# NATIVE AMERICAN JUSTICE IN THE UNITED STATES

Gregory J. Domareki*

The 24 October 1992, *Bangor Daily News* ran a story respecting the *Charlottetown Accord* wherein three Aboriginal Canadians held differing views concerning the *Accord*. One Mic Mac favoured the *Accord*, opining that for the first time Aboriginal Canadians would be given a chance to govern themselves and receive "recognition." One gentleman felt that the *Accord* should be rejected, believing that the Federal Government was abdicating its appropriate role vis-à-vis Native Canadians. He further opined that the Provinces really did not care about Native Canadians anyway and the threat of oppression from the Provinces seemed more dangerous than did the threat from the national government. A third Native Canadian felt the Indians should take no part whatsoever in the Referendum, arguing that, as sovereign nations, they should not involve themselves in the affairs of others.[1] It would seem that all of these points of view have merit, depending upon how the First Canadians view themselves, where they wish to go, and what they wish to be.

In the United States, Native American-Federal Government relationships have a long and rich tradition, at least in the ideal, as set forth in scores of Federal Court cases, including United States Supreme Court decisions. Chief Justice John Marshall, in the famous *Cherokee Indian* cases[2] set a number of ringing precedents respecting Indian tribal sovereignty. The many tribal courts which exist today owe much to the powerful language used by Marshall in those cases. Some of that language, from *Worcester*, is worth noting:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.[3]

Later in that case Marshall observed:

---

*Chief Judge, Penobscot Indian Nation, Old Town, Maine.

[1]D. Fund, "Despite Self Government Native Canadians Split on Accord" *Bangor Daily News* (24 October 1992).

[2]The *Cherokee Indian* cases include: *Cherokee Nation* v. *Georgia* (1831), 30 U.S. (5 Pet.) 1, and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515.

[3]*Ibid.* at 542.

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation", so generally applied to them, means "a people distinct from others". The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[4]

And finally:

> The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its rights to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[5]

The exact philosophical basis for Indian sovereignty has been the subject of judicial disagreement since the Supreme Court divided in *Cherokee Nation* v. *Georgia*.[6] Chief Justice Marshall and Justice McLean viewed the Indian tribes as "Domestic Dependent Nations." Justices Johnson and Baldwin saw the Indians as possessing no sovereignty at all. Justices Thompson and Story, relying upon renowned international law writers, Vittel, Victoria and Grotius, felt that weaker, non-European communities were sovereigns and that their sovereignty was not diminished by entering into treaties with militarily superior nations. The Marshall view still is the generally recognized basis of federal-tribal relationships; that is, the Indian tribes are considered domestic dependent nations in a guardian-ward sense.

The vast body of Indian law which emerged in the States involves federal-tribal relationships rather than state-tribal relations. These latter relationships are likewise mostly determined by application of federal law in federal courts. This is because the *Indian Commerce Clause*[7] has been interpreted by the Supreme

---

[4]*Supra*, note 2 at 559.

[5]*Ibid.* at 560.

[6]*Supra*, note 2. The Supreme Court split: 2-2-2 (1 absent).

[7]*United States Constitution*, Art. I, § 8, cl. 3.

Court as giving the U.S. Congress plenary power over Indian affairs. Federal courts have construed this power as one which pre-empts a similar exercise by the states. Generally, the powers exercised by the states, in the area of Indian affairs, are only powers and relationships permitted or condoned by Congress and the federal courts. Much of this Congressional power over Indians is exercised through the Bureau of Indian Affairs under the Department of the Interior.

What then, are the powers possessed by these domestically dependent Indian Nations? Felix Cohen, the recognized U.S. authority on Indian law, states:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe; e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe; i.e. its powers of local self-government. (3) These powers are subject to qualifications by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[8]

Cohen argues, and many federal court decisions have accepted the proposition, that the statutes of Congress must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or positive content. What is not expressly limited remains within the domain of tribal sovereignty.

> Perhaps the most basic principal of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers, granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished'. The Supreme Court has held that 'Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status'.[9]

The political history of tribal-federal relations has not always been a happy one for Native Americans. From 1790 to 1874, Congress employed policies of *removal* of the Indians from their lands and *relocation* of the Indians westward. Later from 1871 to 1927, the Indian was placed in a *reservation system* and traditional Indian treaty lands were broken up by *allotment* of those lands to individual Indians, as distinguished from the tribe itself, in the hope that the assimilation of the Indian would result in the extermination of the Indian culture and government. Past policies were re-evaluated and Indian *reorganization* of the tribes was permitted

---

[8]R. Strickland *et al.*, *Felix S. Cohen's Handbook of Federal Indian Law* (Charlottesville: Bobbs-Meril, 1982) at 122-23.

