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Strengthening What Remains

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I. Introduction

Tribal courts exist primarily to advance tribal people. However, as the historical development of tribal courts illustrates, this "service" was not always intended to serve the interests of the tribal community in preserving its own concepts of law. This was due to the various political and social agendas being pursued by the federal government through the use of tribal courts, none of which were particularly sensitive to the native world view or philosophy. As tribal courts enter into a new period of development, we are at an opportune moment to critically appraise our systems and evaluate them using native ideals and taking into consideration the native world view. It is the particular responsibility of native lawyers, practitioners, professionals, and advocates working within the tribal justice systems to assess the current situation of tribal courts and to determine the future course of tribal systems.

Preserving, strengthening and incorporating our native concepts of justice, which include both native principles and laws as well as traditional methods and objectives of dispute resolution, are of particular importance in the appraisal of our tribal court systems. To the extent that tribal nations are similar, mutual exchange among them is useful; to the extent that tribal nations are different, this evaluation must be carried out on a tribal level. It is the intent of this paper to encourage that localized evaluation. This appraisal will consider the effect reliance on non-Indian law, both in the past and the present by tribal courts and lawyers, has had and continues to have on Indian nations.

The entire area of customary law, including methods of traditional dispute resolution, is currently a "high profile" area receiving attention from legal experts and researchers. Customary law is extremely important to the future development of tribal justice systems. Those involved in the tribal judicial systems must begin to articulate their thoughts on, and address customary law. Courts in Indian country and the individuals involved in those courts play an influential role in controlling the extent to which the legal systems will embody customary law. All those involved in the judicial field at the tribal level, from lay people to legal professionals, must become involved in this discussion. The use and development of customary law in our legal system rises or falls on the position taken by the judiciary, the advocates and the litigants. Despite all the helpful insights which may be gained from legal anthropologists and historians, tribal people are the ones familiar with the realities. We can distinguish the rhetoric from the practical truth, the ideal from the practice. And most impor-

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tantly, we are the ones who, because we are most familiar with the problems, are instrumental in pointing to the practical solutions and methods which will succeed.

We find ourselves at a juncture in the development of our tribal court systems. Therefore, we need to take a moment to cast our thoughts over what has passed and why things have developed as they have. In this respect, it is critical to remember the history of tribal judicial systems development. As tribal courts expand their jurisdiction and develop, it is necessary not only to envision a destination, but also to change course if necessary to avoid the development of tribal justice systems by default. We must see to their future development by design. My ultimate vision is to see tribal justice systems develop into true indigenous justice systems, distinct from all others. To the extent that Indian nations are under real, or imagined, mandates to demonstrate some conformity, this can be accomplished without discarding or ignoring their own wisdom.

This paper is intended to encourage discussion and stimulate action and thought as well as to support the ongoing work in tribal courts in this area. We are involved in an ongoing process of developing an indigenous body of law and system of justice. We must pay particular attention to how we are going about the development of our court systems and look closely at what is developing. Incorporating customary law, whether wholly or partially, into our developing legal systems makes them truly unique to our individual tribes and reflective of the concepts we, as Indian people, have of law and justice.

The first question is how do we go about doing this? There is no simple or easy answer. The first step is to begin consciously thinking about it, talking about it and identifying those elements in our current systems where we have already incorporated principles of customary law and identifying other specific areas where we can incorporate the principles of customary law. The second step is to look at our systems to see where they are not meeting the needs of the community and to seek to incorporate methods which will more effectively meet those needs. As we look for viable methods, we should look first at tribal concepts and principles of dispute resolution which may assist in this effort and which complement our way of thought before we import other methods from outside. We should also look to adapt those methods which we import, or are mandated to follow, to fit our communities. I hope to encourage serious reflection on the present state of our court systems. Do such systems reflect native principles and values? Do they seek to incorporate and reinforce basic and important community values? Given the federal government's historic, and even its fairly recent agenda for tribal courts, a negative answer to this question is not surprising. However, I do not believe it is the intention of any tribal court system to merely mimic the Anglo-American system without thinking about developing a unique tribal justice system. There are enough similarities among tribes that we can discuss this matter collectively, yet the answers are as varied as the tribes themselves and thus lie within the tribal communities, not outside them. Once tribal people entered the legal profession, the move to turn the tribal justice system into our own tool began. My vision for tribal courts is the development of systems of justice which reflect the native society's concepts of law and harmony. While it is true that tribes are uncer-

tain federal mandates,[2] there are ways of meeting those mandates while still maintaining tribal integrity in the design of the dispute resolution system.

