



Indigenous Justice Systems and Tribal Society

Indigenous justice systems are based on a holistic philosophy. Law is a way of life, and justice is a part of the life process.

by Ada Pecos Melton

IN MANY CONTEMPORARY TRIBAL COMMUNITIES, dual justice systems exist. One is based on what can be called an American paradigm of justice, and the other is based on what can be called an indigenous paradigm.

The American paradigm has its roots in the world view of Europeans and is based on a retributive philosophy that is hierarchical, adversarial, punitive, and guided by codified laws and written rules, procedures, and guidelines.¹ The vertical power structure is upward, with decision making limited to a few. The retributive philosophy holds that because the victim has suffered, the criminal should suffer as well. It is premised on the notion that criminals are wicked people who are responsible for their actions and deserve to be punished.² Punishment is used to appease the victim, to satisfy society's desire for revenge, and to reconcile the offender to the community by paying a debt to society. It does not offer a reduction in future crime or reparation to victims.

In the American paradigm, the law is applied through an adversarial system that places two differing parties in the courtroom to determine a defendant's guilt or innocence, or to declare the winner or loser in a civil case. It focuses on one aspect of a problem, the act involved, which is discussed through adversarial fact finding. The court provides the forum for testing the evidence presented from the differing perspectives and objectives of the parties. Interaction between parties is minimized and remains hostile throughout. In criminal cases, punitive sanctions limit accountability of the offender to the state, instead of to those he or she has harmed or to the community.

The indigenous justice paradigm is based on a holistic philosophy and the world view of the aboriginal inhabitants of North America. These systems are guided by the unwritten customary laws, traditions, and practices that are learned primarily by example and through the oral teachings of tribal elders.³ The holistic philosophy is a circle of justice that connects everyone involved with a problem or conflict on a continuum, with everyone focused on the same center. The center of the circle represents the underlying issues that need to be resolved to attain peace and harmony for the individuals and the community. The continuum represents the entire process, from disclosure of problems, to discussion and resolution, to making amends and restoring relationships. The methods used are based on concepts of restorative and reparative justice and the principles of healing and living in harmony with all beings and with nature.⁴

Restorative principles refer to the mending process for renewal of damaged personal and communal relationships. The victim is the focal point, and the goal is to heal and renew the victim's physical, emotional, mental, and spiritual well-being. It also involves deliberate acts by the offender to regain dignity and trust, and to return to a healthy physical, emotional, mental, and spiritual state. These are necessary for the offender and victim to save face and to restore personal and communal harmony.

Reparative principles refer to the process of making things right for oneself and those affected by the offender's behavior. To repair relationships, it is essential for the offender to make amends through apology, asking forgiveness, making restitution, and engaging in acts that demonstrate a sincerity to make things right. The communal aspect allows for crime to be viewed as a natural human error that requires corrective intervention by families and elders or tribal leaders. Thus, offenders remain an integral part of the community because of their important role in defining the boundaries of appropriate and inappropriate behavior and the consequences associated with misconduct.

In the American justice paradigm, separation of powers and separation of church and state are essential doctrines to ensure that justice occurs uncontaminated by politics and religion. For many tribes, law and justice are part of a whole that prescribes a way of life. Invoking the spiritual realm through prayer is essential throughout the indigenous process. Restoring spirituality and cleansing one's soul are essential to the healing process for everyone involved in a conflict. Therefore, separation doctrines are difficult for tribes to embrace; many find it impossible to make such distinctions. Whether this is good or bad is not the point. It is, however, an example of the resistance of indigenous people to accept doctrines or paradigms that contradict their holistic philosophy of life.

Law As a Way of Life

The concept of law as a way of life makes law a living concept that one comes to know and understand through experience. Law, as life, is linked to the elaborate relationships in many tribal communities. In some tribes it is exemplified by tribal divisions that represent legal systems prescribing the individual and kin relationships of members and the responsibilities individual and group members have to one another and to the community.⁵ For example, in several Pueblo tribes, one is born into one of two moieties, or tribal divisions, decided by patrilineal lines. A woman can change membership only through marriage, when she joins her husband's moiety. Males generally cannot change their moiety, unless it is done during childhood through adoption or if their mother remarries into the opposite moiety. This illustrates how tribal law becomes a way of life that is set in motion at birth, and continues through an individual's life and death.

