AMERICAN INDIAN TRIBAL COURTS AS MODELS FOR INCORPORATING CUSTOMARY LAW

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Introduction

Two men from the same community fought bitterly; one man survived the fight. The community met to decide the future of the murderer and the murdered man's family according to the community's customs and traditions. Because of an emerging threat from an alien, dominant society, the community had to work together, and, therefore, retaliatory justice was not preferred. Peaceful co-existence was necessary for the survival of the community. It was ultimately decided that the murderer should provide compensation to the murdered man's family. The community considered the matter resolved.

The new, dominant society, however, did not agree with how the community resolved the matter. This society found these developments deeply troubling. After all, how could a known

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murderer be allowed to live openly in the community? The dominant society acted swiftly to ensure that such an event would not occur again.

This particular tale is an American story.[1] Yet, on a summer day in 2010, an Afghani judge told a remarkably similar story of events that had recently occurred in his own home country to a captivated audience in a small meeting room. His story underscored the difficulties of developing an Anglo-styled justice system in a country such as Afghanistan, where tribal customs and traditions play a substantial role in the administration of justice.

In the audience in that small meeting room, were American Indian tribal judges, including the author, who were startled by the familiarity of the tale, as this is the story of *Ex Parte Crow Dog*,[2] a famous federal Indian law case from the nineteenth century.[3] For the American Indian tribal judges, hearing that the events underlying *Ex Parte Crow Dog* were essentially repeated in Afghanistan, underscored the similarity between the American Indian historical experience and the experience of many communities in the modern developing world. Like American Indians, many of the indigenous communities of the developing world view traditions and customs as important to the administration of justice.[4] Moreover, as experienced by American Indians in the nineteenth and twentieth centuries, many of these modern communities are struggling with the imposition of an Anglo-styled justice system[5] by a new dominant society. This trend can

1. Specifically, this is the story of *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Here, Kan-Gi-Shun-Ca (Crow Dog) killed Sin-ta-ge-le-Scka (Spotted Tail). Both men were members of the Brule Sioux Band of the Sioux Nation and the killing occurred within the exterior boundaries of the Band's reservation. Crow Dog was punished according to the law of the Brule Sioux Band. The federal government also sought to prosecute Crow Dog, as it determined that the punishment Crow Dog received under tribal law was inadequate. In *Ex parte Crow Dog*, the U.S. Supreme Court held that under the then-existing law federal law was not applicable to crimes that occurred between Indians and arose solely within the confines of Indian country.

2. 109 U.S. 556 (1883).

3. For more information on *Ex Parte Crow Dog*, *see* SIDNEY HARRING, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* 100–101 (Cambridge University Press, 1994); *see also* B.J. Jones, *Role of Indian Tribal Courts in the Justice System*, 3 (March 2000), available at: http://www.icctc.org/Tribal%20Courts-final.pdf.

4. Johanna Gibson, *The UDHR and the Group: Individual and Community Rights to Culture*, 30 HAMLINE J. PUB. L. & POLICY 285, 310-311 (Fall 2008).

5. The use of "Anglo-style justice system" refers to the dominant system of rules and procedures in place in American state and federal courts. ed. note.

currently be seen around the world in places like Africa and Asia.[6]

As explained below, American Indian tribal courts have developed within the dominant, Anglo-styled justice system of the United States of America. Because of the similarities between the American Indian experience of the nineteenth and twentieth centuries and the realities currently facing traditional communities around the world, it is helpful to look to the development of American Indian tribal courts for guidance on how to marry traditional and Anglo-styled justice systems. In other words, when developing new court systems, it is not necessary to "reinvent the wheel" – as examples of American Indian court systems incorporating customary law with law and procedure used in the federal and state court systems abound throughout the United States. Those looking to develop new court systems may therefore look to American Indian tribal courts as models for the incorporation of customary law.