From the beginning of contact to this day, we have faced the challenge of maintaining our ways. All of us here today face this common challenge in the development of our court systems. As native people in the United States we have a long history of resistance to the destruction of the ways of our people, and we have learned some hard lessons.

Recalling the history of tribal courts reminds us of the heavy hand of the federal government upon these systems and should prompt a critical examination of the present state of our systems. We should view critical evaluation as pure survival instinct. Before we make plans to move forward, we must determine where we are and where we have been.

The history of tribal dispute resolution predates both state and federal courts

In the remainder of this paper, I will briefly review the legal history of tribal courts, then look at the terms that are used when we speak of developing justice systems based on Indian concepts. I then look at the importance world view plays in developing judicial systems for tribal communities and the effect on Indian nations that tribal courts and tribal lawyers have when they use non-Indian law. Lastly, I make some practical suggestions in moving toward the establishment and incorporation of native principles of law into tribal courts.

II. Legal History of Tribal Courts

A. General Overview

The history of tribal dispute resolution predates both state and federal courts. This history is as different from the history of state and federal courts as the Indian culture and value system are different from the dominant culture and its value system. The history of tribal courts is dominated by the federal-tribal relationship.

While it may be said that all tribes have their own unique history, generally the history of the development of tribal court systems is similar. In addition to the tribal court systems that we will speak of, several tribes, including several of the Pueblos of New Mexico, operate entirely within a "traditional" system. A mirror to reflect the Anglo-American jurisprudence model, whether in whole or in part, is missing; it has never been there. Under such tribal systems the methods and the ends of dispute resolution differ.[3] In the case of non-traditional tribal courts, federal law interjected Anglo-American laws and concepts irrespective of the difference between traditional law and Anglo-American law and the gulf between the two.[4] Recognizing that a gulf exists is the first step towards understanding the impact Anglo-American law and its concepts of justice has had on native peoples. This sobering recognition is also instrumental to comprehend the challenges facing modern day tribal court systems, structured in the Anglo-American mode, struggling to remain relevant to, or at least respectful of, native social and

political thought. Interestingly, a similar challenge faces traditional systems, as they seek to maintain traditional aspects of their systems, while "modernizing" their operations to meet increased and changing demands. External mandates premised on the Anglo-American jurisprudential model of justice press on these systems as well.[5]

B. History

Prior to 1871, when treaty-making with tribes ended, the federal policy was one of respect for tribal self-government and traditional forms of tribal justice. Congress recognized this right through treaties. Tribes retained sole jurisdiction over Indians and concurrent jurisdiction over criminal conduct by non-Indians. In *Worcester v. Georgia*,[6] the United States Supreme Court ruled that the state of Georgia had no jurisdiction over Indians within Indian country, unless Congress expressly authorized it. There was no limitation on tribes in terms of their ability to use traditional forms of judgments, i.e., restitution, banishment, and death.