The indigenous approach requires problems to be handled in their entirety. Conflicts are not fragmented, nor is the process compartmentalized into pre-adjudication, pretrial, adjudication, and sentencing stages. These hinder the resolution process for victims and offenders and delay the restoration of relationships and communal harmony. All contributing factors are examined to address the underlying issues that precipitated the problem, and everyone affected by a problem participates in the process. This distributive aspect generalizes individual misconduct or criminal behavior to the offender's wider kin group, hence there is a wider sharing of blame and guilt. The offender, along with his or her kinsmen, are held accountable and responsible for correcting behavior and repairing relationships.⁶

Differences in Justice Paradigms

American Justice Paradigm	Indigenous Justice Paradigm
Vertical	Holistic
Communication is rehearsed	Communication is fluid
English language is used	Native language is used
Written statutory law derived from rules and procedure, written record	Oral customary law learned as a way of life by example
Separation of powers	Law and justice are part of a whole
Separation of church and state	The spiritual realm is invoked in ceremonies and prayer
Adversarial and conflict oriented	Builds trusting relationships to promote resolution and healing
Argumentative	Talk and discussion is essential
Isolated behavior, freeze-frame acts	Reviews problem in its entirety, contributing factors are examined
Fragmented approach to process and solutions	Comprehensive problem solving
Time-oriented process	No time limits on the process, long silences and patience are valued
Limits participants in the process and solutions	Inclusive of all affected individuals in the process and solving problem
Represented by strangers	Representation by extended family members
Focus on individual rights	Focus on victim and communal rights
Punitive and removes offender	Corrective, offenders are accountable and responsible for change
Prescribes penalties by and for the state	Customary sanctions used to restore victim-offender relationship
Right of accused, especially against self-incrimination	Obligation of accused to verbalize accountability

Vindication to society

Reparative obligation to victims and community,
apology and forgiveness

Indigenous Systems Today

The status of tribes as sovereign nations are both preconstitutional and xtraconstitutional. Tribes continue to possess four key characteristics of their sovereign status: a distinctive permanent population, a defined territory with identifiable borders, a government exercising authority over territory and population, and the capacity to enter into government-to-government relationships with other nation-states.⁷

The administration of justice, law, and order is a function of government retained by the tribes as sovereign nations. It is within this realm that indigenous justice systems exist. Although there have been many efforts to limit the jurisdiction of tribal justice systems,⁸ tribes retain the authority to determine the legal structure and forums to use in administering justice and to determine the relationship of the legal structure with other governing bodies. Tribes have personal jurisdiction over their members and non-member Indians, territorial jurisdiction over their lands, and subject-matter jurisdiction over such areas as criminal, juvenile, and civil matters. While limited by the Indian Civil Rights Act in sentencing,⁹ tribes have concurrent jurisdiction over the felony crimes enumerated under the Major Crimes Act.¹⁰

The forums for handling disputes differ for each tribe, which may use varying combinations of family and community forums, traditional courts, quasi-modern courts, and modern tribal courts.

Family forums, such as family gatherings and talking circles, are facilitated by family elders or community leaders. Matters usually involve family problems, marital conflicts, juvenile misconduct, violent or abusive behavior, parental misconduct, or property disputes. Customary laws, sanctions, and practices are used. Individuals are summoned to these gatherings following traditional protocols initiated by the chosen elder. For example, in Pueblo communities the gathering is convened by the aggrieved person's family, which must personally notify the accused and his or her family of the time and place of the gathering.

Generally, elders are selected as spokespersons responsible for opening and closing the meetings with prayers. During the meeting, each side has an opportunity to speak. The victim may speak on his or her own behalf, and the family may assist in conveying the victim's issues. Extended family members often serve as spokespersons if the victim is very young or vulnerable. Similarly, a spokesperson may be designated to speak on behalf of the accused, especially if the accused is a juvenile or if other circumstances prevent the accused from speaking. When the family forum cannot resolve a conflict, the matter may be pursued elsewhere. Offender compliance is obligatory and monitored by the families involved. It is discretionary for decisions and agreements to be recorded by the family.

