system values so highly.

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<sup>14</sup> The Indian Child Welfare Act, 25 USC 1901, was enacted to give Indian tribal courts more authority to decide cases involving the removal of Indian children from their homes and into foster homes or adoptive homes.

<sup>15</sup> They are called such because of a federal law which was enacted in 1953 called Public Law 83-280. See 25 USC 1321-1326; 28 USC 1360; 18 USC 1162. This law was enacted as the result of a perceived lack of law enforcement and court systems on certain reservations. The law gave courts in certain states (Minnesota, Wisconsin, California, Nebraska, Oregon, and later Alaska) the authority to decide disputes that arise on Indian reservations and the other states the option to assume such authority by enacting appropriate laws.

<sup>16</sup> The Navajo Tribal Court, for example, has a separate branch called the Peacemaker Court which allows people to utilize that method rather than the usual method of dispute resolution to resolve conflict. See Gloria Valencia-Webber, *Tribal Courts: Custom and Innovative Law*, 24 NM L. Rev. 225 (1994).

<sup>17</sup> The Mille Lacs Band of Chippewa Indians in Minnesota utilizes this method for sentencing juvenile delinquents.

## ***TRIBAL COURTS TODAY***

The tribal courts and CFR courts that exist today are a varied collection. Many tribal court judges are trained attorneys but that is not always the case. Tribal courts have been fortunate to have respected tribal members, who are not attorneys, serve as tribal judges. These individuals may be knowledgeable of the customs and traditions of a particular tribe and may be able to apply that knowledge and experience in resolving disputes. Oftentimes, the larger tribal courts have both law-trained and non-attorney judges. Many tribal members who have become attorneys have returned to work for their tribe as judges and this has increased the level of respect for these courts in the eyes of tribal members. Tribal judges are generally appointed by the tribe's governing body to serve a certain term. Other tribes require elections for the position of tribal judges while yet others appoint, but the judge must run to retain his seat periodically. Most tribal courts allow both attorneys and "lay advocates" - tribal members who have become knowledgeable of tribal law - to represent persons in tribal court. Each tribal court has its own method of admitting persons to practice there, with some requiring bar exams, while most merely require the attorney to pay an admission fee and study the Tribal code and constitution.

### ***HOW TRIBAL COURTS FUNCTION AUTHORITY OF TRIBAL COURTS***

#### 1. Jurisdiction of Tribal Courts

##### A. Criminal Jurisdiction

Persons with little knowledge of tribal courts may be surprised at how similar tribal court procedures are to those in state and federal courts. Tribal courts use sworn testimony, keep a record of court proceedings and use both a judge and jury system to decide cases.

One big difference between tribal and state courts is the limits on tribal court authority over certain kinds of cases and persons. Whereas a state court is a court of general jurisdiction, meaning that the court can exercise authority over all persons who have committed a crime within the state's territory or has some contact with the state, tribal courts have seen their authority over certain acts and persons limited by certain United States Supreme Court decisions and Acts of Congress. For example, tribal courts cannot prosecute non-Indians who commit crimes on the reservation, even if they are committed against members of the tribe. Those crimes have to be prosecuted in federal court, if the victim is Indian, or state court if the crime

is against a non-Indian or is a victimless crime. This is because the U.S. Supreme Court has found that Indian tribes lack the inherent authority to regulate the criminal conduct of non-Indians. Tribal courts can, however, prosecute any Indian person who commits a crime within the reservation.<sup>18</sup>

Indian tribal courts are similarly limited in the types of sentences that can be imposed upon Indians who violate the law. At present, federal law<sup>19</sup> prohibits a tribal court from imposing a tribal jail sentence in excess of one year for any one crime committed. As a result, most tribes do not prosecute serious felonies such as murder, rape and aggravated assaults, preferring that the federal courts prosecute such crimes. Despite this, some tribal codes do have prohibitions against such serious crimes in case a tribal prosecution is warranted.<sup>20</sup> Most tribal jails are also not equipped to house long-term inmates, but instead are similar to holding cells where inmates spend short jail sentences. Other tribes must contract with city or county governments to detain their prisoners.

There is a territorial element to a tribal court's exercise of authority over criminal activity also. In general, tribal courts can only exercise jurisdiction over crimes that have been committed on the reservation.

#### B. Civil Jurisdiction

A civil case in court is one involving a dispute between two private parties, such as a divorce or lawsuit to collect a debt owed a merchant. Indian tribes and their entities are also frequently involved in tribal court civil disputes.

Tribal courts have very broad authority to hear civil disputes, particularly when the dispute involves some area of domestic relations matter such as marriage, adoption, or child custody. Tribal courts have heard cases ranging from personal injury lawsuits where the injured party is requesting millions of dollars in injuries to small claims cases involving much more modest requests for relief of damages.

