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Sandra Day O'Connor

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REMARKS

LESSONS FROM THE THIRD SOVEREIGN: INDIAN TRIBAL COURTS*

The Honorable Sandra Day O'Connor†

Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. The part played by the tribal courts is expanding. As of 1992, there were about 170 tribal courts, with jurisdiction encompassing a total of perhaps *one* million Americans.

Most of the tribal courts that exist today date from the Indian Reorganization Act of 1934.¹ Before the Act, tribal judicial systems were based around the Courts of Indian Offenses, which were established in the 1880's by the federal Office of Indian Affairs. 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. By that time, however, enormous disruptions in customary Native American life had been wrought by factors such as forced migration, settlement on the reservations, the allotment system, and the imposition of unfamiliar Anglo-American institutions. Consequently, in 1934, most tribes had only a dim memory of traditional dispute resolution systems, and were not in a position to recreate historical forms of justice. Swift replacement of the current systems by

* These remarks were delivered at the Indian Sovereignty Symposium IX in Tulsa, Oklahoma, on June 4, 1996. They are published here substantially as delivered. To aid the reader, footnotes have been added.

† Associate Justice, Supreme Court of the United States.

1. Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1983)).

traditional dispute-settling institutions was not possible. Therefore, while a few tribes, such as the New Mexico Pueblos, have "traditional courts" based on Indian custom, most modern reservation judicial systems do not trace their roots to traditional Indian fora for dispute resolution. Rather, because the tribes were familiar with the regulations and procedures of the Bureau of Indian Affairs, that model provided the framework for most of the tribal courts. Nevertheless, many tribes today attempt to incorporate traditional tribal values, symbols, and customs into their courtrooms and decisions. Some tribal courts, in proceedings that otherwise differ little from what would be seen in State or Federal court, have incorporated traditional features of Indian dispute-resolution to try to infuse the proceedings with values of consensus and community. For example, the placement of litigants and court personnel in a circle aspires to minimize the appearance of hierarchy and highlight the participation and needs of the entire group in place of any one individual.

The tribal courts, while relatively young, are developing in leaps and bounds. For example, many tribes are working to revise their tribal constitutions and to codify their civil, regulatory, and criminal laws to provide greater guidance and predictability in tribal justice. At the same time, tribes have expanded the use of traditional law. Many tribal codes now combine unique tribal law with adapted State and Federal law principles. The number of law-trained Native Americans has increased. Both State and Federal courts continue to recognize the tribal courts as important fora for resolution of reservation-based claims involving both Indians and non-Indians.

Tribal courts today face significant challenges. They must work to satisfy the sometimes-competing demands of those inside and outside the tribal communities. But while the challenges are great, the effective operation of tribal courts are essential to promote the sovereignty and self-governance of the Indian tribes. As the Supreme Court has recognized, "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."²

To fulfill their role as an essential branch of tribal government, the tribal courts must provide a forum that commands the respect of both the tribal community and the non-tribal community including courts, governments, and litigants. To do so, tribal courts need to be perceived as both fair and principled. And at the same time the courts seek to satisfy these conditions, they must strive to embody tribal values—values that at times suggest the use of different methods than those used in the Anglo-American, adversarial, common-law tradition.

While tribal courts now include within their jurisdiction a broad range of issues, they naturally take a particular interest in the issues which are most pressing to the population which they serve. Issues related to the family, and to the control of natural resources such as land, water, oil, fish, and timber, are of

2. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

particular interest to the tribal courts, both because important tribal traditions are implicated and because these issues have a vital and recurring impact on the welfare of the community.

In addressing the matters that come before them, the decision-making process by tribal courts need not, and sometimes do not, replicate the process undertaken in State and Federal courts. Tribal courts often act more quickly, and more informally, than do their counterparts. The factors considered to reach a decision, the procedures used, and the punishment or resolution arrived at, may differ in reflection of tribal values. Tribal court judges frequently are tribal members who seek to infuse cultural values into the process.

While tribal customs and beliefs vary of course from tribe to tribe, some general patterns emerge. In contrast with the Anglo-American system's emphasis on punishment and deterrence, with a "win-lose" approach that often drives parties to adopt extreme adversarial positions, some tribal judicial systems seek to achieve a restorative justice, placing emphasis on restitution rather than retribution and on keeping harmonious relations among the members of the community. To further these traditional Native American values, tribal courts may employ inclusive discussion and creative problem-solving. The focus on traditional values in contemporary circumstances has permitted tribal courts to conceive of alternatives to conventional adversarial processes.

The development of different methods of solving disputes in tribal legal systems provides the tribal courts with a way both to incorporate traditional values *and* to hold up an example to the nation about the possibilities of alternative dispute resolution. New methods have much to offer to the tribal communities, and much to teach the other court systems operating in the United States. For about the last fifteen years, in recognition of the plain fact that the adversarial process is often not the best means to a fair outcome, both the State and Federal systems have turned with increasing interest to the possibilities offered by mediation, arbitration, and other forms of alternate dispute resolution. In many situations, alternative methods offer a quicker, more personal, and more efficient way of arriving at an answer for the parties' difficulties.

The special strengths of the tribal courts—their proximity to the people served, the closeness of the relations among the parties and the court, and their often greater flexibility and informality—give tribal courts special opportunities to develop alternative methods of dispute resolution. Many of the issues that arise most frequently in tribal courts lend themselves to alternative methods of resolution. For example, vital issues touching on domestic relations, child custody, probate, tort, and criminal prosecutions, may be solved more satisfactorily using a non-adversarial method. A cooperative process is particularly useful where family issues, particularly related to children, are involved, because the process helps the parties to work together to arrive at a fair and workable solution. An adversarial process, in contrast, may worsen the strains between members of the family, and create new conflicts or reopen old ones. In addition, family problems lend themselves to methods of resolution shaped by the particular character of individual tribal courts because family issues—involving child

custody, juvenile crimes, marriage, and inheritance—are ones where tradition provides a critical guidance for social behavior.