The purpose of this article is to briefly highlight American Indian tribal courts as potential models for court development in the developing world. As a starting point, this article concisely explains why the incorporation of indigenous customary law is preferred when developing new court systems in nations where indigenous populations have traditionally relied on customary law to resolve disputes. To begin an examination of American Indian tribal courts as models for the incorporation of customary law specifically, this article next explores American legal developments that led to the emergence of modern American Indian tribal court systems. The article then examines current external and internal values applied to these court systems. An examination of such values and related perceptions is helpful in determining whether or not the marriage of customary law with Anglo legal traditions within some American Indian tribal court systems has been successful. The article concludes that, while acknowledging that American Indian tribal court systems are by no means perfect, they provide an example of how indigenous traditions and customary law and court systems may be merged with the now dominant Anglo-styled court systems of the American state and federal legal systems. American Indian tribal court systems may, therefore, be a model for future court development where there is a

6. *See* Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (Winter 2005).

need to merge indigenous customary law into new, dominant court systems.

The Role of Customary Law in Modern Court Development

This article assumes that the incorporation of traditional and customary law and systems of indigenous communities is crucial to the development of new court systems. Although a full discussion of the benefits of such incorporation is beyond the scope of this article, a brief examination of the merits of incorporating customary law into new court systems superimposed on indigenous justice systems is helpful. First, indigenous communities may be slow to trust a new, foreign centralized legal system, either because of a history of oppressive application of that system and its substantive legal rules, or simply because those rules do not reflect the norms of the indigenous community.[7] Similarly, long-standing traditional dispute resolution systems may be difficult, if not impossible, to replace entirely.[8] Additionally, many traditional beliefs and customs are interwoven with political, social and economic spheres of indigenous communities, and it is impossible to disassemble one area or deal with a single aspect of societal life without affecting another.[9] It is therefore unrealistic to believe communities will abandon local customs because of an edict from the new, central government.[10] Moreover, attempts to discontinue customary law abruptly can often cause resentment among communities that have traditionally relied on customary law.[11] This in turn may be disruptive to national unity.[12]

In addition to incorporating traditional law into new legal systems, the local, customary courts themselves may be preferable for logistical reasons.[13] Customary courts are accessible to people in rural areas and can provide services in the local language, while many formal state systems often do not have the capacity to reach rural populations, nor do court officials tend to speak the indigenous

7. *Id*. At 240.
8. *Id*. at 260.
9. Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 485 (Spring 2002).
10. See Lynn Berat, *Customary Law In a New South Africa: A Proposal*, 15 FORDHAM INTL. L. REV. 92, 100 (1991/1992).
11. *Id*.
12. *Id.*
13. Connolly, *supra* note *6,* at 243.

language.[14] Customary courts can also be highly efficient and economical as dispute resolution often happens faster than in state-run courts.[15] Generally speaking, therefore, this article assumes it is better to incorporate existing customary law and legal structures into new court systems rather than imposing an entirely new legal system on the indigenous population.

Overview of Federal Indian Law Related to American Indian Tribal Court Development

American Indian tribal court systems, in many instances, are just such an example of the incorporation of customary law and legal structures into Anglo-styled justice systems. American Indian tribal court systems exist in the United States as systems of justice outside of the American state and federal justice systems. Some tribal courts resemble courts usually seen in Anglo-styled justice systems, while other tribal courts are quite traditional.[16] This section briefly reviews the development of federal Indian law relevant to the creation of current American Indian tribal court systems.[17]

As previously explained, American Indian tribal courts exist as entities separate from state and federal justice systems. A myriad of historical legal developments led to the separateness of American Indian tribal courts. First, it is notable that American Indian tribes are extra-constitutional, meaning that tribes exist outside of the United

14. *Id.* at 243, 259.

15. *Id.* at 243.