The daily staple of cases for a tribal court is very similar to that in the

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<sup>18</sup> Often the term "Indian Country" is utilized when reference is made to a tribe's territorial jurisdiction. Indian Country is a term of art defined under federal law, 18 USC 1151, to include all lands within an Indian reservation, rights of way running through Indian allotments, and dependent Indian communities.

<sup>19</sup> See 25 USC 1302.

<sup>20</sup> In some instances, both the federal courts and tribal courts have prosecuted the same criminal activity, and the US Supreme Court has held that this is permissible. See *United States v. Wheeler*, 435 US 313 (1978).

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state courts with many domestic relations cases, consumer collection matters, juvenile delinquency proceedings, and housing cases. If a civil dispute involves an Indian on the reservation, such as a lawsuit by a merchant to collect a debt from a reservation Indian, the U.S. Supreme Court has recognized that such a case can only be brought in a tribal court, and not a state court.<sup>21</sup> Similarly, in the area of domestic relations, it is generally recognized that only tribal courts can hear cases such as those brought for the adoption of Indian children<sup>22</sup> who reside on the reservation, or divorce cases where one party to the dispute is an Indian residing on the reservation.

Tribal courts can even exercise jurisdiction over certain civil disputes involving non-Indians, unlike the criminal jurisdiction arena. If a non-Indian enters into a consensual relationship with the tribe (for example marries a tribal member or enters into a contract with the tribe to perform work on the reservation), or its' members and a dispute breaks out regarding the relationship, the tribal court can decide the dispute.

The tribe, or an individual Indian, can also bring the dispute into state court if they wish, although the non-Indian would probably be restricted to bringing the suit in tribal court. See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138 (1984). Another instance where a tribal court may be able to exercise authority over the actions of a non-Indian on a reservation occurs when the non-Indian's activities have a serious impact upon the tribe and its members' well-being. Examples may be when a non-Indian is polluting reservation waters or is committing acts of domestic violence against a tribal member. In those instances, a tribal court would be able to issue orders preventing further polluting or domestic violence by the non-Indian, although it would be restricted from bringing a criminal prosecution against the non-Indian.

There are some limitations on tribal court jurisdiction which are the result of the use of federal law. For example, tribal courts cannot probate interests individual Indians have in trust or allotted lands or personal property held in trust, which are lands that are held in trust by the United States government for individual Indians. These types of probate hearings are conducted by Administrative Law Judges in the Department of Interior. Tribal courts can hear probate hearings regarding the personal property (cars, bank accounts, etc.) of deceased Indians, however, and do frequently hear these cases. Nor can tribal courts hear bankruptcy cases or suits against the United States government. These types of cases are governed

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<sup>21</sup> See *Williams v. Lee*, 358 U.S. 217 (1959).

<sup>22</sup> See *Fisher v. District Court*, 424 US 382 (1976).

by federal law which prohibit tribal court authority.

## 2. Procedure Used in Tribal Courts

### A. Criminal Cases

It should be remembered that because Indian tribes are not created by the United States Constitution, that document does not apply to restrict the actions of tribal governments or their court systems.<sup>23</sup> However, just as the Bill of Rights contained in the United States Constitution ensures certain rights to persons charged with crimes in the federal and state courts, Indian tribal courts have their own version of the “Bill of Rights.” It is called the Indian Civil Rights Act and it was enacted by Congress in 1968 to ensure persons certain basic rights when working or dealing with tribal governments and court systems. Because it 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. Those persons charged with crimes in tribal court have the right to be read the charges, the right to confront witnesses against them and to call witnesses to testify for them, the right to remain silent which includes the right not to be compelled to testify in their own defense, the right to not be confined unless the tribe proves the charges against them beyond a reasonable doubt, the right to reasonable bail, and the right not to be prosecuted twice for the same criminal activity.

In other respects, the Indian Civil Rights Act provides more, and sometimes less, protection for the criminally accused than a state or federal court would provide. A defendant in a tribal court is entitled to ask for a jury trial of at least six persons whenever the crime he is charged with carries the possibility of a jail sentence. This is somewhat broader than the right in federal and some state courts where a person can only get a jury trial when facing the possibility of imprisonment of more than six months. The Indian Civil Rights Act only guarantees a jury trial of six persons, whereas the federal and most state courts guarantee a panel of twelve jurors to decide a case. Undoubtedly, Congress was concerned about imposing the huge costs associated with twelve-member juries on Indian tribes who are strapped for resources to operate their court systems.<sup>24</sup>

A similar concern may have prompted Congress not to require Indian tribal courts to provide free attorneys for indigent persons charged with crimes in tribal court. Although the tribal court must allow a person to be represented by counsel, the court does not have to appoint and pay for an

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<sup>23</sup> See *Talton v. Mayes*, 163 US 376 (1896).