From 1871 to 1934 the federal policy was to end tribal self-governance. This was the period in which the General Allotment Act,[7] was enacted and Indian lands were divided into individual holdings, with the remainder opened to settlement, and Indians subjected to state law. In 1883, Courts of Indian Offenses were created to replace tribal forums of justice. The purpose of these courts was to educate and civilize the tribes with the Bureau of Indian Affairs and later, Congress providing the funding for the courts.[8] During this period, traditional tribal law was seriously weakened, losing its authority to a Bureau of Indian Affairs legal order composed of the Indian agent, a "code of indian offenses," Indian police, and agency-appointed chiefs and judges.[9] In 1885, Congress passed the Major Crimes Act,[10] to extend federal court jurisdiction over felony criminal offenses committed by Indians on Indian reservations. Congress was spurred by *Ex Parte Crow Dog*[11] in which Crow Dog, the accused murderer of Spotted Tail (both Brule Sioux) was tried for murder and convicted in the First District Court of Dakota, Dakota Territory, and sentenced to death. The Supreme Court found the district court to be without jurisdiction, finding Crow Dog was subject to the jurisdiction of his tribe and not to the United States or its general laws. The traditional remedy included reconciliation and an ordered gift.[12] In *Talton v. Mayes*,[13] the Court found that the Bill of Rights under the United States Constitution, providing protections for criminal defendants, did not apply to tribal criminal proceedings. This was the precursor to the Indian Civil Rights Act of 1968.[14] The effect of this period was the weakening of traditional governments and law, as well as the loss of 90 million acres of tribal land to non-Indians from the date the General Allotment Act was passed to 1934.

From 1934 to 1953, the federal policy sought to restore tribal self-government, which included the creation of tribal courts. The Indian Reorganization Act (IRA)[15] was passed by Congress in 1934 to accomplish this purpose. Under the Act, tribes could adopt written constitutions. Model constitutions were provided and contained provisions whereby tribal councils could create tribal courts to replace Courts of Indian Offenses. Many tribes adopt-

ed these model constitutions. Not all tribes which organized under the IRA adopted constitutions and a number of tribes did not organize under the IRA. The model constitutions and model codes limited criminal jurisdiction of tribal courts to minor offenses, subjected laws and ordinances to Interior Department approval, and limited sentencing powers of tribal courts to a maximum period of six months imprisonment for criminal offenses.

From 1953 to 1968, the federal policy was to terminate the federal trust responsibility and transfer jurisdiction to states. One purpose of the policy was to eliminate tribal courts. Although most tribes and their court systems survived termination, tribal councils were discouraged from efforts to develop more effective tribal courts. The structure of courts remained unchanged and tribes were forced to bear greater funding burdens. Congress also passed Public Law 280[16] which allowed state courts to assume criminal and civil jurisdiction over Indians within Indian country without tribal consent. *Williams v. Lee*[17] upheld tribal court jurisdiction in non-Public Law 280 states over civil disputes by non-Indians and Indians within Indian country. Tribal court criminal jurisdiction remained limited. Yet, federal jurisdiction under the Major Crimes Act and the General Crimes Act[18] was not vigorously exercised. The tribal codes developed by the Interior Department and adopted by tribes remained basically unchanged since 1934.

In 1968, the Indian Civil Rights Act (ICRA) was passed and the federal policy of recognizing tribal powers of self-government, including the authority to establish court systems for administering justice, was once again reaffirmed. The Indian Civil Rights Act, however, provided no federal funding to enable tribes to restructure or improve their court systems. Moreover, it permitted federal courts to review by writ of habeas corpus the legality of detention by order of an Indian tribe. The Act required tribal courts to afford criminal defendants many of the basic due process rights made applicable to federal and state courts under the United States Constitution. It placed requirements on tribal self-government which reflect Anglo-American principles of justice.[19] The Act also limits the sentencing power of tribal courts for criminal offenses to one year or a $5,000 fine upon conviction.

From 1968 to the present, the Congressional policy has been to promote tribal self-government and increase funding for court operations. However, many courts are currently operating on tribal and federal funds which are not nearly comparable to similarly situated state courts. Tribal courts are underfunded and understaffed because many tribes lack funds to adequately supplement federal funds to assist courts with the development of the court system and expanded tribal jurisdiction. Recent U.S. Supreme Court decisions have taken criminal jurisdiction over non-Indians and non-member Indians from tribal courts at a time when both live, work and are routinely present on reservations.[20] Criminal jurisdiction over non-member Indians was restored by Congressional amendment to the Indian Civil Rights Act in 1992. Some tribes prosecute major crimes listed under the Major Crimes Act due to the lack of federal enforcement.

The United States Supreme Court recently found a tribal court lacked jurisdiction over a civil dispute between non-Indians in Indian

country. Many tribes have amended their tribal codes, moving away from the Code of Indian Offenses and the IRA model codes, but some still employ codes whose major criminal and civil provisions have not changed since they were first adopted under the IRA.