16. A variety of American Indian tribal courts currently exist within the United States. Melissa Tatum, *Tribal Courts: The Battle to Earn Respect Without Sacrificing Culture and Tradition in* HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE AND RESISTANCE at 83 (Larry Cata Backer ed.) (Carolina Academic Press 2007) (explaining that "tribal courts are as diverse in structure and practice as the cultures they serve" as some tribes have retained traditional courts, some Department of Interior Courts of Indian Offenses, and others have chosen to mirror state and federal courts). There are over 300 tribal courts currently in existence; *see also* Jones, *supra* note 3 at 1. ("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.").

17. Given the limited nature of this article, it is not possible to fully discuss the development of federal Indian law that helped to create modern American Indian tribal court systems.

States Constitution.[18] In the early nineteenth century, the U.S. Supreme Court affirmed the separateness of American Indian tribal nations. In *Cherokee Nation v. Georgia*,[19] the U.S. Supreme Court held that American Indian tribes were "domestic dependent nations," highlighting their separateness from both state and federal governments. In *Worcester v. Georgia*,[20] the U.S. Supreme Court further clarified the separateness of American Indian tribes, finding that the laws of the states shall have "no force or effect" within the exterior boundaries of American Indian tribal nations. However, in the late nineteenth century, the absolute authority of the federal government over American Indian tribal nations was articulated by the U.S. Supreme Court in *United States v. Kagama*,[21] where the Court held that Congress has plenary authority over American Indian tribal nations. As an expression of its plenary authority over Indian country, on June 18, 1934, Congress passed the Indian Reorganization Act (IRA),[22] with the partial purpose of increasing local tribal self-government.[23]

Following passage of the IRA, American Indian tribal courts

18. Scholars have noted that "tribal sovereignty is both pre-constitutional and extra-constitutional." Ann Tweedy, *Connecting the Dots Between the Constitution, The Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 656 (Spring 2009), *citing* Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions*: *Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets,* 5 U. PA. J. CONST. L. 405, 417 (2003).

19. 30 U.S. 1 (1831).

20. 31 U.S. 515 (1832).

21. 118 U.S. 375 (1886).

22. Pub. L. No. 73-383, 48 Stat. 984 (1934).

23. Mescalero Apache v. Jones, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 73-1804, at 6 (1934)); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, n. 40 (June 2008) ("Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2000), which had as its purpose the need to craft measures 'hereby Indian tribes would be able to assume a greater degree of self-government.'") (citing Morton v. Mancari, 417 U.S. 535, 542 (1974)); Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 1 (1998), available at: http://www.icctc.org/CC%20manual/Lessons%20From%20the%20Third%20Sovereign.pdf ("Passage of the Indian Reorganization Act allowed the tribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems.")

began to proliferate[24] throughout Indian country.[25] As the Honorable Sandra Day O'Connor has noted, "Most of the tribal courts that exist today date from the Indian Reorganization Act of 1934. Before the Act, tribal judicial systems were based around the Courts of Indian Offenses, which were set up in the 1880's by the federal Office of Indian Affairs."[26]

As American Indian tribal courts began to spread throughout Indian country, fears within the dominant society arose regarding application and enforcement of tribal law.[27] Perhaps in reaction to these fears, Congress and the U.S. Supreme Court took steps to limit

24. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 835 (June 2007) ("There are a growing number of tribal courts in place to hear disputes--between both members and non-members--that arise on the reservation. Tribal courts vary widely in their structure: trial courts, appellate courts, Peacemaker courts, talking circles, drug courts, and specialized courts for domestic violence or child custody matters can all be found in Indian country.") (citing Nell Jessup Newton, *Tribal Courts Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 294 (1998)).

25. "Indian country" is defined at 18 U.S.C. §1151, which states that "[e]xcept as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

26. Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 1 (1998), available at: http://www.icctc.org/CC%20manual/Lessons%20From%20the%20Third%20Sovereign.pdf.

