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INTRODUCTION TO TRADITIONS AND CUSTOM DISPUTE RESOLUTION

The following is an overview of Traditional Dispute Resolution, Peacemaking, and Restorative Justice concepts. Policies and procedures will be developed after formal training in a Peacemaking Program.

For a good example, see the Peacemaking Program of the Navajo Nation.

It is essential to look at Public Law 280 and its implication on Traditional Dispute Resolution structures, especially the Restorative Justice Model.

I. Public Law 83-280

Public Law 280 was passed in 1953. Congress granted extensive criminal and civil jurisdiction over Indian Country within its borders. The law allowed states to assume criminal and civil authority on reservations without tribal consent.

P.L. 280's criminal provision (18 U.S.C. § 1162) took federal criminal jurisdiction under the Indian Country Crimes Act (aka General Crimes Act) and the Major Crimes Act out of Indian Country in 5 the following states (commonly referred to as the "mandatory states"):

1. California
2. Minnesota
3. Nebraska
4. Oregon
5. Wisconsin

Issues with Public Law 280

The Public Law 280 does not take into consideration Tribal sovereignty.

Tribal consent was not required before the State accepted mandatory criminal jurisdiction under P.L. 280.

The delegation was unfunded. The Federal government did not allocate money to states with their assumed authority.

The federal law delegated federal authority over tribal affairs to state authority. The State shared this authority with county governments to enforce state laws on tribal lands.

State officials enforced state law, and the tribal law was ignored or neglected.

PROBLEMS WITH THE SYSTEM

- State and local law enforcement
- A safe haven for criminals
- Tribes are not capable of effective justice systems
- Bureau of Indian Affairs
- Do not fund law enforcement and courts in PL 280 states—there is no funding.
- Department of Justice
- U.S. Attorneys do not want to take on the work

1968 Amendment-RETROCESSION

In 1968 Congress amended the law to include:

1. Retrocessions, a provision allowing states to return all or some jurisdiction over Native Americans to the federal government,
2. Indian Civil Rights Act (ICRA), which now requires tribal consent before the federal government may transfer its jurisdiction to a state.

Also, the ICRA provides the method for states to return (retrocede) P.L. 280 jurisdiction to the federal government. The State can retrocede all or any part of the criminal or civil jurisdiction acquired under PL 280 (25 U.S.C. § 1323).

There is no provision for tribal consent to a state seeking retrocession or for a tribe to initiate and pursue retrocession.

If a tribe wants to influence the process, it must do so by political means.

The Secretary has discretion on whether to accept or reject a state's retrocession request.

Jurisdiction without P.L. 280

State steps out of Indian Country, and criminal jurisdiction becomes federal and tribal, Except For crimes committed by non-Indians against non-Indians.

Indian Country Crimes Act (aka General Crimes Act), 18 U.S.C. 1152, extends all general criminal laws of the United States to "Indian Country."

Its primary purpose is to prosecute non-Indians committing major crimes against an Indian (exclusive federal).

Non-major crimes committed by Indian defendants against non-Indians are concurrent with the federal and tribal unless tribes prosecute first.

Major Crimes Act, 18 U.S.A. 1153, 14 major crimes applicable in "Indian Country" where the defendant is an Indian regardless of who the victim is. Concurrent federal and tribal jurisdiction;

Ex Parte Crow Dog-Indian murdered another Indian, no jurisdiction under General Crimes Act—needed new federal criminal statute.

Who has jurisdiction?

1. Is the perpetrator Indian or non-Indian?
2. Is the victim Indian or non-Indian?

Did the crime occur? If so where

1. "Indian Country"
2. reservation
3. allotment
4. Independent Indian community?

HOW IT WORKS

NON-INDIAN CRIME:

Felony Crimes---committed by non-Indians fall exclusively to the federal government.

Misdemeanor---federal and may be no prosecution.

INDIAN CRIME:

Felony Crimes---maybe federal prosecution (concurrent federal and tribal unless tribe prosecutes first)

Misdemeanor---exclusively tribal jurisdiction

Failure of the federal government to prosecute non-Indians, even if major, under the Indian Country Crimes Act is a problem seen in non-PL 280 states.

The Tribal Law and Order Act of 2010 (TLOA) devotes considerable provisions to the "declination" process.

The tribe is left to prosecute the majority of crimes occurring within its reservation.