[9]*Oliphant* v. *Suquamish Indian Tribe* (1978), 435 U.S. 191 at 231.

pursuant to the *Indian Reorganization Act of 1934*[10] followed by the *termination* of Congress' relationship and funding with the tribes. Once again the hope was that *assimilation* would result (1945-1961). Finally, in 1961, Congress proclaimed the self-determination era of Native American tribal governments and cultures.

The present policy reflects the increasing awareness by Congress, the Bureau of Indian Affairs and the federal courts, that aside from working a terrible injustice, "Removal," "Relocation," "Allotment," "Assimilation" and "Termination" did not accomplish their intended effect. Indians, and their cultures, for better, persisted.

According to David Getches, editor of the casebook *Federal Indian Law*, there are 488 federally recognized Indian tribes in the United States, with approximately 1.4 million Indians, comprising about half of one percent of the nation's population, and owning approximately 52.5 million acres of land, or about 2.4% of all land in the United States.[11] It seems now to have become popular and politically correct to encourage these people to govern themselves with their own institutions, including their own tribal courts.

For many years the federal government had provided the dominant law and order on Indian reservations through its Bureau of Indian Affairs' police and federal investigative entities. In the "History of Tribal Courts," Sockbeson, Managing Attorney of the Native American Rights Fund, implied that these early Indian courts, set up by the agencies of the federal government, were in actuality, effective in undermining the powers of the traditional chiefs and therefore, the tribes in general.[12] Sockbeson states:

> The new court system not only challenged traditional leadership but also redirected tribal notions of justice. The traditional remedies of compensation and mediation were abandoned and Indians were introduced to the more "enlightened" method of European justice. Jail time and fines were the remedies imposed.[13]

It cannot be denied that a significant minority of Native Americans are still distrustful of even their own tribal courts. While most tribal members see the advantages of having their own court system, this writer senses that some traditional members would far prefer to see that power, and all other tribal power,

---

[10]c. 576, 48 Stat. 944.

[11]D. Getches & C. Wilkinson, eds, *Federal Indian Law*, 2d ed. (Minnesota: West, 1986) at 13.

[12]H. J. Sockbeson, "History of Tribal Courts" (Address to the Penobscot Indian Nation, October 1991) [unpublished]. Henry J. Sockbeson is a Penobscot, Native American graduate of Colby College and Harvard Law School. He is the Managing Attorney of the Washington, D.C. office of the Native American Rights Fund. He has also worked on legal issues affecting Native Americans with California Indian Legal Services in Eureka, California.

[13]*Ibid.* at 10.

vested in the traditional leadership of the tribe. Tribal courts are considered by some to be a white man's institution antithetical to Indian tradition. When this writer was offered the position of Appellate Justice by the Passamaquoddy Nation, it caused a raise of the eyebrow when the Nation submitted a written contract containing the provision: The Judge shall be subject to the supervision and direction of the Tribe or designated representatives. Of course such a contract would clearly have violated the separation of powers doctrine and could not be signed. Happily, the written contract was shelved and the Passamaquoddys obtained their Appellant Judge on a handshake. But the point is clear, that the Indian may never completely trust the white man or his institutions. Unhappily, the long trail of broken treaties and agreements would warrant that mistrust. Hopefully a new day will come to dawn based on mutually kept promises.

One may well ask: Did the Europeans have a corner on the *justice* market? Were all the European institutional concepts, in fact, more just than those possessed by the Native Americans themselves? The case of *Ex Parte Crow Dog*, is illuminating.[14] In *Crow Dog*, two Sioux Indian chiefs saw a political rivalry escalate until one chief, Crow Dog, shot and killed the other, one Spotted Tail. The Sioux tribal council, following tribal law and tradition, ordered peacemakers to meet with both families and an award was made to Spotted Tail's survivors of $600 (a substantial sum in 1883), 8 horses and a blanket. Tribal harmony was restored. The Europeans would have given Crow Dog a speedy trial and a speedier hanging. But where would that have left the widow and the orphans?