27. For example, in testimony related to what became known as the Indian Civil Rights Act, U.S. Senator Quentin Burdick stated, "in many cases the tribal courts are 'kangaroo courts.' One of the basic reasons for my statement is that the method of selecting tribal judges insures that an Indian appearing before tribal court, in too many cases, will not get fair treatment." Testimony of Senator Quentin Burdick, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong. 88 (1962). More recently, in her comments on the pending Tribal Law and Order Act of 2009, the Honorable Theresa Pouley indicated that concerns still seem to remain regarding the effectiveness of American Indian tribal courts. "At the hearing last month on the draft Tribal Law and Order Act, representatives from the Departments of Justice and Interior expressed concerns to this Committee regarding the extension of tribal court sentencing authority. DOJ and BIA expressed concerns as to whether tribal courts would adequately protect the rights of criminal defendants. DOI expressed similar concerns, and also raised issues regarding increased costs of longer detentions and possibly an increase in habeas petitions." Prepared Statement of Hon. Theresa M. Pouley, Judge, Tulalip Tribal Court; President, Northwest Tribal Court Judges Association, 33-34 (July 24, 2009).

American Indian tribal court authority.[28] As a result of these developments, American Indian tribal courts have limited authority over non-Indians, as they have no authority over non-Indian criminal defendants[29] and restricted authority over non-Indians involved in civil matters.[30] Today, the majority of matters handled by American Indian tribal courts tend to include property and family law.[31] This is consistent with the general policy of the American federal government to leave issues related to American Indian tribal members solely within the inherent tribal sovereignty of tribal governments.[32]

As seen above, the American federal government has played a significant role in the development of American Indian tribal court systems. As a result of this historical relationship, many American Indian tribal court systems have come to incorporate various aspects of Anglo-styled justice systems.

Current Perceptions of American Indian Tribal Courts

Having determined how modern American Indian tribal court systems came into existence, it is now helpful to consider the success of such systems as judged by external and internal constituencies. This section will consider how tribal courts are currently functioning in relation to other justice systems, as perceived by both external and internal communities. The current perception of American Indian tribal justice systems is an important piece in understanding the effectiveness of the existing system. In other words, can a justice

28. *See, e.g.,* the Indian Civil Rights Act of 1968, which applied many of the protections of the U.S. Constitution to Indian country as well as limiting American Indian tribal court punishment authority to $5,000 and/or one year in prison. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03. *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that American Indian tribal courts did not have authority over non-Indians in criminal matters).

29. *Oliphant* at 435 U.S. 191 (1978).

30. *See* Plains Commerce Bank v. Long Family Land & Cattle, 554 U.S. 316 (2008) (holding that although American Indian tribal courts have jurisdiction to regulate conduct on tribal lands, that power is lost once the land is transferred to non-Indians); *see also* Montana v. United States, 450 U.S. 544 (1981) (holding that American Indian tribal courts possess civil jurisdiction over non-Indians when the non-Indians either enter into a consensual relationship with the plaintiff allowing for tribal court jurisdiction or when the non-Indians' activities threaten the health, welfare, economic security or political integrity of the tribe).

31. Newton, supra note 24 at 308.

32. *See generally* Worcester v. Georgia, 31 U.S. 515 (1932) (holding that the laws of Georgia did not have any effect within the Cherokee Nation's territory); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that tribes have the power to determine tribal membership).

system exist within the United States that incorporates indigenous traditions and customary law to varying degrees? As explained below, the answer appears to be "yes" in some instances.

Because American Indian tribal courts exist outside of American state and federal justice systems, they are subject to both external and internal values: external values of non-tribal communities, such as the U.S. Congress, U.S. Supreme Court and even non-Indian communities living near Indian country, regarding the "legitimacy" and effectiveness of such tribal court systems,[33] and internal values of the local American Indian tribal community over which the tribal court system has authority.[34] Accordingly, both the external and internal "validity" of an American Indian tribal court system, as determined by these external and internal value systems, must be considered when attempting to ascertain the current perceptions of American Indian tribal court systems. Understanding current perceptions is helpful in making conclusions regarding the effectiveness of American Indian tribal court systems.