Examples of Crimes Left to the Tribe

- D.U.I.
- Drug-related crimes (possession, distribution, manufacturing, etc.)
- Domestic Violence (VAWA –criminal jurisdiction of non-Indians)
- Assault (can be major or misdemeanor)
- Trespass
- Breaking and Entering

Exhibit 2. Indian country criminal jurisdiction as conferred PL 280		
Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of Federal and tribal jurisdiction.
Non-Indian	Indian	Mandatory State has jurisdiction exclusive of federal and tribal jurisdiction. Optional State and Federal Government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	Mandatory State has jurisdiction exclusive to the Federal Government but not necessarily of the tribe. Optional State has concurrent jurisdiction with the Federal courts.

Indian	Indian	Mandatory State has jurisdiction exclusive of the Federal Government but not necessarily of the tribe. Optional State has concurrent jurisdiction with tribal courts for all offenses and concurrent jurisdiction with the Federal courts for those offenses listed in 18 U.S.C. 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although Federal jurisdiction may attach in an optional State if it impacts individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent State, tribal, and, in an Optional State, Federal jurisdiction. There is no State regulatory jurisdiction.
<p>Source: U.S. Department of Justice, "Jurisdictional Summary," U.S. Attorneys' Manual, Title 9, Criminal Resource Manual 689. Retrieved October 24, 2004, from the World Wide Web: www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm</p>		

II. RESTORATIVE APPROACH JUSTICE

A. Introduction and Purpose:

1. Restorative Justice originates with indigenous peoples worldwide, including Native Americans. It is a process of making things right. There is an "affected party" and a "responsible party." It can function in one of three ways: as a form of diversion from the criminal process, allowing offenders, especially young or first-time offenders, to avoid charges and a conviction; as a form of alternative sentencing; or, in more severe cases, as a way to reduce a criminal sentence. This process requires that questions are asked and questions answered. Who has been hurt? What are their needs? Who is responsible for righting the harm? What rules were broken? Who did it? What do they deserve? The most important question that gets asked and answered in restorative justice circles is, "What happened?"

2. Place the emphasizing peacemaking and the common good, and consider the person(s) and their situation while determining an outcome consistent with cultural and traditional forms of resolution. In the Native American culture, consider what will keep the "responsible party" in the community. The goal is to provide a restorative and reparative justice practice as an alternative to the court system. Restorative justice seeks to evaluate the harmful impact of a crime or act on its victims and determine how to repair that harm best while

holding the person who caused it accountable for their actions. The goal is healing, along with reintegrating individuals into their community. The parties agree on an outcome that provides appropriate restitution, such as financial compensation and community service. Additionally, Native concepts of relationships are that people are not simply individuals in society, but everyone owes special obligations to others. By adding a cultural connection component, the offender can start to connect to their roots.

B. Fundamental Principles of Restorative Justice Applied when a Crime has been Committed.

1. Crime is Fundamentally a Violation of People and Interpersonal Relationships.

(a) Victims and the community have been harmed and need restorations.

1. The primary victims are those most directly affected by the offense. Still, others, such as family members of victims and offenders, witnesses, and members of the affected community, are also victims.
2. The relationships affected (and reflected) by crime must be addressed.
3. Restoration is a continuum of responses to the needs and harms experienced by victims, offenders, and the community.

(b) Victims, offenders, and the affected communities are the stakeholders in justice.

1. A restorative justice process maximizes the input and participation of these parties, especially primary victims and offenders, in the search for restoration, healing, responsibility, and prevention.
2. The roles of these parties will vary according to the nature of the offense as well as the capacities and preferences of the parties.
3. The State has circumscribed roles, such as investigating facts, facilitating processes, and ensuring safety, but the State is not a primary victim.

(c) Violations Create Obligations and Liabilities.

1. Offenders' obligations are to make things right as much as possible.
2. Since the primary obligation is to victims, a restorative justice process empowers victims to participate effectively in defining responsibilities.
3. Offenders are provided opportunities and encouragement to understand the harm they have caused to victims and the community and to develop plans for taking appropriate responsibility.

