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Tribal Law and Tribal Courts

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TRIBAL COURTS, HISTORY OF

Courts in **Indian Country** do not find their origins in any specific statutory authorization, but rather in the early administrative practice of the Bureau of Indian Affairs and in the subsequent and implicit authorization suggested by the **Indian Reorganization Act** of 1934. This view, of course, does not consider the existence of Native American adjudicatory mechanisms that may have preexisted or existed in tandem with formally identified Native American courts. Such concerns are, however, often critical in examining issues of legitimacy.

The "need" for some sort of Native American court system emanated from the perceptions of local and national non-Indian administrators in Indian Country that some formal device was necessary to regulate law and order on reservations. Prior to the authorization by the secretary of the interior in 1883 to establish **courts of Indian offenses,** local Indian agents on the reservations resorted to a variety of expedients. The most common solution was for the agent himself to act as judge or to delegate the duty to one of his other subordinates or to a "trusted" Indian. This practice, though not statutorily authorized, was in line with the course of action suggested several times by earlier commissioners of Indian affairs and secretaries of the interior, who envisioned the local agents as justices of the peace.

Despite these ad hoc practices throughout Indian Country, the specific impetus for courts of Indian offenses seemed to come from the reform impulse of Secretary of the Interior H. M. Teller, who was appointed in 1882. Indian Affairs Commissioner Hiram Price compiled a set of rules for courts of Indian offenses, which were approved on April 10, 1883, by Secretary Teller and circulated to the agents. These rules provided guidelines for court organization and procedure and an abbreviated criminal and civil code. The only express qualification for prospective jurists was that they not be polygamists. The range of jurisdictional authority was thought to be modeled after that of a justice of the peace in the state or territory where such a court was located.

It was recognized from the first that there was, at best, a shaky legal foundation for these tribunals. There was no federal statutory authorization for the establishment of such courts, only the generally acknowledged authority of the Department of the Interior to supervise Indian affairs. Because no authorizing legislation defined the jurisdiction of the courts of Indian offenses, the courts and police were often challenged. The usual reaction of the commissioner of Indian affairs in the face of a jurisdictional challenge was to try to avoid a showdown. In this regard, there was unblemished success: no successful legal

reservations. Reports appeared that criticized Anglo-controlled land-tenure patterns, growing poverty, and administrative abuse in Indian Country. The 1928 **Meriam Report** initiated by Secretary of the Interior Hubert Work is the best-known of these, but it made no recommendations on the subject of law and Native American courts. The report argued that the situation varied too greatly among the various Native **American nations.**

The Indian Reorganization Act of 1934 was the culmination of this reform movement. One of the sweeping changes it sought to accomplish was in the matter of law and order on Indian reservations. **John Collier,** commissioner of Indian affairs, proposed a sweeping reform bill that dealt with four major areas: self-government, special education for In-· dians, Indian lands, and a court of Indian affairs. The Collier proposal envisioned a dual system of Native American courts. The first level wa.s. to be organized under the self-government title of the proposed act·; Native American nations would be able to retain their local courts eithe{" as courts of Indian offenses or as courts created through specific aμf· thorization in a native nation's constitution adopted pursuant to th.Bl' Indian Reorganization Act. At the same time, a national court of Inell·. affairs would be staffed with seven judges appointed by the preside: and subject to confirmation by the Senate. The court would always l;i in session and would be held in a number of different circuits, *Ea:* judge would be responsible for a particular region.

The jurisdiction of this special court of Indian affairs was set out.c section 3 of the proposed legislation. The court would assume resp'· sibility over the following matters: major criminal cases; cases wli an Indian commuoity was a party; cases involving questions *oh(* merce where one litigant was an Indian and the other a non-In'., civil and criminal cases involving an ordinance where a party wEf a member of the Indiah community; questions involving Indian;• · ments where the rights of an Indian were involved; and cases inv() the determination of heirs and the settlement of such things as \).. land partitions, and guardianships.

According to some commentators, a number of provisions in th of Indian affairs title would have changed the traditional coJ1... Indian justice rather significantly. All federal guarantees to.: defendants and the federal rules of evidence would apply. Ir! the court would duplicate the system of procedure and appeiif' vailed in the federal court system. No Indian thinking or;r· considered in the drafting of the bill. If things were not goi. the reservation, improvement lay in ratcheting up of appliQa. standards.