In 1993, President Clinton signed tribal courts legislation into law.[21] The legislation provided for federal appropriations to be made available to tribal courts for their exclusive use. Tribes still await these appropriations.

A central proposition in federal Indian law governing tribal nations, and hence tribal judicial systems, is that Indian nations retain vestiges of their original sovereignty and therefore have residual authority to govern their own affairs. Their sovereign qualities were initially recognized by the federal government when it negotiated treaties with Indian nations as it did with other foreign nations. Thus, the power to establish and maintain tribal judicial systems is an inherent, retained power that was never surrendered.

III. Terms

Some of the terms used to discuss the development of justice systems based on Indian concepts follow. Because these terms are used interchangeably, I would like to attempt here to comment on them so that we will have a common understanding of the different terms. In reference to the law of native societies, commonly used terms are: customary law, tribal common law, indigenous law, and native law. In reference to traditional tribal methods of resolving disputes; traditional dispute resolution, peacemaking and peacekeeping are common terms. Custom, tradition, and practice are widely used to refer to the source of both the law of native societies and the methods of dispute resolutions.

A. Customary law, common law, indigenous law and native law

All four of these terms refer to the same concept. However, in this category I have my own preference. Because common law is so closely associated in my legal-trained mind with the common law of England, I prefer using customary law, indigenous law, or native law.

Generally, customary law is a law that is derived from custom. Custom in this sense means a long-established usage or practice which is considered unwritten law. Some additional requirements are that it has acquired the force of law by common adoption or acquiescence, and that it does not vary.

B. Traditional dispute resolution, peacemaking and peacekeeping

Traditional dispute resolution refers to the methods of resolving disputes which were used by tribes prior to the existence of tribal courts. Peacemaking, a term used by particular tribes, i.e., the Navajo and the Iroquois, is a method of traditional dispute resolution.

C. Custom, tradition, practice and usage

Custom, as we use it in the discussions regarding justice based on Indian concepts, has the same narrow meaning as defined above; that is, long-established practices considered as unwritten law. The general meaning of custom includes those usages or practices common to many peoples or to a particular place as well as

to the whole body of usages, practices or conventions that regulate social life. It is important however, to keep in mind the narrow definition which we use here.

Tradition is the method by which information and beliefs and customs are handed down by word of mouth or by example from one generation to another without written instruction. It also refers to the cultural continuity in social attitudes and institutions or to the pattern of thought or action passed down from generation to generation. In this sense, tradition may be said to refer more to the methods of resolving disputes and the methods by which native law is passed from one generation to the next.

Practice and usage are generally used to describe custom, and so are, in essence, interchangeable with the word, custom.

This is only a cursory examination of these words and their usage. As these words are used interchangeably, it is hoped that this will assist our communication. They are also English words. The meaning of "law" in the indigenous language is also important to consider.

IV. World View and Tribal Court Development

The historical use and incorporation of non-Indian law has had negative effects on the development of judicial systems which are compatible with native societal concepts. The fact remains, however, that the Anglo-American approach to law is pervasive in most tribal court systems. Yet, the question why tribes would consider altering judicial concepts embodied in the Anglo-American system of justice, will arise. The answer is simple. Native and non-native societies operate from two different world views. The Anglo-American system represents the world view of Anglo-Americans. It is embedded in English history and law. Consequently, it should not be considered odd for Indian people to develop a system which is reflective of the native world view, embedded in native history and law.

In comparing the general concepts of justice held by indigenous people of North America to the concepts of the Anglo-American system, I want to point out the fundamental differences in legal precepts or concepts that exist between indigenous concepts of law and relationships and Western or Anglo-American concepts of justice. The challenge Indian nations face today is developing justice systems which are relevant to the people and which meet community needs, and most importantly do not unilaterally substitute Western principles for indigenous concepts.