<sup>24</sup> Such persons may include those who do not speak the English language, have been convicted of felonies, or who have sat on other juries within a certain period of time.

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attorney for a person who cannot afford legal counsel. Many tribal courts have public defender systems, sometimes staffed by attorneys but often staffed by non-attorneys familiar with tribal court procedures. Being represented by an attorney or the tribal public defender is purely voluntary as a tribal defendant may choose to represent himself in the court and most tribal courts have recognized a right to do this. Almost every tribal court has a prosecutor or presenting officer, usually an attorney but not always, who prosecutes criminal cases in the name of the tribe. Some tribal courts have received special grants to retain prosecutors who prosecute only a certain category of cases such as domestic violence cases.

A frequent criticism of tribal court jury trials is that only tribal members can sit on juries. The U.S. Supreme Court cited to this common reality when it held that tribal courts have no criminal jurisdiction over Indians from other reservations who commit crimes. This is true for most Indian tribal courts where jurors are usually drawn from tribal election rolls. Some tribes allow any Indian who resides on the reservation to serve on a tribal jury, while some other tribal codes actually do not appear to restrict any person from serving on a tribal jury provided the person lives on the reservation. One obvious problem tribes confront when deciding who should be allowed to sit on tribal juries is that a non-Indian cannot be prosecuted by a tribe for violating his sworn duties as a juror and this may convince tribes not to allow them to sit. Nothing in the law, however, prevents an Indian tribe from allowing any person to sit on a tribal jury, including those persons who are normally disqualified under state and federal law.

Indian tribes have also been given some freedom by Congress to decide what laws will be applied to persons who commit crimes within their reservations which are prosecuted in federal courts. The federal death penalty, for example, can only be applied to those persons who commit murders on reservations when the Indian tribe has chosen, by tribal resolution, to allow it to apply.<sup>25</sup> The same provision applies to allowing prosecutions of juveniles under 13 as adults<sup>26</sup> and the "three-strikes and you're out law," making certain repeat offenders subject to more serious punishment in federal court for their actions.<sup>27</sup>

Persons who are convicted by tribal courts and put into jail have the right to go to federal court to challenge their convictions after they have appealed through the tribal court system. This privilege, called the privilege of habeas corpus, is guaranteed any person in custody of a tribe by the

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<sup>25</sup> See 18 USC 3598.

<sup>26</sup> 18 USC 5032.

<sup>27</sup> 18 USC 3559(c)(6).

Indian Civil Rights Act.<sup>28</sup> It is similar to the rights of a person to challenge a state conviction in federal court. The person must demonstrate a violation of the Indian Civil Rights Act, however, to obtain release from the federal courts. See *Duro v. Reina*, 495 U.S. 676 (1990).

#### B. Civil Procedures

Indian 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.<sup>29</sup> The most common method of resolving disputes in tribal courts is the “adversary” system popular in state and federal courts. This system allows each party to present evidence and testimony and then requires the judge, or in limited cases jury, to decide which side should prevail. A tribal court need not provide a jury trial to a person in a civil case, as such is not mandated by the Indian Civil Rights Act. Nevertheless, some tribal courts do permit civil jury trials with similar juries as those selected in criminal cases. Oftentimes, this is only when a certain amount of money is in dispute. Tribal courts use many of the same laws that apply in state courts to resolve cases such as divorce, child custody, housing eviction cases, and consumer collection matters. Some tribal codes, however, go by tribal custom law, which is oftentimes not defined in the tribal code and requires some knowledge of the practices and customs of the tribe to understand. A good example of this is that many tribal courts place Indian children with grandmothers in custody disputes whereas a state court would almost never place a child with a non-parent. This is because grandparents have traditionally raised many Indian children and Indian custom respects this practice.

Another practice commonly used in tribal courts which may appear inconsistent with what happens in state and federal courts is the right of persons to be heard, especially the elderly. Indian tribes traditionally resolved disputes by consensus rather than by court adjudication. One still sees the impact of a consensus-building tradition in many tribal courts where all parties are allowed substantial time to state their positions and may often refer to matters that do not appear related to the dispute before the court. Tribal courts are much more tolerant of this because most tribes have an oral tradition which placed much more of a premium on the spoken, rather than the written word. This is why many tribes do not require a party in a civil case to file a written response to a civil complaint, but instead allows the person to appear in court and state his position in opposition.

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<sup>28</sup> See 25 USC 1303.

<sup>29</sup> Such fairness is required by the due process provision of the Indian Civil Rights Act which requires a tribal court to provide due process to all persons in its court.