External Perceptions of American Indian Tribal Court Systems

As previously explained, during the late twentieth century, Congress and the U.S. Supreme Court reacted to concerns regarding the extension of American Indian tribal court jurisdiction by limiting tribal court civil jurisdiction and eradicating criminal jurisdiction over non-Indians. Additionally, Congress enacted the Indian Civil Rights Act in 1968 to extend the majority of the protections of the U.S. Constitution over all individuals living in Indian country, regardless of race. During this time, many additional federal laws were passed that explicitly extended to Indian country.[35] As a result, a close relationship between the federal government and American Indian tribes developed, and "[t]he extent of tribal court jurisdiction is a

33. *See, e.g.*, Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 842 (March 2006) (explaining that tribes live with criminal laws that reflect the values of an external community).

34. *See, e.g.*, Washburn, *supra* note 33, at 841 (explaining that there should be an alignment between the legal system having authority over the community and the community's values for there to be effective law enforcement).

35. For example, see the Clean Water Act, 33 U.S.C. §1251, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.*; the Clean Air Act, 42 U.S.C. §7401, *et seq.*; the Endangered Species Act, 16 U.S.C. §1531, *et seq.*; the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.*; and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, *et seq*.

matter of federal as well as tribal law, involving as it does issues at the heart of the relationship between the federal government and Indian tribes."[36] Even when a tribal court applies customary or tribal law, the typical practitioner will likely find the resulting decision to be familiar.[37] Additionally, the types of cases typically found on a tribal court docket are similar to those cases that would be found on a state or federal court docket.[38] Furthermore, modern American Indian tribal courts are more accessible than they have been previously.[39]

These recent developments suggest that American Indian tribal court justice systems may be increasingly acceptable to external communities. Although it is difficult to generalize regarding the external perceptions of American Indian tribal justice systems as

36. Newton, *supra* note 24, at 320.

37. Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. REV. 225, 250 (1994) ("The legal reasoning based on custom can also result in outcomes facially indistinguishable from those based on federal or state law. One must distinguish external form from internal substance to appreciate how the outwardly similar is not so."). *See also* Newton, *supra* note 24, at 304-305 (discussing the Navajo Supreme Court's decision in Castillo v. Charlie and how the Court's application of tribal law resulted in a decision that utilized fact-finding and decision-making methods similar to those employed in state court).

38. Newton, *supra* note 24, at 298-99 (Dean Nell Jessup Newton read 85 cases published in the Indian Law Reporter from the year 1996. Of the cases she read, she determined that the majority raised jurisdictional and procedural questions, although there were a few property, tort and family law cases.

39. Dean Nell Jessup Newton explained that many lack knowledge about tribal courts in part because "most tribal court opinions are not widely distributed." Newton, *supra* note 24, at 289. Recent publication developments may therefore have a significant impact on the accessibility and familiarity of external constituencies with modern American Indian tribal courts. Tatum, *supra* note 16, at 92 ("Some tribal court decisions are available online in traditional legal databases, such as Westlaw and VersusLaw, or even posted on websites maintained by tribal courts themselves, and some tribes have also chosen to publish their decisions in book format. The Navajo Nation has long published its decisions in paper, and other tribes such as the Mashantucket Pequot and Muscogee (Creek) Nation are also opting for this approach."). Notably, Westlaw recently developed databases for 13 tribes and two more expansive tribal court reporters, West's American Tribal Law Reporter and Oklahoma Tribal Court Reports. Additionally, a new board of authors and editors is updating on a regular basis COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, the foremost treatise of federal Indian law, making recent developments in the field more accessible. Furthermore, many tribal judges are now actively participating in academic and public discourse regarding their decisions. Tatum, *supra,* at 92. ("[T]ribal judges have begun actively speaking at conferences and publishing articles. Those speeches and articles cover topics ranging from how a particular court works to complex, theoretical analyses of specific legal issues. Tribal judges have also begun seeking out their state colleagues at meetings and conferences to put a public face on the tribal courts. Many states now have joint state/tribal court judicial conferences and training sessions.").

