

TRIBAL CONSTITUTIONS, BYLAWS AND ORDINANCES
Outline and Class Notes from 2022 Falmouth Training
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Tribal Government History

I. History is relevant to the development of Constitutions, Bylaws and Ordinances.

A. In the Early Days

1. Tribal governing structure typically based on birth and family position (clan functions)
2. Collective Attitude (person defined in terms of the group)
3. Body of law through democratic, unanimous- decision making process with enforcement process

B. Misconceptions that tribes were lawless and uncivilized.

1. Tribes always had laws, community values, rules on what was allowed and what was not allowed, and made decisions about what should be done to help those who violated the rules/laws.
2. Oral tradition passed the laws down from generation to generation. It was also passed to children through the child rearing practices. Elders passed down rules and customs.

II. Early Tribal European Interaction

- A. Different Values (i.e. individualism, land ownership and written laws)
- B. Tribes centralize, form alliances and become more structured to counter European presence
- C. The Iroquois League was formed by a group of five, then six, Native American tribes. Its purpose was peace and cooperation. Together, all the members made decisions that affected all the tribes. The Iroquois League of the Iroquois confederacy, inhabited

New York State and originally composed of the Mohawk, Oneida, Onondaga, Cayuga, and the Seneca Peoples known as the Five Nations.

III. Federal-Tribal Relationship

- A. Delaware Treaty (1st treaty between US and tribe- Delaware tribe (1778)
- B. Extensive treaty-making with new nation 1830-1870: Removal (land West of Mississippi in exchange for their territory in the East)
- C. 1871-1925: Assimilation – absorb tribes into the larger Culture

IV. Historical Development

- A. Tribes have inherent sovereignty from their people before the United States even existed. Inherent sovereignty is the most basic principle of all Indian law and means that the powers lawfully vested in an Indian tribe are those powers that predate New World discovery and have never been extinguished.
- B. These powers of inherent sovereignty have been recognized by the courts. Even though no specific federal statute, constitutional provision, or executive order establishes or reiterates the concept of inherent Indian sovereignty, it has been plainly stated by the Supreme Court to exist.
- C. Tribal sovereignty is the inherent authority of tribes to govern themselves and to honor and preserve cultures and traditional ways of life.
- D. Tribes, as sovereign nations had treaties with other Sovereign nations before the United States Constitution.
 - 1. Pre-Constitution: Britain and Spain had Treaties with Tribes / Treated as Sovereign

2. Constitution: Sovereign Status of Tribes in Commerce Clause of the U.S. Constitution
 - a. The sovereign status of tribes is stipulated in the Commerce Clause, which empowers Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”
 - b. The reference to Indian, by contrast, in the Commerce Clause has real force. Since the end of the federal treaty-making with the tribes in 1871, it has been the primary constitutional provision supporting exercise of federal power over Indians.
- E. Supreme Court Cases:
 - a. 1823 – 1832 Cherokee Trilogy Cases
 1. Created a trust relationship between the tribes (Dependent / Ward) and United States (Guardian)
 2. Found that state law does not apply within reservation boundaries
 3. Established Tribes as “Domestic Dependent Nations”
 - 4.. Rights of self-government not granted by U.S. but exist under doctrine of “Reserved Rights”

V. Tribal Government History

- A. The period between 1871 and 1925- Era of Assimilation. The time the government thought it was the best interest of Indians to not have their tradition. The Boarding schools off reservation were forced on the native children to “Kill the Indian and save the Man.”
- B. This had devastating effect on the tribes. With the trauma came unhealthy coping mechanisms; traditions and language were lost because they were not passed down orally.

1. 1871: End of Treaties – Final agreements now formalized through acts of Congress rather than through treaties
2. 1887: The Allotment Act- Reservations were broken up into parcels of land and allotted or assigned to individual Indians-held in trust for 25 years by the US and then individual ownership.
3. Meriam Report- In 1924, Congress ordered that a Team of investigators visit Indian reservations across the United States and report back on what they found. The result was “The Problem of Indian Administration”, published in 1928. It was the first government study to demonstrate with extensive data that federal Indian policy in the 19th century had resulted in a travesty of social justice to Native Americans. The report found generally, that the federal government was failing at its goals of protecting Native Americans, their land, and their resources, both personal and cultural. It was felt that the tribes could do better with their own government. The Bureau of Indian Affairs urged Congress to pass the Indian Reorganization Act (IRA) of 1934 to reverse the effects of governmental abuse and neglect and to introduce Native Americans to a new era of cooperation with the federal government.
4. 1934: Indian Reorganization Act produced a boilerplate Constitution
5. 1950’s: Public Law 280
6. 1968: Indian Civil Rights Act
7. 1975: Indian Self-Determination and Education Assistance Act
8. 1978: Indian Child Welfare Act
9. 1988: Indian Gaming Regulatory Act