Community forums require more formal protocols than family forums, but draw on the families' willingness to discuss the issues, events, or accusations. These are mediated by tribal officials or representatives. Some tribes have citizen boards that serve as peace makers or facilitators. Customary laws, sanctions, and practices are used. Personal notice is made by tribal representatives to the individuals and families involved. Usually, this is all that is necessary to compel individuals to meet in both the family and community forums. When necessary, a personal escort to the gathering place may be provided by tribal officials. In some tribal communities notice may be by mail.

In the community forum, the tribal representative acts as facilitator and participates in the resolution process along with the offender and victim and their families. As with the family forum, prayers are said at the beginning and at closure. An unresolved matter may be taken to the next level, however, but tribes may or may not offer an appeal process for the community forum. In the Navajo peacemaker system, formal charges in the Navajo district court may be filed. In some Pueblo communities, matters may be pursued through the traditional court. Offender compliance is obligatory and monitored by the families involved and tribal officials.

Traditional courts incorporate some modern judicial practices to handle criminal, civil, traffic, and juvenile matters, but the process is similar to community forums. These courts exist in tribal communities that have retained an indigenous government structure, such as the Southwest Pueblos. Matters are initiated through written criminal or civil complaints or petitions. Defendants are often accompanied by relatives to the hearings. Generally, anyone with a legitimate interest in the case is allowed to participate from arraignment through sentencing. Heads of tribal government preside and are guided by customary laws and sanctions. In some cases written criminal codes with prescribed sanctions may be used. Offender compliance is mandated and monitored by the tribal officials with assistance from the families. Noncompliance by offenders may result in more punitive sanctions such as arrest and confinement.

Defendants are notified in writing. Although rare, matters may be appealed to the tribal council. In some tribes where a dual system exists, interaction between the modern American court and traditional court are prohibited. That is, one may not pursue a matter in both lower-level courts. However, an appeal from either court may be heard by the tribal council, which serves as the appellate court. Generally, these courts record proceedings and issue written judgment orders.

Quasi-modern tribal courts are based on the Anglo-American legal model. These courts handle criminal, civil, traffic, domestic relations, and juvenile matters. Written codes, rules, procedures, and guidelines are used, and lay judges preside. Some tribes limit the types of cases handled by these courts. For instance, land disputes are handled in several Pueblo communities by family and community forums. Like traditional courts, noncompliance by offenders may result in more punitive sanctions such as arrest and confinement. These are courts of record, and appellate systems are in place.

Modern tribal courts mirror American courts. They handle criminal, civil, traffic, domestic relations, and juvenile matters and are guided by written codes, rules, procedures, and guidelines. They are presided over by law-trained judges and often exist in tribal communities that have a constitutional government. Like traditional courts and quasi-modern tribal courts, noncompliance by offenders may result in more punitive sanctions such as arrest and confinement. Like quasi-modern tribal courts, these are courts of record, and appellate systems are in place.

Some of the quasi-modern and modern courts incorporate indigenous justice methods as an alternative resolution process for juvenile delinquency, child custody, victim-offender cases, and civil matters. The trend of tribal courts is to use the family and community forums for matters that are highly interpersonal, either as a diversion alternative, as part of sentencing, or for victim-offender mediation. Some are court-annexed programs such as the Alternatives For First Time Youth Offenders Program sponsored by the Laguna Pueblo tribal court in New Mexico. Under this program, juvenile offenders are referred to the village officers, who convene a community forum. Recommendations for resolving the matter may be court-ordered, or the resolution may be handled informally by the village officers. This joint effort by the court and village officers allows them to address the problem at the local village level and to intervene early to prevent further delinquency.

Characteristics of Indigenous law

Common terms or references to the law of indigenous societies include customary law, indigenous law, native law, and tribal or native law ways. All refer to the same concept.