From initial contact native peoples experienced conflict in legal principles with the various colonizers. For example: with respect to the ownership of land, the native concept was that one cannot buy and sell the land; native law was oral and theirs written; many native societies were matrilineal while the colonizers' societies were patrilineal. Unless differences in world view are articulated, it is difficult both to understand clearly the struggle in developing a native justice system within a system modeled after the Anglo-American system and to devise a method to do so. The displacement of native concepts and principles by the use and adoption of non-Indian law by Indian nations also becomes clearer by articulating the differences. The differences between indigenous views of justice and Anglo-American views of justice are fundamental. There are many different tribes, many different languages, yet there are some general principles

and common threads within our indigenous systems of justice.

A. A comparison of Anglo-American and Indigenous law

See Appendix A.

B. The Effects of Use of Non-Indian Law

The greatest danger in using non-Indian law is that since it is not law that has evolved from native peoples themselves, it advances non-Indian approaches which do not necessarily provide the best way to resolve disputes handle crimes and violations for a native community. A gulf between native people and non-Indian law occurs where non-Indian law introduces or reinforces views which are contrary to accepted values or precepts of the community. The Anglo-American system is in itself contradictory to native values in restoring harmony. Thus, the effectiveness of the methods and the law applied by the tribal judicial system in alleviating the problems it is responsible for addressing can be undermined by influence of Anglo-American principles. Courts and tribal lawyers must consider the difference between the federal and state governments and their approach to justice, and that of tribal governments in relation to the people they serve. While there are some similarities, there are also significant differences in terms of economic resources, function and philosophy.

To the extent that tribal justice systems pattern themselves, not only in structure but in the law applied in their systems, after federal and state court systems, they surrender their own unique concepts of native law and participate, at a certain level, in their own ethnocide. Law is a significant part of all cultures and to the extent that Anglo-American concepts displace native concepts, native culture is changed. The use of non-Indian law perpetuates and interjects a way of thinking which should be carefully considered. While it may seem difficult to consider and argue cases based on a tribal perspective, this is the only way tribes can develop their own unique jurisprudence. If non-Indian law is not automatically used by tribal courts, or turned to as providing the definitive answer on all aspects of the law, Indian concepts will emerge.

Some would argue that there are reasons for the use of non-Indian law and that tribal courts are legitimized if they look and act like non-Indian courts. Non-Indian parties and lawyers are more comfortable in or with a system they can recognize. Others say that traditional law is too difficult or too controversial to apply.

Legitimization should not come at such a high price. Differences are to be expected by parties and lawyers when going into another jurisdiction. It is time that we begin to rethink the structure and foundational principles of tribal judicial systems and to infuse the tribal system with our own concepts of justice which more closely reflect our societal beliefs.

VI. Practical Considerations

A. The Importance of Incorporating Customary Law Ways into Tribal Judicial Systems

Many tribal Constitutions and Codes mandate that custom and tradition be utilized by the tribal court. These provisions vary, but the majority of these provisions are quite strong regarding the preeminence that custom and tradition are to be given by the judiciary when

considering matters before them. Even if no written provisions exist, recognition of the customary law of the tribe by the judiciary is possible.

Customary law is oral and primarily preserved in the native language. The predominance of English and the increasing number of tribal peoples who only speak English, the use of English in the tribal court and the employment of persons external to the tribe as judges and advocates within tribal systems has diminished the use of native languages. This in turn affects the way in which thoughts and ideas are expressed. In integrating and relying on traditional law, courts and parties are likely to find themselves caught between English and the native language, unless everyone before the court is conversant in the native language. This raises at least two issues. One is insuring that a place is made for the use of native language in tribal court systems. The court has a responsibility to insure that qualified translators are available and utilized by the court for the benefit of both English and native speakers. The second issue is the interdisciplinary aspect of developing a court system based on native principals and traditional law. The court and lawyers must and should be working with others in the community who are recognized for their knowledge of the native language, of the history of the people, and of the legal traditions and teachings. In order to bring traditional law into the court, oral interviews and fieldwork may be required. It is important to recognize the work required in developing a tribal system which seeks to utilize traditional law. The work is slow and painstaking, with many detractors requiring great commitment, not only on the part of those involved in the court system, but of the leadership and the community. While outside forces and societal changes have impacted custom, it is important to distinguish between disuse of custom and custom which simply has not been recognized, but which, in fact, remains alive and intact.

