American Indian Tribal Courts

The Costs of Separate Justice

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INTRODUCTION: SCOPE AND METHOD

Today many American Indian tribes are attempting to deal with the civil and criminal problems on their reservations through their own tribal courts.[1] Few people in this country—including lawyers—are aware of the existence of this separate and semiautonomous Indian court system, and even fewer have any idea of how it operates. It is worthwhile, therefore, to acquaint both the general public and members of the legal profession with the workings of this system.

To study and to report on a topic as broad as "the tribal court system" is a very ambitious task, yet one that deserves to be undertaken for several reasons. (1) Despite the popularity of, and preoccupation with, so many other Indian issues and problems—particularly the dramatic political, legal, and philosophical ones—almost nothing is known or written about the day-to-day affairs of contemporary reservation life, which include the opera-

1. "Tribal court" is used here as a general descriptive term. It has sometimes been used as a term of art to distinguish one type of court—historically, politically, and organizationally—from two other types of Indian courts: the "traditional," or "custom," courts, found primarily on the Pueblo reservations in New Mexico, and the "Courts of Indian Offenses," the BIA-created and controlled courts that predate the currently predominant tribal courts (see further textual discussion).

tions of the tribal courts.[2] It is important to acquaint the public—whether simply interested citizens or potential decision makers—with these mundane facets of Indian life. (2) Because of

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2. There is a wealth of literature, including "legal" literature, on Indian matters, but it rarely deals with contemporary issues. Apart from a few short pieces dealing mainly with the theory rather than practices, there is no legal literature on the present-day tribal court system. Instead the bulk of it concerns jurisdictional issues and treaty rights on land or water use. A quick look under the category of "Indians," in the *Index to Legal Periodicals,* for example, reveals a preponderance of articles dealing with jurisdictional and substantive Indian "claims." In addition, there are studies with an anthropological focus—typically, historical quests to uncover the traditional "law-ways" of selected tribes. See, e.g., Karl N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (Norman: University of Oklahoma Press, 1941); Watson Smith & John M. Roberts, Zuni Law: A Field of Values (Papers of the Peabody Museum of American Archaeology and Ethnology, Harvard University, vol. 43, no. 1) (Cambridge, Mass.: Harvard University, Peabody Museum, 1954). Another example is the research presently being done at the University of Alaska (Institute of Social, Economic, and Government Research) by Professors Arthur E. Hippler and Stephen Conn on the law-ways of Alaska Eskimo and Indian groups.

Also common are all-purpose, textbook-like treatments that attempt to deal with the "entire Indian business"—historical, political, and legal; contemporary reservation conditions and institutions are by and large excluded. One of the more valuable publications of this genre is William A. Brophy & Sophie Aberle, eds., The Indian—America's Unfinished Business (Norman: University of Oklahoma Press, 1966). Also, Monroe E. Price, Law and the American Indian: Readings, Notes, and Cases (Contemporary Legal Education Series) (Indianapolis: Bobbs-Merrill Co., 1973); and Theodore W. Taylor, The States and Their Indian Citizens (Washington, D.C.: Bureau of Indian Affairs, 1972). Finally, of course, there is the political, hysterical, or plain "rip-off" literature that trades on popular romantic interest in, or white American guilt and bias toward, the Indian's condition. (One need only look at the covers and flip through the pages in any of the rows of Indian-related publications in popular, and even academic, bookstores.) Stan Steiner's The New Indians (New York: Harper & Row, 1968) is one of the better-known books of the political-polemical type. Its value lies in its capturing rather well the personalities and world views of the new Indian leaders. Its flaw lies in its totally uncritical presentation of what is essentially an extreme and xenophobic outlook and in the implication that it represents the views of the average Indian. In fact, much of what is reported in Steiner is no more than the rhetoric—albeit increasingly popular rhetoric—of an angry and vocal fringe group of self-appointed spokesmen and leaders. For every "new Indian" who goes about juxtaposing a caricature of white values (evil) against Indian values (good), there are 10 "old Indians" who are aware of the unreality of this juxtaposition and of the diversity within so-called white and Indian values and of the commonality between them. For every Indian leader who points his finger at the white system, there are 10 Indian nonleaders who recognize the arrogance of and inconsistencies in this exercise. For every one of Steiner's "Red Muslims" shouting "Red Power," there are 10 "non-denominational" Indians who are indifferent to such sloganizing and 10 more who are convinced that red power only means that Indian authorities rather than white ones will exploit them. Practically the only works that deal specifically with the contemporary tribal court system are the reports of the Senate Hearings on the Constitutional Rights of the American Indian (Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., 89th

the general ignorance about the tribal court system, one is obliged to cover the whole of it if one discusses it at all. It makes little sense to focus on some select part of the operations—as research projects typically do—when there is no appreciation of the whole; no part can be understood in isolation. On the other hand, it has not been possible to treat the whole system in great depth, but rather only lightly and impressionistically. A good portion of this report, as a result, reads like and essentially is field notes and observations.