### ***ROLE OF TRIBAL COURTS IN PROTECTING ADULT AND CHILD VICTIMS***

One area where tribal courts provide a vital service to victims of crime and violence is in issuing protection orders and orders protecting children who have been victims of abuse and neglect. On most reservations, when a person has been the victim of domestic violence or a child has been abused, the tribal court is the only court with the authority to issue an order protecting that person. Tribal court protection order proceedings are very similar to the procedures used by state courts. Most tribal courts have fill-in-the-blank forms to be filled in for a temporary protection order. After the issuance of a temporary protection order and notice of hearing the order is distributed to either tribal or BIA police to serve upon the offender. A hearing follows, at which time the victim can appear with an attorney, an advocate, or by herself/himself. After that hearing, if a permanent protection order is entered a copy is sent to tribal or BIA law enforcement and sometimes sent to other local law enforcement if the victim frequently travels off reservation. Many tribal codes have mandatory arrest requirements and mandatory hold provisions in domestic violence cases which allow the victim to get protection from the offender after a violation.

Child abuse and neglect cases are another important part of tribal court cases. On many reservations the tribe operates its own child protection program, while on others it coordinates those services with BIA or county child protection programs. When an Indian child is neglected or abused, the court or the tribal code can permit a law enforcement officer or social worker to take emergency custody of the child in order to protect the child. Such a removal is generally followed by a petition to the tribal court for an emergency placement which can only last for a specified period of time before the parents or guardian of the child have a right to appear in court for a hearing to determine if the placement should continue. If the emergency situation persists and the child protection program feels more services are needed, it can file a dependency and neglect petition which has to be proven by the tribe by clear and convincing evidence in most tribal courts.

In many tribal courts, the tribal prosecutor also serves as the presenting officer in abuse and neglect cases, while other tribal courts have persons who just serve as presenting officers. If the tribal court has a public defender, oftentimes this person represents the parents or guardian of the child. Many tribal codes allow for the appointment of a guardian ad litem for the child, which is a person who speaks for the child in tribal court. On

many reservations, this person is a child advocate volunteer, while on others it is a person with knowledge of Indian child-rearing practices who can help the tribal judge determine what is best for the child. If a parent or guardian's neglect of his/her parental duties continue, the tribal court has a proceeding whereby the parental rights can be terminated and the child freed for adoption. These types of proceedings are less common on reservations because generally relatives of the child come forward to care for the child rather than the child being placed with another family.

### **TRIBAL COURTS AND THEIR RELATIONSHIP TO OTHER COURT SYSTEMS**

It is very important that a tribal court order be honored by other courts, including state and federal. Not only is this important to the tribe, but to a person with an order from a tribal court it is essential that the order be honored off the reservation. This is especially true when the person's safety is dependent upon the order being honored by other courts. When one court honors an order of another court, it is called full faith and credit, or comity. Full faith and credit is required when law requires it, while comity means that one court will honor another court's orders out of respect for the other court's authority. In some situations, state and tribal courts must honor each other's orders under full faith and credit. This includes domestic violence protection orders<sup>30</sup> and child support orders.<sup>31</sup> Some states have also held that tribal court orders should be honored as orders from foreign territories.<sup>32</sup> In the majority of states, however, tribes and states either honor each other's orders under some type of comity or they do not honor each other's orders. Many state courts do not understand tribal court procedures and are cautious when confronted with tribal court orders because they believe that tribal court systems do not comply with the same standards as state courts and that some tribal judges are not law-trained. To overcome some of these issues, in many states, tribal-state court forums have been created to allow state and tribal judges to interact about their respective court systems and this dialogue has led to agreements about such issues as full faith and credit.

### **CONCLUSION**

Indian tribal courts are the unknown commodity in the American legal system primarily because people are uneducated about their authority and procedures. They perform vital functions in assuring harmony and safety for

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<sup>30</sup> See 18 USC 2265.

<sup>31</sup> 28 USC 1738B.

<sup>32</sup> See 28 USC 1738.

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the reservation communities that they serve. They do so on drastically fewer dollars than the federal and state courts which they are often compared to. Tribal justice systems deserve the respect of all who work with them.

## **Native American Topic Specific Monograph Project Titles**

<b>Abusers Who Were Abused: Myths and Misunderstandings</b>	Dewey J. Ertz, Ph.D.
<b>Community Readiness: A Promising Model for Community Healing</b>	Pam J. Thurman, Ph.D.
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<b>Public Law 280: Issues and Concerns</b>	Ada P. Melton, Esq. Jerry Gardner, Esq.
<b>The Role of the Child Protection Team</b>	Eidell Wasserman, Ph.D.
<b>The Role of Indian Tribal Courts in the Justice System</b>	B.J. Jones, Esq.
<b>The Roles of Multidisciplinary Teams and Child Protection Teams</b>	Eidell Wasserman, Ph.D.