4. Voluntary participation by offenders is maximized; coercion and exclusion are minimized. However, offenders may be required to accept their obligations if they do not do so voluntarily.
5. Obligations for the harm inflicted by crime should be related to making things right.
6. Obligations may be experienced as difficult or painful but are not intended as pain, vengeance, or revenge.
7. Obligations to victims, such as restitution, take priority over other sanctions and responsibilities to the State, such as fines.
8. Offenders must be active participants in addressing their own needs.

(d). The community's obligations are to victims and offenders and the general welfare of its members.

1. The community has a responsibility to support and help victims of crime to meet their needs.
2. The community is responsible for its members' welfare, social conditions, and relationships, preventing crime and promoting peace.
3. The community has responsibilities to support efforts to integrate offenders into the community, be actively involved in the definitions of offender obligations, and ensure opportunities for offenders to make amends.

C. Restorative Justice Seeks to Heal and Put Right the Wrongs.

1. The needs of the victims for information, validation, vindication, restitution, testimony, safety, and support are the starting points of justice.
 - a. The safety of victims is an immediate priority.
 - b. The "justice process provides a framework that promotes the work of recovery and healing that is ultimately the domain of the individual victim.
 - c. Victims are empowered by maximizing their input and participation in determining needs and outcomes.
 - d. Offenders are involved in the repair of the harm insofar as possible.
2. The process of justice maximizes opportunities for exchanging information, participation, dialogue, and mutual consent between victim and offender.
 - a. Face-to-face encounters are appropriate for some instances, while alternative forms of exchange are more appropriate in others.
 - b. Victims have the principal role in defining and directing the terms and conditions of the exchange.
 - c. The mutual agreement takes precedence over imposed outcomes.
 - d. Provide opportunities for remorse, forgiveness, and reconciliation.
3. Offenders' needs and competencies are addressed.

- a. Recognizing that offenders themselves have often been harmed, healing and integration of offenders into the community are emphasized.
 - b. Offenders are supported and treated respectfully in the justice process.
 - c. Removal from the community and severe restriction of offenders is limited to the minimum necessary.
 - d. Justice values personal change above compliant behavior.
4. The justice process belongs to the community.
- a. Community members are actively involved in doing justice.
 - b. The "justice process draws from community resources and, in turn, contributes to the building and strengthening of community.
 - c. The "justice process attempts to promote changes in the community to prevent similar harms from happening to others and to foster early intervention to address the needs of victims and the accountability of offenders.
5. Justice is mindful of the outcomes, intended and unintended, of its responses to crime and victimization.
- a. Justice monitors and encourages follow-through since healing, recovery, accountability, and change are maximized when agreements are kept.
 - b. Fairness is assured, not by uniformity of outcomes, but by providing necessary support and opportunities to all parties and avoiding discrimination based on ethnicity, class, and sex.
 - c. Outcomes that are predominantly deterrent or incapacitate should be implemented as a last resort, involving the least restrictive intervention while seeking restoration of the parties involved.
 - d. Unintended consequences are resisted, such as the co-optation (taking over) of restorative processes for coercive or punitive ends, undue offender orientation, or the expansion of social control.

Model of Howard Zehr and Harry Mika "Fundamental Principles of Restorative Justice," The Contemporary Justice Review, Vol. 1, No. 1 (1998), 47-55.

III. Peacemaking

Peacemaking is a traditional Native American form of justice that focuses on healing and reparation. Peacemaking, or some form of it, is found among many tribes and reflects each tribe's unique culture, religion, and collective experiences. Peacemaking brings together those impacted by a conflict (the offender and victim), family, neighbors, and community members.

A. Program Goals:

- 1. Reach a resolution
- 2. Healing relationships

3. Giving victims a voice
4. Holding participants accountable
5. Empowering the community
6. Sharing values and connections

B. Subject Matter Jurisdiction:

1. Family matter
2. Juvenile issues
3. Inheritance
4. Minor criminal offenses.
5. Issuance of liquor licenses
6. Permits for firearm
7. Regulation of building materials
8. Administration of conservancies and community forests
9. Regulation of the tourist industry
10. Retaliation
11. Jurisdiction over a wide range of civil and criminal matters
12. Pardons of felons in particular circumstances.
13. Reintegrate inmates into communities upon leaving prison.
14. Workplace Discrimination, Harassment, and Conflict
15. Neighborhood disagreements.
16. Family conflicts
17. Truancy
18. Fighting
19. Bullying
20. Employer and employee disputes
21. Drunk Driving

C. Eligibility Criteria:

1. All criminal and juvenile delinquency cases are technically eligible for peacemaking regardless of charge, except for cases involving intimate partner violence, child abuse, elder abuse, and sexual assault.
2. Individuals with a severe mental illness or need for intensive substance abuse treatment were also ineligible.
3. A victim or complaining witness, although it was not a requirement.