Customary law is generally derived from custom. Custom in this sense means a long-established practice that has acquired the force of law by common adoption or acquiescence; it does not vary.¹¹

Tribal common law is based on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices. In some tribes, the tribal common law has been set out in different court decisions and written opinions over time and has become case law.¹² Among several Pueblo communities, the matrilineal system holds that property belongs to the female. In a divorce or separation, property is divided according to the matrilineal definitions of property ownership and is written into the decisions of the traditional or tribal court. Similarly, Navajo courts incorporate Navajo common law in decisions in probate, criminal, and child custody cases, and marital conflicts.¹³

For many tribes along the Northwest coast such as the Yurok, customary laws dictate the areas where families can conduct their fishing, hunting, and gathering. These areas are passed down from one generation to the next. When someone fishes in another family's area, it is considered an affront to the entire family. By custom, the wronged family convenes a family forum as the proper way to handle the matter and to request compensation. Compensation may be with fish, fishing gear, feathers, hides, beadwork, traditional clothing, or other forms of payment.

Among several Pueblo communities, it is customary for discipline to be administered by the *fiscale*, who is responsible for maintaining the peace and overseeing the welfare of children and youth. It is a general practice for parents to summon the *fiscale* when their children are unruly or misbehaving. The *fiscale* advises the children about the consequences of their misconduct and may reprimand them or refer them and their parents to services such as counseling.

In many tribes, information, beliefs, and customs are handed down orally or by example from one generation to another.¹⁴ For example, in the Minto Tribal Court of Alaska the resolution process involves a segment dedicated to "traditional counseling" by the facilitator or presiding judge. There is a general practice of "advising giving" in the traditional courts of the Pueblos and the "talking to" in the Navajo peace making system. This segment is traditionally set aside for the spokespersons or tribal officials to speak of community values, mores, and the consequences of misbehavior or misconduct. Often these are

conveyed in parables or creation narratives and beliefs. Advice is given about harboring vengeful feelings, and everyone is encouraged to renew relationships.

The Indigenous Justice Process

Indigenous methods of conflict resolution include traditional dispute resolution, peace making, talking circles, family or community gatherings, and traditional mediation, described only by the language of the tribal community. All these refer to the methods of resolving problems and to the methods of restorative and reparative justice.

The structure of relationships in many tribal communities is paramount to a legal system exemplified by the clan system. Tribal law determines clan identification, which is often matrilineal. Among Pueblo communities, moiety and clan affiliations determine for which group an individual will dance, sing, or hunt in social activities, which religious or medicine groups one may join, which political positions one may hold, whom one may court or marry, or what property one may own. The clan system regulates the behavior of its members. The interlocking relationships in tribal communities often determines the flow of how problems are handled.

For example, in many tribal communities, parents and the extended family are expected to nurture, supervise, and discipline their children. When parental misconduct occurs, such as with physical or sexual abuse or neglect, the parents and extended family convene through the leadership of an elder to address the matter. In a minor case of physical abuse or neglect, the family forum is used. The distributive aspect is invoked extensively to ensure protection of the children and to monitor and enforce proper parental behavior and responsibility, which is regulated by the family. More serious cases may involve tribal officials.

In the family and community forums and the traditional courts, those accused of wrongdoing are required to give a verbal account of their involvement in an incident, whether or not they admit to the accusations.¹⁵ This verbal account is key in discovering the underlying factors precipitating the problem. It requires participation by the offender's family and relatives who may have to explain the offender's misconduct, especially when some type of victimization has occurred. For example, parents may be admonished for not providing proper discipline and supervision for their children who vandalized or destroyed property. Relatives may be criticized for allowing a son or brother to abuse his wife or children.

Verbal accountability by the offender and the offender's family is essential to express remorse to the victim and the victim's family. Face-to-face exchange of apology and forgiveness empowers victims to confront their offenders and convey their pain and anguish. Offenders are forced to be accountable for their behavior, to face the people whom they have hurt, to explain themselves, to ask forgiveness, and to take full responsibility for making amends. Observing and hearing the apology enables the victim and family to discern its sincerity and move toward forgiveness and healing. Forgiveness is strongly suggested, but not essential for the victim to begin healing.