Despite these familiar difficulties, the Collier Bill did go' in attempting to improve the system of justice in Indian;

lenges were brought against the courts of Indian offenses. Tribal courts remained fragile and potentially volatile forums for all concerned.

The tasks of the courts of Indian offenses became vastly more complicated when the ravages of the allotment process and the sale of "surplus" Native American lands brought substantial numbers of non-Indians as permanent residents to the reservation. The bright line that had separated European-American and Indian communities was obliterated; jurisdictional dilemmas became apparent. Various questions arose: What courts had (or would accept) jurisdiction over non-Indians, over Indian allottees, or over mixed-bloods? How would these courts be financed? These dilemmas are still not fully resolved today, more than one hundred years later. Despite the principal claim that the courts of Indian offenses were necessary to maintain law and order on the reservation, other motives were at work. For example, the 1892 revision provided that "if an Indian refuses or neglects to adopt habits of industry, or to engage in civilized pursuits or employments, but habitually spends his time in idleness and loafing, he shall be deemed a v&grant" and punished accordingly. The "need" for law and order ofteri,meant a "need" for acculturation and **assimilation.** This notion of reform often sought to impose or instill "proper virtues" in Indians; *it* was particularly characteristic of federal policy during the period 1871-1928.

A court of Indian offenses was established on a particular reservation when its Indian agent and the commissioner oflndian affairs concluded that it was practicable and desirable; thus such courts were established for all Indians with the exception of the Five Civilized Tribes, the Indians of New York, the Osage, the **Pueblos,** and the eastern **Cherokees,** all of whom had recognized Native American governments and courts. The peak of their activity was reached around 1900, when about two-thirds of the agencies had their own courts. Some agencies never established a court, and others experimented with them only briefly. Congress's penurious appropriations for the courts limited the number that could function at any time. The commissioner of Indian affairs determined where the courts would be located. In 1891, an acting commissioner expressed this selection process and its unbounded discretion by noting that courts would be established "as it may appear the good of the Indian Service requires." Today only about twenty-five courts of Indian offenses continue to function. They are popularly referred to as "CFR" courts because most of their governing regulations are found in volume 25 of the *Code of Federal Regulations.* Most other

American nations have established courts pursuant to their con-

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Finally, the wheels of reform began to turn in Indian Country. The

late 1920s saw renewed public concern for *the* conditions on Indian

addition to the powers already discussed, the proposed court could have removed cases from Native American and state courts and heard appeals from local Indian courts. The secretary of the interior also was authorized to appoint ten special attorneys to provide legal advice and representation to both native governments and individual Indians before the court. Not unexpectedly, as with much of the proposed Collier Bill, this title generated a great deal of controversy during legislative hearings. The final enactment of the bill, which became known as the Indian Reorganization Act of 1934, or the Wheeler-Howard Act, bore faint resemblance to the original proposal. The title dealing with the court of Indian offenses disappeared entirely.

Under the IRA, Native American nations and bands were to draft their own constitutions, adopt their own laws, and set up their own court systems. Regardless of the statutory provisions, most Native American constitutions were drafted by the Bureau of Indian Affairs without Indian consultation and consequently reflected little, if any, direct local concern. As a result, there was no opportunity to formally reinstitute traditional law on the reservation, even if it existed at the time. These BIA constitutions did not provide for any separation of powers and did not specifically create any court system. Most constitutions, rather facilely, it seems, recognized the power of a council-an elected legislative body-to "promulgate and enforce ordinances providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers." Most legislation also required the approval of the Bureau of Indian Affairs. In recent years, a number of Indian nations have amended their constitutions to remove the approval power of the Bureau of Indian Affairs. Itis important to note, however, that the exercise of these constitutional powers (whether by an IRA government or not) is not to be considered the exercise of federally delegated powers but rather the exercise of a sovereign authority that predates the U.S. **Constitution.**

Most current Native American judicial codes that serve to elucidate the framework of Indian court activity are a combination of unique Native American law and adapted state and federal Jaw principles. Apparent in the newer codes is a decided commitment to develop increased Native American statutory, including customary, law and an organized and reported body of Indian decisional law.

FURTHER READING

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