D. Referral Process:

1. Referral from the criminal or juvenile justice systems. A judge, prosecutor, or defense attorney could initiate a referral to peacemaking. To be accepted into the program, all stakeholders must agree that the case was suitable, and the victim or complaining witness must consent.
2. Referrals from the educational system
3. Self-Referral

E. Voluntary Participation:

1. Participation in peacemaking is voluntary.
2. All participants must agree to enter the program before peacemaking can begin, and after the staff explains the rules and requirements of the peacemaking program,

F. Accepting Responsibility:

1. One of the goals of peacemaking is for defendants to accept responsibility for their role in the conflict.

G. Food for the participants and peacemakers at the beginning of each session can alleviate an otherwise tense situation.

H. Duration of the Sessions:

The number of peacemaking sessions is determined by how long it takes to achieve a resolution.

I. Participation:

Everyone in attendance should receive an opportunity to speak and respond without interruption in the peacemaking circle. The facilitator should be aware of potential re-victimization throughout the process.

J. Healing Steps:

1. During the peacemaking sessions, the parties in the Circle discussed what the defendant could do to heal the relationships damaged in the conflict, provide restitution, or improve their own lives to avoid future disputes.
2. The healing steps are meant to be flexible and individualized. Confidentiality of the healing steps is maintained. They might include the following:
 - a. Letters of apology
 - b. Volunteer work
 - c. Helping with an upcoming tribal event
 - d. Participating in Manoomin harvest, Maple Syrup gathering
 - e. Participating in a naming ceremony
 - f. Participate in a shake tent ceremony to learn your Clan
 - g. Classes on drum beaters and drum-making
 - h. Take a class on moccasin making
 - i. Offer tobacco and say a prayer daily
 - j. Ask for forgiveness through a letter or in person
 - k. Pow Wow
 - l. Alcohol or mental health treatment, if needed
 - m. Stone Medicine Wheel
 - n. Community service

K. Healing Relationships:

Peacemaking allowed participants to talk through a conflict in a safe setting in conventional adversarial ways.

L. Peacemaking Circles:

1. Use a ceremony or intentional centering activity in opening and closing to make the Circle a sacred space.
2. A Talking Piece
3. A Facilitator or Keeper
4. Guidelines
5. Consensus Decision-Making

M. Circles have various uses:

1. Talking
3. Understanding
4. Healing
5. Sentencing
6. Support
7. Community Building
8. Conflict
9. Reintegration
10. Celebration or Honoring Circles

N. Examples of other practices used in the Tradition and Custom Dispute Resolution process to help the responsible person re-engage in the community:

1. Mentors
2. Face-to-face encounter with the offender and the victim
3. Elders panel circle sentencing
4. Peacemaker ceremony
5. Sweat lodge ceremony,
6. Fasting
7. Family Group Conferences

Resource:

Circle Processes A New/Old Approach to Peacemaking, Kay Pranis, 2005 Good Books, Intercourse, PA

Family Power Engaging and Collaborating with Families, Elizabeth Smull, Joshua Wachtel, and Ted Wachtel, 2012, International Institute for Restorative Practices Bethlehem PA.

Howard Zehr and Harry Mika "Fundamental Principles of Restorative Justice," The Contemporary Justice Review, Vol. 1, No. 1 (1998), 47-55.

Peacemaking Circles Evaluating a Native American Restorative Justice Practice in a State Criminal Court Setting in Brooklyn By Suvi Hynnen Lambson January 2015

Restorative Circles in Schools Building Community and Enhancing Learning, Bob Costello, Joshua Wachtel, and Ted Wachtel, 2010, International Institute for Restorative Practices Bethlehem PA.

Restorative Justice in Education Fostering Responsibility, Healing and Hope in Schools, Katherine Evans and Dorothy Vaandering, 2016, Good Books, Skyhorse Publishing, New York, N.Y.

U.S. Department of Justice, "Jurisdictional Summary," U.S. Attorneys' Manual, Title 9, Criminal Resource Manual 689.

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