perceptions may differ widely at regional and local levels, recent developments suggest that the common perception may be improving. For example, there is a general lack of cases challenging tribal court authority in federal court after the exhaustion of tribal court remedies, suggesting that those parties subject to tribal court authority are content with tribal court decisions.[40] Furthermore, the percentage of Bureau of Indian Affairs (BIA)-funded tribal judicial systems receiving an acceptable rating dramatically increased in 2008, when the percentage of tribal courts receiving this rating increased to 22 percent from 0.01 percent in 2004.[41]

The recent enactment of the Tribal Law and Order Act of 2010, however, is perhaps the best indicator regarding the national perception of the adequacy of American Indian tribal courts.[42] Signed into law in July 2010, the Tribal Law and Order Act grants American Indian tribes the option of increasing their tribal court punishment authority from up to one year in prison and/or $5,000 to up to three years and/or $15,000 in cases involving tribal felonies.[43] The availability of increased tribal court punishment authority is conditioned on the American Indian tribe's adoption of certain measures designed to provide added protections for the defendant. For example, the American Indian tribe wishing to increase its court's punishment authority must provide a right of effective counsel and the assistance of a licensed defense counsel where the defendant is indigent.[44] Furthermore, the American Indian tribe must ensure that tribal judges adjudicating matters where the defendant may be subject to increased punishment are also licensed attorneys.[45] Finally, the tribe must make its criminal laws and procedure publically available and keep a record of the proceedings. On the whole, adoption of the Tribal Law and Order Act of 2010 suggests that the federal government has enough confidence in existing American Indian tribal court systems to allow for the expansion of tribal court punishment

40. Newton, *supra* note 24, at 328.

41. *Detailed Information on the Bureau of Indian Affairs – Tribal Courts Assessment* (Jan. 9, 2009); available at: http://www.whitehouse.gov/omb/expectmore/detail/10001091.2003.html (last accessed March 31, 2010).

42. Pub. L. No. 111-211, 124 Stat. 2258 (2010).

43. Section 304, Pub. L. 111-211. Before enactment of the Tribal Law and Order Act of 2010, American Indian tribal court punishment authority was limited to up to a $5,000 fine and/or one year in prison. 25 U.S.C. §§ 1301-03.

44. 124 STAT. at 2280.

45. *Id.*

authority, but not without provisions in place that the federal government deems necessary for the administration of justice.

Internal Perceptions of American Indian Tribal Court Systems

Like external perceptions of American Indian tribal courts, it is difficult to make broad generalities about internal or local community perceptions of American Indian tribal courts. This problem is compounded by the existence of hundreds of different American Indian tribal court systems,[46] and each community will have a different perception of the court system having authority over it. Although it is impossible to consider the internal perceptions of all of these individual American Indian tribal court systems in this article given existing space limitations, the internal perceptions of one tribal court system, the court system of the Sault Ste. Marie Tribe of Chippewa Indians, may be instructive.

Located in the Upper Peninsula of Michigan,[47] the Sault Ste. Marie Tribe of Chippewa Indians is composed of 29,000 enrolled members,[48] but the majority of the membership does not live within the exterior boundaries of the Tribe's reservations. The Sault Ste. Marie Tribe of Chippewa Indians was federally recognized in 1972.[49] Its tribal court system is composed of a trial court and an appellate court. The Tribe's court system has jurisdiction over tribal members and handles both criminal and civil matters. A full-time Chief Judge, part-time associate judge and part-time magistrate judge adjudicate matters at the trial court level.[50] A part-time associate judge also oversees the Tribe's drug court.[51] The Tribe's Court of Appeals is

46. In 2001, the number of tribal courts exceeded 350. Nancy Carol Carter, American Indians and Law Libraries: Acknowledging the Third Sovereign, 94 LAW LIB. J. 7, 26 n. 20 (Winter 2002).