VI. Sovereignty

- A. The key part of sovereignty is jurisdiction.
- B. Supreme Court Cases
 - 1. Cases Extending Sovereignty
 - a. Inherent authority to condition presence of Indians and non-Indians within reservation boundaries [Merrion v. Jicarilla Apache tribe (1982)]
 - c. Indians have the right to make their own laws and be ruled by them [Williams v. Lee (1959)]
 - d. Constitutional limitations on State and Federal governmental powers do not, per se, restrain or apply to Indian tribes [Santa Clara Pueblo v. Martinez (1978)]
 - 2. Recent Cases Restricting Sovereignty
 - a. Tribes cannot exercise criminal jurisdiction over non-Indians [Oliphant v. Suquamish Indian Tribe (1978)]
 - b. Inherent sovereign powers of a tribe do not extend to the activities of non-members of the tribe / the exercise of tribal power beyond what is necessary to protect tribal self-government or to control Internal relations is inconsistent with the dependent status of tribes [Montana V. U.S. (1981)]
 - c. (Crow Tribe Lacked Authority to Regulate Hunting and Fishing by Non-Members on fee land, owned by Non-Members within Reservation - Montana v. U.S. (1981))
 - d. Tribal court's assertion of jurisdiction over civil suit between non-Indians arising out of an accident on a state highway was rejected. (State v. A-1 Contractors (1997) (Extended Montana Rule to Tribal Adjudicatory Jurisdiction)
 - e. Tribes cannot tax non-member activity occurring on non-Indian fee land (Atkinson Trading Co. v.

Shirley (2001)

d. Tribes are unable to tax the activities of non-members unless a “Consensual Relationship” exists (i.e Sales Tax) [Atkinson Trading Co.]

f. Test for exertion of control over non-indians: whether the regulation of activities of non-members is necessary to protect tribal self-government or to control internal relations.

Nevada v. Hicks (2001)

g. Ownership of land is only one factor to be considered in applying test [Hicks].

Held: Tribal court lacked jurisdiction over non-member defendants who had allegedly violated the tribal member plaintiff’s civil rights and damaged his property while searching his home on tribally owned land [Hicks]

h. State/ Plenary Powers

1. Co-equal sovereigns with tribes

a. Tribes, who have Inherent Sovereignty, have more Sovereignty than States, who were just delegated sovereignty.

2. Government-to-government relationship with tribes

a. Tribes have Sovereignty Immunity, but not against the Federal Government

3. No extension of state law on Indian lands unless authorized by federal government [Williams]

a. i.e Public Law 280

VII Plenary Powers

A. Congress can dilute tribal sovereignty. Congress can make decisions about tribal sovereignty. They have the power to alter it at any time, and the tribe cannot do

anything.

1. i.e. Indian Civil Rights Act (ICRA)
 - a. Extends protections under Bill of Rights to tribal members (except establishment of religion / requirement of jury trial in civil cases)
 - b. Generally, tribes must afford members same protections contained in Bill of Rights
 1. Even though one part of the ICRA requires that tribal governments extend to their citizens the same rights enjoyed by other U.S. citizens under the U.S. Constitutional Amendment one and Amendments Four Through Eight. The citizen could file a claim, but the courts don't hear these issues unless the tribe waives its sovereign immunity. Without that waiver, there are no remedies.
2. i.e. Major Crimes Act
 - a. Makes 14 serious crimes committed in Indian country federal offenses
 - b. The 14 crimes are imposed regardless of the tribe's criminal code

VIII. Sovereign Immunity

- A. Tribes have the common-law immunity from suit traditionally enjoyed by sovereign powers [Turner V. U.S. (1919)]
- B. Subject to plenary power of congress / without congressional authorization tribes are exempt from suit [Santa Clara Pueblo]
- C. Tribal officials and employees acting within the scope of their authority are also immune from suit
- D. A waiver of immunity cannot be implied but must be unequivocally expressed [U.S. V. Testan (1976)]
- E. Tribe is subject to suit only where congress has authorized the suit or the tribe has waived its

immunity [Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering P.C.]