The judiciary and advocates appearing before the court must use custom responsibly and must assume certain ethical obligations in its use. For instance, an advocate should be under the same obligation to report to the court both the favorable and unfavorable customary law on a particular matter, in the same manner they are responsible for reporting favorable and unfavorable case law. In addition, both the judiciary as well as the advocates should bear responsibility to search out applicable customary law before advocating or applying outside law.

The application of customary law to members of the tribe and non-members is a particularly important issue. Some courts decide whether it would be appropriate to apply customary law to tribal members based on their status as traditional, and on their bicultural or assimilated status. They also make a distinction between members and non-members. This is an interesting distinction which I will address below.

A great deal of responsibility for the development of customary law as a solid foundation of tribal law lies with the tribal court system, primarily the judiciary and the parties before the court. The responsibility for the articulation and pronunciation of customary law lies with the judiciary, but I contend that the responsibility of presenting customary law to be considered by the courts belongs to the litigants.

The premise I begin with is that all tribes and their courts apply and draw upon custom-

ary law to some extent. Many, as they apply it in decision making, may not stop to label it as such. This is what I want to stress here: the need for the tribal judiciary to consciously document its use, articulate it when applied[22] and request parties to address customary law, and where it is applicable, to present customary law to the court. Applying customary law is not always easy for tribal court judges. It is often easier to apply state or federal law because it is written and because Western legal training leads us in that direction. On the other hand, because Indian tribes are oral societies, the customary law is contained in the oral tradition of the tribe. It is not written down. It is typically not codified. The sources of common law are the members of tribal society who were raised traditionally. In addition, non-legal research materials may provide information, as well as the personal experience and observation of community members. Western legal training does not necessarily prepare lawyers, both native and non-native, for this aspect of tribal court advocacy or judging.

How can the native court develop and encourage the use of customary law? One, courts can develop their own unique rules for customary law when it is at issue, or develop their own unique interpretation of the rules of evidence used by courts to accommodate the nature of customary law which might otherwise make it difficult or cumbersome to apply. Two, the court can call its own experts on customary law if customary law will assist the court to understand evidence, (i.e., significant acts which symbolize something according to custom, such as paternity, or to determine a fact in issue, such as whether there was a marriage), or when customary law is in dispute. Basically judges have a great deal of flexibility when they believe customary law will assist in understanding evidence or determining a fact in issue or when the judge needs expert guidance on what the customary law is.

Courts might want to consider developing unique rules or provisions which encourage the introduction of customary law, and clearly set out how customary law is to be addressed and presented to the court.

B. When Customary Law is Not at Issue

When customary law is not at issue, i.e., where the custom is so widely known and accepted in the community, the court may consider recognizing the customary law on its own. This is known as judicial notice under the rules of evidence used by Anglo-American courts. The limitations on judicial notice generally apply only to adjudicative facts and exclude propositions of generalized knowledge under which common law rules are formulated. Tribal courts could set forth customary law not in dispute and widely known and accepted through its rulings. Indeed recognition of customary law by constitution or code is strong support, if not a strong mandate to do so.

C. Encouraging Use of Customary Law by Litigants

Because the court must be assisted by litigants in the development of customary law, the court might consider adopting unique rules which require litigants to plead the applicability or inapplicability of customary law, and require them to address relevant customary law, just as relevant state and federal law is routinely argued. Litigants would thus be required to determine whether customary law

exists on a given matter, what that customary law is, and whether or not it is applicable and why it is or why it is not applicable.

D. Role of the Legislature

One of the roles of the tribal legislature is to provide for the use and development of customary law through legislation and to fund or support research of customary law at the tribal level. Codification of customary law is sometimes discussed, but the major emphasis is on assisting courts in its recognition. Because codification of customary law is not necessarily the answer, by incorporating customary law into legislation, its relationship to the oral tradition is changed. The primary method through which customary law will become a part of the tribal legal system is through the development of judge-made law and through the legislature's use of traditional legal concepts and precepts as the basis for legislation.