Many tribal courts have already developed methods that meet the needs of their communities while at the same time using to the extent possible the tribe's underlying traditions and values. A good example is the Navajo Peacemaker Court, formed in 1982 by the Judicial Conference of the Navajo Nation to provide a forum for traditional mediation. The Navajo Peacemaker Court is now an active, modern legal institution which incorporates traditional Navajo concepts into a judicial process for dispute resolution. The process is directed by a mediator, who acts to guide and encourage parties to resolve their dispute. The process relies on parties' participation and their commitment to reaching a solution, rather than on the imposition of a judgment by an impersonal decisionmaker in order to reach a successful conclusion. In this way the Navajo Peacemaker Court successfully blends beneficial aspects of both Anglo-American and Indian traditions.

The Northwest Intertribal Court System, a consortium of fifteen tribes in the Pacific Northwest, was established in 1979 to provide court services and personnel to the individual tribal courts of member tribes. Several of the member tribes have supplemented their formal tribal court system with Peacemaker programs that are based on traditional values of consensus and respectful attention to individuals.

The Indian communities' interest in the development of alternatives for dispute resolution has led to the development of the Indian Dispute Resolution Services, a group formed about six years ago to provide training in conflict resolution. That organization is helping Indian communities to settle unresolved disputes around the country and to provide fair and timely outcomes for parties.

Mediation can be effective not only within a tribal community, but also between the tribe and other groups. The Native American Heritage Commission and the Community Relations Service of the United States Department of Justice have collaborated on several mediation cases involving the repatriation of Indian remains. Some mediations took place between tribes and developers who had discovered remains at construction sites; others took place between tribes and universities that wanted the remains for academic research. Mediation worked to settle successfully the many conflicts that arose over the proper treatment and assignment of such ancestral remains and funerary objects.

The development of methods of alternative dispute resolution may help tribal courts to expand the exercise of their authority over more civil cases. Historically, the great majority of cases heard in tribal courts involves criminal matters; relatively few civil disputes were decided. This disparity might reflect the time and expense required for civil cases, the courts' reluctance to handle civil cases because of a lack of familiarity or advanced legal training, or perhaps may have arisen because tribal courts serve a less litigious community. Development of alternative methods of dispute resolution allows the tribal courts to take advantage of their strengths in order to provide efficient and fair resolution of such conflicts. For this reason, the tribal courts should continue to

explore additional possibilities for alternative methods of dispute resolution. These methods need not be limited in scope to disputes within a tribe; but could be used also to resolve conflicts between one tribe and another; and between a tribe and the State and Federal government, political units, private investors, or contractors. At its best, such a method would provide a cooperative, relaxed forum for the conclusion of disputes, with use of a process that would include all interested parties to ensure their involvement and their consent; and, at the same time, offer important practical advantages by accomplishing its tasks more agreeably, more quickly, and less expensively than the adversarial mode. By expanding such techniques, the tribal courts may set out the paradigm for other courts to follow.

While tribal courts seek to incorporate the best elements of their own customs into the courts' procedures and decisions, the tribal courts have also sought to include useful aspects of the Anglo-American tradition. For example, more and more tribal judicial systems have established mechanisms to ensure the effective appealability of decisions to higher courts. In addition, some tribes have sought to provide tribal judiciaries with the authority to conduct review of regulations and ordinances promulgated by the tribal council. And one of the most important initiatives is the move to ensure judicial independence for tribal judges. Tribal courts are often subject to the complete control of the tribal councils, whose powers often include the ability to select and remove judges. Therefore, the courts may be perceived as a subordinate arm of the councils rather than as a separate and equal branch of government. The existence of such control is not conducive to neutral adjudication on the merits and can threaten the integrity of the tribal judiciary. Some tribes, like the Cheyenne River Sioux Tribe in South Dakota, have amended their constitutions to provide for formal separation of powers.

The growing number of law-trained, well-prepared people participating in the system, both as lawyers and judges is a vital improvement of the tribal judicial systems. Many tribal judges have taken steps to craft ethical guidelines and to institute tribal bar requirements for the lawyers who practice before them, and have participated themselves in further training for the task of judging. Both lawyers and judges must be knowledgeable and principled if the tribal judicial systems are to engender confidence in the fairness and integrity of their courts. Whether in tribal court, state court, or federal court, the exercise of a court's jurisdiction is a serious matter, and all persons—Indian and non-Indian—who come before a court are entitled to just and reasoned proceedings.

The judicial systems of the three sovereigns—the Indian tribes, the Federal government, and the States—have much to teach one another. While each system will develop along different lines, each can take the best from the others. Just as a "single courageous State may, if its citizens choose, serve as a laboratory . . ."³ for the development of laws, the experiments and examples provid-

3. *New State Ice Co. v. Liebmann*, 285 U.S. 310, 311 (1931) (Brandeis, J., dissenting).

ed by the various Indian tribes and their courts may offer models for the entire nation to follow. To give but one example, the Navajo Peacemaker Court has been studied not only by officials within this country, but also from Australia, New Zealand, Canada, and South Africa, for possible use. The Indian tribal courts' development of further methods of dispute resolution will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model. And, while tribal courts currently seek to expand the role of traditional law in their judicial systems, they may well choose to incorporate some of the features of the Anglo-American system, such as access to an effective appeal and the independence of the judiciary.

The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation. The three sovereigns can learn from each other, and the strengths and weaknesses of the different systems provide models for courts to consider. Whether tribal court, state court, or federal court, we must all strive to make the dispensation of justice in this country as fair, efficient, and principled as we can.