The restorative aspect frequently involves the use of ritual for the offender to cleanse the spirit and soul of the bad forces that caused the offender to behave offensively. Ceremonial sweats, fastings, purifications, and other methods are used to begin the healing and cleansing process necessary for the victim, the offender, and their families to regain mental, spiritual, and emotional well-being and to restore family and communal harmony.¹⁶

The agreements reached in family and community forums are binding. Participants are compelled to comply through the same interlocking obligations established in individual and community relationships. Compliance and enforcement are important aspects of indigenous systems because there is little coercion. Accepting punishment does not guarantee that an offender will be accountable. Therefore, it is essential that offenders perform outward acts to demonstrate their responsibility for correcting behavior. Offender accountability is essential to ensure compliance with decisions and to prevent further criminality or relapse into deviant behavior. Equally important is for punitive sanctions to be decided and applied by individuals who were affected by the offender's behavior.

Historically, there is little evidence of penal systems in tribal communities. This fact remains today, although there are many who express the need for secure confinement facilities to address serious and violent crimes. Many customary sanctions to appease victims and to safeguard against vengeance are still in use. These include public ridicule, public shaming, whippings, temporary and permanent banishment, withdrawal of citizenship rights, financial and labor restitution, and community service. Some tribes still temporarily or permanently banish individuals who commit serious or violent crimes. Among the Warm Springs Tribes in Oregon, it is customary to refer lawbreakers to the "whipman," who may whip a person for misconduct. In the Laguna Alternatives for First Time Youth Offenders Program, community service is used extensively.

The indigenous process is also used in offenses where there are no victims, such as problems between parents and children, individual misconduct, or alcohol consumption. Family members affected by the offender's behavior or who are concerned with the offender's welfare may participate. Many tribal people view crime, delinquency, and other deviant behaviors as symptoms of bigger family problems. Widening the affected target group to include the offender, parents, siblings, and other extended family members enlists help from those most familiar with the situation to assist in correcting and preventing more serious crime.

The indigenous process can often be extremely uncomfortable and emotional because it involves participation by everyone affected, but great care is taken to provide a safe environment for matters to be discussed. The distributive nature of this process uses the extended family as a resource for the offender, the victim, and the community to resolve problems, to ensure compliance, to provide protection, and to retain ownership of the problems.¹⁷

Preserving Indigenous Systems

Tribes are faced with the inevitable conflict created by two justice paradigms competing for existence in one community. Many Americans believe the law is something to be applied and justice is something to be administered. In contrast, tribes traditionally believe law is a way of life and justice is a part of the life process. For one paradigm to exist, it must convert people to follow it. Although it appears that tribal courts follow the Anglo-American legal system, many adhere to the traditional values of the tribal justice system. This is largely because tribes have been wary of the ethnocentric view of the Western colonizers who devalued their legal structures and wanted to replace them with an imported Western system.¹⁸ Tribes were also required to participate in the Anglo-American legal system in order to protect their lands and people, but they did so without trusting or believing it. This foreign system was imposed by the federal government, thereby thwarting their efforts to convert the tribes.

Attempts to strengthen and re-traditionalize tribal justice systems stem from discontent with the efforts of modern tribal courts to address the crime, delinquency, social, and economic problems in tribal communities. It is joined by the dominant culture's current disillusionment with justice in this country, which causes doubt about retributive justice and a move toward a more restorative framework.¹⁹ This emerging restorative perspective for the American justice system is illustrated by the following values:

All parties should be included in the response to crime-offenders, victims, and the community. Government and local communities should play complementary roles in that response. Accountability is based on offenders understanding the harm caused by their offense, accepting responsibility for that harm, and repairing it ... [R]estorative justice guides professionals in the appropriate and equitable use of sanctions to ensure that offenders make amends to victims and the community.²⁰

Conversion to the American justice paradigm is a difficult choice for tribes, particularly those with a functional indigenous justice system. For many, full conversion is not possible because the indigenous justice paradigm is too powerful to abandon. The strong adversarial features of the American justice paradigm will always conflict with the communal nature of most tribes. For this reason, the inherent restorative and reparative features of the indigenous justice paradigm will continue to be more appealing to the majority of tribal people.

Nonetheless, it is important for tribes to identify their community strengths and views on justice, law, and order. The role of non-Indians is to assist and support the tribes in strengthening their justice systems and to suppress the urge to take over or replace them. It is the sovereign and cultural right of tribes to explain, interpret, change, enact, and apply their own laws, oral and written, through whatever mechanisms they choose. It is their responsibility to teach the knowledge and skills embedded in their indigenous paradigm to their young. American Indian and Alaskan Native people have the clearest understanding of their indigenous law ways because they live them. They must be the messengers of this law to preserve its integrity, authority, power, and meaning to the people.