In fact, that is precisely what did occur. Crow Dog was tried for murder by the District Court in the Territory of Dakota, convicted and sentenced to hang. The United States Supreme Court reserved however, holding that Crow Dog was not subject to federal prosecution for an act that he, an Indian, had committed against another Indian on the reservation. The Court placed great weight upon the protection of the Sioux's right of self-government, which the Court found to have been a primary objective of the United States treaties with the tribe. The Court also appeared sensitive to the role of the Indians' own value system in the exercise of that self government. Those sensitivities were not, however, apparently shared by Congress, which, outraged by the release of Crow Dog, immediately thereafter enacted the *Major Crimes Act of 1885*.[15] This Act thereafter ceded to the United States power to try and to punish murder and a list of other enumerated serious crimes committed by Indians in Indian territory. The *Major Crimes Act*, still today, results in serious criminal offenses being tried in federal courts, in most states, with lesser offenses being tried in the various tribal courts.

---

[14](1883), 109 U.S. 556.

[15]18 U.S.C.A. § 1153 [hereinafter the *Major Crimes Act*].

A few states have accepted the responsibility and jurisdiction for the prosecution of these crimes under state law.

The federal-tribal dichotomy does not, however, subsist in Maine, wherein federal jurisdiction over major crimes is now ceded to the State of Maine. That scenario came about as follows: Maine Indian tribes were laying claim to lands in all of Maine. They argued that their lands had been ceded away in violation of the *Indian Trade and Intercourse Act of 1790*, which essentially declares void all land transactions with the Indians accomplished without the approval or consent of Congress.[16] Few took the Indians' claims to all of Maine very seriously. But when the case of *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*[17] held that the right to extinguish Indian title to land was an attribute of sovereignty which no state (only the federal government) can exercise and that the *Non-intercourse Acts*[18] gave statutory recognition to that fact, Maine politicians and landowners began to get a queasy feeling in the pit of their stomachs. Clearly, a land claims agreement was now a necessity. The result was the federal enabling act, entitled the *Maine Indian Claims Settlement Act of 1980*[19] and the Maine act, *An Act to Implement the Maine Indian Claims Settlement.*[20] These Acts, in addition to solving the land claims dispute by establishing a Land Acquisition Fund and a Settlement Fund for the Maine tribes, also, and perhaps more importantly, completely revamped the federal tribal jurisdictional framework in Maine.

No longer would the federal government prosecute serious criminal offenses committed by Indians in Indian territory in Maine. In fact, the federal government almost totally withdrew its role in the area of criminal jurisdiction. (There are still some federal statutes, such as the *Indian Civil Rights Act* of 1968, which permit *habeas corpus* relief in federal forums.)[21] But the new statutory framework essentially provided that the State of Maine would thenceforth prosecute Class A through C crimes (more serious crimes), and the Maine Tribal Courts would prosecute Class D and E crimes. Although the issue has not been judicially decided, it is the opinion of this writer that the tribes nevertheless do possess concurrent jurisdiction over major crimes. It might be wondered how popular the

---

[16]c. 33, 1 Stat. 137.

[17](1975), 528 F. 2d 370.

[18]25 U.S.C. § 177. See Act of 22 July 1790, c. 33, § 4, 1 Stat. 138 for an example. The general Indian affairs statutes of 1790-1834 were titled the *Trade and Intercourse Acts*. The sections prohibiting unapproved land acquisitions from Indians have been called *Non-intercourse Acts* by the Supreme Court: *Oneida Indian Nation* v. *County of Oneida* (1974), 414 U.S. 661, 667.

[19]25 U.S.C.A. § 1721 [hereinafter the *Maine Indian Claims Settlement Act]*.

[20]30 M.R.S.A. 6202 [hereinafter *An Act to Implement the Maine Indian Claims Settlement*].

[21]25 U.S.C.S. § 1302.

attempted exercise of such concurrent jurisdiction would be with tribal defendants, however.

The *Maine Indian Claims Settlement Act* also provided for exclusive tribal juvenile jurisdiction and Indian child custody jurisdiction respecting on-reservation Indians. Congress gave broad protection to tribes and Indian parents in the *Indian Child Welfare Act of 1978.*[22] The *Maine Indian Claims Settlement Act* also clearly enumerated certain powers possessed by the tribes, for example the power to enact ordinances, collect taxes, decide tribal governmental organization, have tribal elections, dispose settlement income, designate officers and officials to administer the law, determine voting qualifications and so forth.