The *method* of study, in turn, was dictated by its scope. It was influenced, in addition, by such realities as the lack of dependable and complete records on tribal court operations. (Similar problems would affect a study of non-Indian lower courts—sometimes even the higher courts.) In any case, these factors explain why a combination of observation and interviews was used as the main *way* of collecting information. The main *subjects* of observation were the proceedings of the courts and the conduct of the participants—judges, litigants, and any representatives of the latter. To complement the observations, these participants in the court process were also interviewed. Naturally, the actions and views of supporting personnel—for example, law enforcement, probation, welfare, and Bureau of Indian Affairs (BIA) officials—also deserved and received attention. For comparative purposes, observations were made and interviews were conducted in county and district courts in areas immediately adjacent to the reservations.[3] Also, visits were made

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Cong., 1st Sess. (1961-65)). The limitations in terms of coherence and depth are inherent in the format of these proceedings, of course. Moreover, as their title indicates, the hearings were focused primarily on the application or applicability of constitutional rights on the reservations; this singularity of purpose eventually led to the passage of the Indian Bill of Rights of 1968 (25 U.S.C. secs. 1302-3 (1975 Supp.), originally Pub. L. No. 90-284, tit. II, 82 Stat. 77 (1968)), which in turn has dictated and narrowed the focus of much of the writing on Indian law since that date. (See the *Index to Legal Periodicals* and the focus indicated by the titles and contents of the following recent articles: Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343 (1969); James R. Kerr, Constitutional Rights, Tribal Justice, and the American Indian, 18 J. Pub. L. 311 (1969); Note, Indian Tribal Courts and Procedural Due Process: A Different Standard? 49 Ind. L.J. 721 (1974).)

3. The term "regular courts" is used interchangeably throughout this report with "Anglo-American courts," "white courts," or "non-Indian courts." All are awkward, but they are necessary to distinguish them from the "Indian" or "tribal" courts. No negative connotation or regional flavor is intended.

to several reservations under state and county jurisdiction to get a feel for the efficacy of that arrangement. Because they were informal—no questionnaires were used—the interviews varied greatly in length and scope; some lasted only 10-15 minutes, while others took one or several sessions of from 3-4 hours to a full day. Most informants were either directly or indirectly connected with the courts or law enforcement agencies. Occasionally, however, the views of the "man in the street" or official or unofficial spokesmen—both on and off the reservation—were sought. All observing and interviewing were done by the author of this report.

To help interpret the first-hand information, the legal and anthropological literature on the American Indian as well as writings on a number of other ethnic, tribal, and national groups were consulted. The footnotes and explicit comparative references in the text will indicate the range of this background reading.

Five reservations with operating tribal courts were visited: the Standing Rock Sioux Reservation (North and South Dakota); the Devils Lake Sioux (Fort Totten) Reservation (North Dakota); the Uintah and Ouray Ute Reservation (Utah); the Blackfeet Reservation (Montana); and the Navajo Nation (Arizona and New Mexico; another small portion of the Navajo Reservation in Utah was not visited). In addition, seven tribes without tribal courts which were under regular state jurisdiction were included in the study: the White Earth Reservation and the Leech Lake Reservation (Minnesota; Leech Lake has a tribal "conservation" court that deals with hunting and fishing violations committed by Indians, but otherwise the residents are subject to the state and county court system); the Eastern Cherokee Reservation (North Carolina); and the Pawnee, Osage, Western Cherokee, and Creek tribes (Oklahoma). Usually a week was spent on each reservation; however, a week and a half was spent on the Navajo Reservation; the two Minnesota reservations were done together in one week; and the four Oklahoma tribes were covered in one week. In Minnesota, a study of the Red Lake Reservation, along with the recently "retrocessed"[4] Nett

4. For years, culminating in the early 1950s, the dominant policies were "assimilation" and "termination" of reservation status; over the past decade, the trend has

Lake Reservation, the only reservations in the state with tribal courts, had to be abandoned when the chairman of the tribe refused to grant permission. During the exploratory stages of the study, when limiting the fieldwork to one state was considered, the Turtle Mountain Chippewa Reservation and the Fort Berthold Reservation (North Dakota) were each visited for half a day. But no follow-up was made when it became clear that studying tribes of a greater geographical diversity was desirable. To take a quick look at the state and county court systems in areas surrounding the reservations meant spending a day or two in such places as McLaughlin and Lemmon, South Dakota; Devils Lake, North Dakota; Cut Bank, Montana; Gallup and Cortez, New Mexico; and Roosevelt, Utah.