The tribe itself however, must affirmatively decide that incorporation of customary law is desirable and encourage its use by considering its application itself as a foundation to its legislation. How much customary law will be incorporated will vary from tribe to tribe.

E. Participation by the Judiciary

Participation and interest of judges in incorporating customary law is critical. If there is no interest or if there is resistance on the part of the judiciary, incorporation of customary law and development of an indigenous body of law unique to a particular tribe will be minimal. The process of incorporating customary law into a formal legal system will not be easy and will take the work of the judiciary, the litigants, and the tribe. If an active approach is not taken to support customary law, customary law will give way to other influences, such as state and federal law devoid of indigenous thought.

F. Application of Customary Law[23]

The application of customary law need not be limited to the indigenous population. If a comparison is made to the application of English common law, nowhere has its application been limited to only a certain group of people but has instead applied to all. Likewise, application of tribal customary law should know no distinctions among groups of people within the tribal jurisdictional boundaries.[24] Where the customary law of two separate tribes come into conflict, say for example, due to intermarriage, the principles to resolve conflicts of law could be applied, or developed by the tribal court itself.[25]

VII. Conclusion

Individual tribes face the challenge to develop an indigenous system of justice based on Indian concepts. Tribes do so in the face of imposed mandates, yet the spirit of resistance is alive. As judges, lawyers and professionals working within the tribal justice systems, or as tribal leaders we need to assure the responsibility for preserving the strength and good that is in our indigenous thought and refuse to blindly mirror the Anglo-American model.

Appendix A

Anglo-American	Indigenous
Adversarial One party against another; One party prevails.	**Non-Adversarial** All come together to work out an answer.
Argue Points of law, points of fact argued against one another. Points of disagreement are focused. Only those with standing may participate.	**Talk** Everyone talks, events are related from each point of view. Non-parties may speak.
Rights of Individuals Paramount; Much care is taken to protect individual rights.	**Rights of Community** Paramount; Emphasis in indigenous communities is on the group rather than on the self or individual.
Vindication of Society In criminal matters emphasis is on vindicating the matter for society, little emphasis on victim or reintegrating accused.	**Restoration of Peace** In community and resolution of underlying problem -- goal of indigenous justice.
Punishment/Imprisonment	**Forgiveness/Reintegration** No imprisonment (Banishment, shame, ridicule).
Rights of Accused Right to remain silent. Ability to deny accusation with burden of proof to be borne by accusers.	**Obligation of Accused** Obliged to speak. Honesty in all parties. Seeking truth. All speak. Through rendition of facts, the evidence speaks for itself. No burden or reversal of burden.
Fine to State	**Restitution to Victim Harmed**
Separation of Church and State Law is secular matter. Law is separate from religion.	**Law is part of whole** Spiritual matters are not separated out from the secular.
English Language Many words cannot be translated into native language, because there is no equivalent thought.	**Native Language** Many words cannot be translated to English, because there is no equivalent thought. Language carries our world view.
Emphasis on Written Record Law is written and must constantly be updated.	**Oral** Indigenous societies are oral societies. Words are alive. Law (custom) is passed orally.
Separate Judicial Body	**Traditional, customary leaders participate.**
Right to Appeal	**No Right to Appeal** Final resolution of matter is sought.

Notes

1. This paper evolved from a presentation made in 1993 at a Customary Law Conference sponsored by the Law Society of Papua New Guinea and the National Institute for continuing Legal Education, in Port Moresby, Papua New Guinea. As a participant in a customary law exchange between indigenous peoples from the South Pacific and the United States, many hours were spent discussing indigenous law and dispute resolution with my traveling companions, Navajo Nation Supreme Court Chief Justice Robert Yazzie, and Philmer Bluehouse of the Navajo Nation Peacemaker project, Ada Pecos Melton, Jemez Pueblo and Cheryl Fairbanks, Tlinglet/Tsimsan. My thanks to these and to all those we met on our travels to Papua New Guinea, Fiji, Solomon Islands, and Vaniutau and the Asia Foundation. Credit must also be given to all the presenters and delegates at the Papua New Guinea conference; for it was their own piercing self-examination of their imported system which inspired many of the thoughts expressed in this paper. Special thanks to my colleagues at the 1995 Boulder People of Color Conference where this paper was presented as a work in progress and to Professors Margaret Montoya, UNM School of Law and Evelina Z. Lucero, Institute of American Indian Arts, for their valuable comments and insight. Finally, thanks to Professor Rob Porter of the University of Kansas School of Law for his support and interest in the development of a genuine tribal jurisprudence.