47. Sault Tribe of Chippewa Indians, available at: http://www.saulttribe.com/ (last accessed August 27, 2010).

48. Sault Tribe of Chippewa Indians, Enrollment Department, available at: http://www.saulttribe.com/index.php?option=com_content&task=view&id=31&Itemid=151 (last accessed August 27, 2010).

49. Sault Tribe of Chippewa Indians, Sault Tribe History, available at: http://www.saulttribe.com/index.php?option=com_content&task=view&id=29&Itemid=205 (last accessed August 27, 2010).

50. Both the full-time chief judge and part-time associate judge of the Sault Ste. Marie Tribe of Chippewa Indians trial court are attorneys licensed to practice law in the State of Michigan. The part-time magistrate judge is not a licensed attorney, but is a member of the Tribe. The part-time magistrate judge also serves as full-time court administrator for the entire tribal court system.

51. The part-time drug court judge is also licensed to practice law in the State

composed of five permanent appellate judges and two reserve appellate judges, who serve when one of the permanent appellate judges is unable to serve.[52] Judges at both the trial and appellate court levels are appointed by the Tribe's Board of Directors, which is composed entirely by members of the Tribe. Tribal judges are appointed to serve for a period of years. For example, the current Chief Appellate Judge was appointed for a four-year period that began in February 2008. Trial and appellate judges may be removed by the Board of Directors. The Board of Directors is elected by the tribal membership.

As with many other tribal courts, the Sault Ste. Marie Tribe of Chippewa Indians' tribal court system has been successful in marrying Anglo-styled norms of justice with tribal traditional law, where appropriate. For example, in March 2008, the Tribe's Court of Appeals rendered an opinion in a matter involving the ability of a former tribal chairman to run for election.[53] The matter before the

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of Michigan.

52. Two of the permanent appellate court judges, including the Chief appellate judge, are licensed to practice law in the State of Michigan. The remaining permanent appellate court judges are members of the Tribe and non-attorneys. One of the reserve appellate judges is licensed to practice law in the State of Michigan and the other is a non-attorney member of the Tribe.

53. In re Janet Liedel and Betty Freiheit, APP-08-05 (March 25, 2008) ("The present matter involves the claims of two tribal members, Petitioners, that their rights under tribal and federal law were violated as a result of the Election Committee's decision not to certify Bernard A. Bouschor as a Unit One candidate for the Tribal Board of Directors ("Tribal Board"). On February 11, 2008, Bouschor filed the required materials to be certified as a Unit One candidate for the Tribal Board. Tribal Code Section 10.110(2) provides that:

> No individual may run for election to office who is currently a Defendant in Chippewa County Circuit Court Case No: 04-7606-CC, in which the Tribe is pursuing civil litigation against the Defendants, including claims involving fraud, breach of lawful authority, breach of fiduciary duties owed to the Tribe, and conversion of over $2.6 Million until such litigation has been finally resolved.

Given that Bouschor is currently a defendant in Chippewa County Circuit Court Case No: 04-7606-CC, the Election Committee determined that it could not certify Bouschor as a Unit One candidate due to the prohibition contained at Tribal Code Section 10.110(2).…Accordingly, on March 17, 2008, Petitioners appealed the Election Committee's refusal to ratify Bouschor as a Unit One candidate.…Petitioners contend that Tribe Code Section 10.110(2), which precluded the certification of Bouschor as a Unit One candidate, violates their fundamental First Amendment rights to vote and freedom of political association under the Tribal Constitution, Article VII, the U.S. Constitution, the protections of which are incorporated into the Tribal Constitution through Article VII, and the Indian Civil Rights Act. Petitioners also allege that the Tribal Board violated Article IX of the Tribal Constitution by failing to obtain the affirmative vote of

tribal Court of Appeals, however, was raised by two members of the Tribe and not the former chairman himself. As a result, whether the two tribal members had standing to appeal the Election Committee's decision was before the Court of Appeals. In determining that the two tribal members did have standing, the Court of Appeals looked to the tribal code and the U.S. Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Notably, the Court of Appeals also considered the customs and traditions of the tribe. In relevant part, the Court of Appeals explained that:

> [i]t is our understanding that historically the leaders of our Tribe welcomed the feedback from all tribal members on the wisdom of the decisions of tribal leaders. It would therefore be consistent with this tribal custom to allow any tribal member to challenge the decisions of the Election Committee, as decisions of the Election Committee are fundamental to the internal governance of the Tribe.[54]

The Court of Appeals' decision in this matter is therefore an example of how a tribal court may incorporate tribal traditions into tribal court opinions.

Given that the tribal court described above appears to be functioning and successfully incorporating tribal customs and traditions into its decisions, it is helpful to determine the internal validity of the court system as established by the community it serves. In determining the internal validity of such American Indian tribal court systems, one measure of the tribal community's perception of the tribal court system may be the community's confidence in the tribal court judges. For example, in recent years, there have been few calls from the local Sault Ste. Marie community for the removal of any tribal court judge. To this author's knowledge, no tribal judge with the Sault Ste. Marie Tribe of Chippewa Indians has been removed in the last two years in response to requests from the tribal community. However, should concerns about the tribal judge's performance exist at the time the tribal judge is considered for re-appointment, the tribal judge may not be re-appointed. In the last two years, only one tribal appellate court judge was not re-appointed due to apparent concerns

seven Tribal Board members. Finally, Petitioners allege that Tribal Code Section 10.110(2) constitutes an illegal bill of attainder.").

54. *Id.* at 3.

regarding her performance. The foregoing, suggests that the Sault Ste. Marie Tribe of Chippewa Indians tribal community, or at least the tribe's board of directors, is generally satisfied with the performance of the tribal court system.

Inherent in most tribal court systems are mechanisms for the removal of inadequate tribal court judges, whether through the election or appointment process.[55] Accordingly, as seen in the example of the Sault Ste. Marie Tribe of Chippewa Indians, concerns regarding the tribal court systems, and performance of the tribal court judges in particular, may be managed at the local, tribal level.[56] These mechanisms lend further support for the proposition that the internal perception of tribal court systems is generally positive within the local, tribal communities they serve.

While it cannot be assumed that all American Indian tribal court systems are functioning at equal levels or equally accepted by external and internal constituencies, the systems seem to be working. Such systems may therefore be appropriate models for court development in other regions facing the challenge of incorporating indigenous traditions and customary law into new court systems.

Conclusion

When European explorers landed in what is now the United States, they brought with them new food, new clothes, new language – and new legal systems. In the intervening centuries, those new legal systems have developed into what are now American federal and state court systems. As a result, American Indian tribal governments that pre-existed the formation of the United States of American have worked in many instances to merge tribal traditions and customary law with Anglo-styled justice systems similar, if not the same, as those used in American federal and state court systems. As a result, modern American Indian tribal court systems have emerged, and, while not perfect, these systems do appear to be largely accepted and perceived

55. *See, e.g.*, Sault Ste. Marie Tribe of Chippewa Indians Tribal Code Sections 80.102; 82.103; *available at:* http://www.saulttribe.com/index.php?option=com_content&task=view&id=406&Itemid=592 (last accessed September 1, 2010) (providing that tribal judges are appointed by the Board of Directors for a set term).

56. Notably, some concerns the tribal community may possess, such as the lack of tribal court punishment authority or criminal jurisdiction over non-Indians, are matters of federal law, as explained above, and therefore outside of the authority of the local tribal community to remedy.

as adequate by external and internal communities. As other nations face the challenge of merging indigenous customary law with Anglo-styled justice systems, American Indian tribal court systems may be used as a model for future court development.