Since appeal from the Maine Tribal Courts is to the Tribal Appellate Division, and since there is no appeal thereafter to any state court, it becomes clear that the powers of the Tribal Courts are substantial. This is even more true with respect to tribal court civil jurisdiction. Felix Cohen, in the *Handbook of Federal Indian Law* states:

> The judicial powers of Indian tribes outside the field of criminal jurisdiction are much less restricted. The *Indian Civil Rights Act* applies to tribal proceedings but is not subject to direct federal court review. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). There is no limitation on tribal criminal punishments. Tribal authority over cases involving non-Indians is well established in some circumstances and may exist in many others. There are few statutes conferring Indian country jurisdiction on the federal courts in civil cases that raise questions of preemption of concurrent tribal court jurisdiction. Under the principal that tribal sovereignty is retained where not ceded to or restricted by federal authority, tribal court civil jurisdiction is very broad.[23]

In *Williams* v. *Lee*, the United States Supreme Court held that the State of Arizona, Superior Court, did not have jurisdiction to hear a civil suit brought by a non-Indian against an Indian, for a transaction that had occurred on the reservation.[24] In holding that the non-Indian's only forum was tribal court, the Supreme Court said:

> [A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian

---

[22]25 U.S.C.A. § 1901.

[23]*Supra*, note 8 at 341.

[24](1959), 358 U.S. 217.

> Affairs. Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized.[25]

How far then have Native American judicial systems come to approaching their European models? Kirke Kickingbirde, in *Indian Jurisdiction*, believes:

> In recent years Indian Nations have demonstrated an important trend toward regaining confidence in their ability to administer law and order. New constitutions, by-laws, and law and order codes are being written. Some Indian Nations are making formal extradition agreements with surrounding local governments, while others have developed law enforcement agencies and tribal courts. Many Indian Nations have established judicial systems pursuant tribal constitutions and ordinances developed under the provisions of the Indian Reorganization Act. In 1980 there were approximately 150 tribal courts handling well over 80,000 cases. These courts include tribal courts, traditional (custom) courts, Courts of Indian Offenses (CFR), and conservation courts concerned with hunting and fishing. Tribal judges are either appointed or elected, depending on the specific tribal judicial system. Many non-Indians have attacked the capabilities of tribal courts and have used this criticism to justify state and federal jurisdiction in Indian Country. However, a recent study by the American Indian Policy Review Commission emphasizes the fact that tribal justice systems are evolving institutions, becoming more and more sophisticated, and are potentially capable of assuming total jurisdiction in Indian Country. The study concluded that tribal court systems are as capable as non-Indian judicial systems in administering justice in Indian Country.[26]

Having viewed the tribal court development from within, as both trial and appellate judge, I agree with Kickingbirde's assessment of tribal court sophistication and capability.

Some of the differences between state and tribal courts may result in the tribal courts being more just and sensitive to the needs of criminal defendants, parties plaintiff and the Nations themselves. The carved totem poles on each side of the Judge's bench, the wooden eagle, woven baskets, warclub and other traditional and customary artifacts, which enliven the Penobscot Nation Tribal Court, for example, are all intended to allow the participant to feel more at home and less alien. Courts, in general, after all, do tend to become places capable of imparting fear and intimidation. The defendant is being prosecuted for a crime, divorced, sued on a contract or some other such thing. Justice must be done but need it be done in precisely the same way and with the same cold aesthetic manner so often associated with the white man's court? While it is true that the laws of the State of Maine are enforced in the tribal courts in Maine, it is also true that the laws and ordinances of the tribes are enforced, as are the customs and traditions of

---

[25] *Ibid.*

[26] K. Kickingbirde, A. Tallchief Skibine & L. Kickingbirde, *Indian Jurisdiction* (Washington: Institute for the Development of Indian Law, 1983) at 25.

these Native Americans. These people have always regarded restitution, rehabilitation and reintegration of the wayward tribal member back into tribal harmony, as superior to European concepts of retribution and punishment, such as hanging, firing squad, electric chair and jail time.

The attempts to harmonize the competing customs and traditions of the Indian and the non-Indian will continue to play out in tribal courts all across the land for years to come. It is submitted that the Indian has many very valuable things to bring to the American justice system. One may ask if the survivors of Spotted Tail were not better served by their own traditional notions of justice than that furnished to them by the European? If the non-Aboriginal Canadian should fear that these Aboriginal Peoples cannot competently govern themselves, perhaps the history of the development of tribal justice in the United States might alleviate that fear.