Something perhaps best described as background fieldwork took place in Salt Lake City and Washington, D.C., where contacts were made and interviews were held with representatives of some of the many "Indian" organizations, groups, and departments (including Interior). In Denver, a training conference for Indian court judges was attended.

TRIBAL COURTS: HISTORY, JURISDICTION, AND CURRENT STATUS

Tribal courts exist today on some 60 to 120 Indian reservations, depending on the definitions of "courts" and "reservations."[5] Most of these reservations, and the major ones in terms of area and population, are located in the northern plains and Rocky Mountain states, particularly Arizona, New Mexico, Montana, and the Dakotas. For a variety of historical reasons—

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been "restoration" or "retrocession" of tribal/reservation status under federal trust (see textual discussion further on).

5. The "estimate" (only an estimate is possible, given the variance in the figures available) of 60 tribal courts comes from sources like Kerr, *supra* note 2; and Hearings Before the Subcomm. on Constitutional Rights, *supra* note 2, at 252-53 (app. J). A count of 120-odd courts was reported in a recent article by Robert L. Simson, who cited the BIA as source (Wall Street J., Dec. 28, 1976, at 1, col. 4). The difficulty is that there has never been a clear and fixed definition of "reservation" and "tribal court." Today the estimate of 60 is conservative; it is limited to the more clearly established reservations and courts and fails to include a number of recently retrocessed reservations. The estimate of 120, on the other hand, must include many smaller and less-established Indian landholdings and courts of more limited jurisdiction (such as tribal "conservation" courts, which handle only violations of fishing and hunting regulations).

some relatively recent[6]—having to do with degree of acculturation or dispersal or simply with the smallness of the Indian tribes and bands in other parts of the country, the Indian people in these parts, even if still living on "reservations" or otherwise designated Indian landholdings, are—with a few exceptions—subject to state court jurisdiction.

The theory behind the self-government power of the American Indian tribes, including the power to regulate their affairs through an adjudicative system, is that this power derives from an original sovereignty, which, though limited through wars, treaties, constitutional language, and congressional action, has never been fully extinguished.[7] Jurisdictional conflicts concerning this theory have occurred, and continue to exist, on two levels: federal versus tribal, and state versus tribal.

In the struggle between state and tribal power, the federal government—most frequently the federal courts, including the U.S. Supreme Court—has been cast in the role of protector of the vestiges of tribal sovereignty. Chief Justice Marshall, in two cases involving the Cherokee tribe decided in the early 1830s, became one of the earliest and primary architects of tribal sovereignty: in *Cherokee Nation v. Georgia,*[8] the Court designated the Indian tribes "domestic dependent nations," and in *Worcester v. Georgia,*[9] it held that the "laws of Georgia can have no force [in the Cherokee Nation]," thus first establishing the principle of federal protection of what was left of tribal autonomy.

The federal government, however, has not always followed

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6. The more recent history bearing on the jurisdictional issue involves the transient congressional commitment to the policy of "termination" (of reservation status) during the 1950s and early 1960s, which began with the sweeping legislation of Pub. L. No. 280, ch. 505, 67 Stat. 588 (codified as 18 U.S.C. sec. 1162 (1974 Supp.)) and resulted in the specific termination of two relatively major tribes—the Wisconsin Menominees (since reestablished as a tribe) and the Oregon Klamaths—as well as some 60 other small groups or bands of Indians and mixed-bloods; in the late 1960s this commitment was ultimately reversed through a series of legislative actions and executive pronouncements. See note 13 and accompanying text *infra.*

7. See Richard P. Fahey, The Vestiges of Sovereignty 3 (1974) (unpublished manuscript available through the Navajo court), citing Felix S. Cohen, ed., Handbook of Federal Indian Law 122 (1942).

8. 9 U.S. (5 Pet.) 178 (1831).

9. 10 U.S. (6 Pet.) 214 (1832).