The many intrusions to the tribal way of life have interfered with the natural evolution of the indigenous justice paradigm, but while slowed, it has never stopped. The tribal resurgence to strengthen and re-traditionalize their judiciaries has rejuvenated the evolutionary process. While mainstream society is in the midst of shifting from a retributive justice model to a restorative one, many tribes are strengthening their indigenous paradigm. In doing so, they are empowering themselves to provide a justice system that has meaning to the people they serve and the power to perpetuate what was preserved by the ancestors and passed on by the elders as testimony of their commitment to the future of tribes. Contemporary American Indian and Alaskan Native people are now faced with making the same commitment to preserve the indigenous justice system the elders maintained and find ways to perpetuate it.

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Footnotes

Points of view or opinions expressed in this article are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

1. Yazzie, *Life Comes From It: Navajo Justice Concepts*, Legal Education Series, Alternatives in Dispute Resolution and Traditional Peacemaking (Petaluma, Calif.: National Indian Justice Center, 1993) and Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*. 32 Temple L. Q. 295 (1959).

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3. Yazzie, *supra* n. 1; Tso, *Decision Making in Tribal Courts*, 31 Arizona L. Rev. (1989); and Zion, *Searching for Indian Common Law*, in Morse and Woodman, (eds.), *Indigenous Law and the State* (Ferus Publications, 1988).

4. Yazzie, *supra* n. 1, at 4.

5. Connors and Brady, "Alaska Native Traditional Dispute Resolution," paper presented at the National Conference on Traditional Peacemaking and Modern Tribal Justice Systems in Albuquerque, New Mexico. Tribal Justice Center, (1986) "Indian Jurisprudence and Mediation the Indian Way: A Case Review of the Saddle Lake Tribal Justice System," paper presented at the Conference on Mediation in Winnipeg, Manitoba.

6. Melton, "Traditional and Contemporary Tribal Law Enforcement: A Comparative Analysis." Paper presented at the Western Social Science Association, 31st Annual Conference in Albuquerque, New Mexico, (1989).

7. Valencia-Weber and Zuni, pre-publication draft, (1995), "Domestic Violence and Tribal Protection of Indigenous Women in the United States." to be published by St. John's University Law Review.

8. See, the establishment of the Court of Indian Offenses in 1883; the unilateral imposition of law and order codes in 1884; passage of the Major Crimes Act, 18 U.S.C. 1153 (1885, Supp. 1986); the Indian Country Crimes Act, 18 U.S.C. 1152 (1817); the Assimilative Crimes Act, 30 STAT. 717 (1898); Public Law 83-280, *Indians-Criminal Offenses and Civil Causes-State Jurisdiction*, 18 U.S.C. 1162, 25 U.S.C. 1321-1326, 28 U.S.C. 1360; the Indian Civil Rights Act, 25 U.S.C. 1301 1303 (1968, Suppl. 1986); and Supreme Court decisions such as *Oliphant v Suquamish Indian Tribe*, 435 U.S. 191; and *Duro v. Reina*, et al., 110 S.Ct. 2953.

9. Indian Civil Rights Act, *id.* at 18, imposes certain protections and limitations on tribal authority and as amended in 1986 limits criminal punishment to one year imprisonment and a \$5,000 fine.

10. Major Crimes Act, *supra* n. 8, at 18.

11. Zuni, "Justice Based on Indigenous Concepts." Paper presented at the Indigenous Justice Conference: Justice Based on Indian Concepts, (1992).

12. Austin, "Incorporating Tribal Customs and Traditions into Tribal Court Decisions." Paper presented at the Federal Indian Bar Association: Indian Law Conference in Albuquerque, New Mexico, (1992).

13. Zuni, *supra* n. 11, at 25.

14. *Id.*

15. Melton, *supra* n. 6, at 16.

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20. Brazemore and Umbreit, "Balanced and Restorative Justice: Program Summary." Office of Juvenile Justice and Delinquency Prevention, October (1994).

[Back to Top](#)

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