2. *See* Indian Civil Rights Act (ICRA) of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1983 & Supp. 1998) (codified as amended at 25 U.S.C. §§ 1301, 1302, 1303, 1311, 1312, 1321, 1326, 1331 and 1341 (1994)).

3. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 10-12 (1994).

4. *See* ICRA of 1968, 25 U.S.C. §§ 1301 et seq; Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601, 3602, 3611, 3612, 3613, 3614, 3621, 3631 (1994)).

5. The Southwest Indian Law Clinic has done some preliminary work with the Pueblo of San Felipe and the Pueblo of Jemez, as they have begun to consider the future development of their court systems. Both pueblos have systems which can be characterized as traditional and which operate differently from Anglo-American courts. For a general description of the contrast and comparisons of traditional and "modern" pueblo court systems, *see* Ada P. Melton, Traditional and Contemporary Justice in Pueblo Communities (unpublished manuscript, on file with Zuni)

6. 31 U.S. 515 (1832).

7. 24 Stat. 388, 25 U.S.C. §§ 331-358 (1983).

8. *See* FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW, 333 (1942); *See* U.S. v. Clapox, 35 F. 575 (D. Or. 1888).

9. *See* HARRING, *supra* note 3, at 13-14 (citing WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL (1966)).

10. 18 U.S.C. §§ 1153, 3242 (1984 & Supp. 1988).

11. 109 U.S. 556 (1883).

12. *See* HARRING, *supra* note 3, at 104.

13. 163 U.S. 376 (1896).

14. 25 U.S.C. §§ 1301 et seq. (1994).

15. Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-94(1983)(hereinafter IRA).

16. Public L. No. 280, 67 Stat. 588 (1953).

17. 358 U.S. 217 (1959).

18. 25 U.S.C. § 1152 (1983).

19. While the act places certain limitations on the tribal exercise of "self-government" and thus affects the governing authority of the tribe, many of the protections of the Act pertain to the government as it administers justice. Thus, the tribal judicial system is directly impacted by the provisions of the ICRA. The protections enumerated affect the tribal judiciary's review of government acts. The provisions also incorporate protections of the Anglo-American system. The tribal judicial system is either directly involved in administering these protections or in seeing to their protection, particularly in criminal matters. These provisions include those protecting against unreasonable search and seizure, double jeopardy, self-incrimination, and the provisions providing for warrants, due process, punishment and trial by jury.

20. *See* Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish, 435 U.S. 191 (1978).

21. *See* Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended in scattered sections of 25 U.S.C.)

22. A good example of this is found in *Navajo Nation v. Blake*, 24 ILR 6017, 6018 (Navajo 1996), in which Justice Austin discusses the difference between treatment of criminal matters under modern Navajo criminal law

and traditional Navajo societal treatment of such matters. "Our modern criminal law, as it is found in the Navajo Nation Criminal Code, is foreign to traditional Navajo society. Navajos, traditionally, did not charge offenders with crimes in the name of the state or on behalf of the people. What are charged as offenses today were treated as personal injury or property damage matters, and of practical concern only to the parties, their relatives, and, if necessary, the clan matriarchs and patriarchs." He also discusses restitution and how it is firmly embedded in both Navajo common law and in modern Navajo criminal law, citing prior case law.

23. The comment made in this section is a reaction to one of the points made by Bradford W. Morse, Professor of Law, University of Ottawa, Canada in a paper presented at the conference sponsored by the Law Society of Papua New Guinea and the National Institute for Continuing Legal Education, in Port Moresby, Papua New Guinea, in July, 1993. This conference was convened to discuss the incorporation of the customary law of the indigenous population of Papua New Guinea into the legal system.

24. *See* Morse, *supra* note 23, at 12.

25. *See id.* at 11.