- F. Extends to civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off the reservation [Wold]
- G. In context of construction contract, supreme court found a waiver that was not unequivocal
- H. Tribe tendered a form contract to a construction co. for a roof installation on an off-reservation business/ after dispute, court imposed the contract's arbitration clause [C&I Enterprises, Inc. v. Citizen Band Of Potawtomi Indian Tribe (2001)]

IX. Federal Trust Relationship

- A. Trust relationship with tribes derives from their status as "Domestic Dependent Nations" [Cherokee Nation v. Georgia (1831)]
- B. Federal government has a fiduciary duty to safeguard tribal trust assets
- C. If U.S. fails to uphold duty, tribes may sue federal government for breaching its trust responsibilities i.e. Klamath Case (137 Billion Dollar Suit Against BIA)

X. Jurisdiction

- A. One aspect of sovereignty (i.e. Power of government to determine cases and controversies)
- B. May lie with tribe, State or U.S.
- C. Affects both parties and sovereign
- D. Courts of general / limited jurisdiction
- E. Courts may have concurrent jurisdiction (e.g. Both tribal and state courts have jurisdiction)
- F. With Hicks case, unclear whether tribal courts ever have jurisdiction over non-member defendants

- G. “As to non-members, a tribe’s adjudicative jurisdiction over non-member defendants equals its legislative jurisdiction [in Hicks court held tribe did not have even legislative jurisdiction over conduct]
- H. Only a few states (includes California) have criminal jurisdiction in Indian country – Public Law 280
- I. State efforts to extend Public Law 280 / Criminal Jurisdiction turn on whether violation is criminal prohibitory or civil regulatory [Bryon V. Itaska (1976)]
 - a. i.e. Speeding Violation held Civil Regulatory / outside State Criminal Jurisdiction

XI. Tribal Constitutions

- A. Most Federally Recognized Tribes have Constitutions. They should reflect customs and traditions.
- B. Federal Control of Tribal Constitutions
 - 1. Background
 - a. Majority of federally recognized tribes have constitutions
 - b. Some, particularly in Alaska, have no formal federal approval of organizational structure (most have unwritten traditional governance)
 - c. Some have established their governmental structure in their treaty provisions (i.e. Creek Nation)
 - d. Congress has enacted laws regarding structure of some tribal governments (i.e. Oklahoma tribes)
- C. The Indian Reorganization Act of 1934 (“IRA”)
 - 1. Offered tribes opportunity to organize under a constitutional form of government
 - 2. Rational: Reduce federal management of Indian affairs / strengthen tribal governments to perform functions of modern governments (i.e. Operate

- federal programs, manage private property and collect taxes)
3. Halted further allotment of Indian lands
 4. Previously, many tribal governments had been unofficially dismantled and federal officials were engaged in tribal decision-making
 5. Model for tribal governments closely shaped after federal government (foreign to most tribes)
 6. Incentive for tribes to organize under section 16 of the Act: Participation in federal loan fund
 7. Tribes organized under the IRA, OIWA or ARA are now subject to same set of regulations on enacting and amending tribal constitutions – organized under “statutory authority”.
 8. Sections of the IRA identify specific tribal government powers for those tribes that have adopted an IRA constitution (i.e. Hire legal counsel)
 9. Powers of the tribe explained Solicitor’s opinion (Vol. 1 Opinions of Sol., Dept. of Int., pages 445-477).
 10. Dept. of Interior drafted model constitution, sent people around Indian Country to talk about it and many tribes adopted it as is
 11. Model delegated decision making to elective representative body (this is different for tribes that had traditional made decisions by community consensus.)
 12. IRA allows tribes to create two different organization structures for different purposes: Sect. 16 (Constitution.) / Sect. 17 (Corp. Charters)
 13. Sect. 17 Corp. Charter cannot be revoked without Congress
 14. Sect. 17 transferred tribal property retains its

status and is subject to Federal Laws and Regulations.

15. IRS ruled that Sect. 17 businesses not taxable, but tribal businesses incorporated under State law are taxable

D. The Indian Civil Rights Act of 1968 (“ICRA”)

1. After 7 yr. Study, Congress felt necessary to extend individual freedoms, procedural safeguards and basic civil liberties onto reservations
2. Applies Amendments 1 and 4-8 to Tribes
3. Differences between Bill of Rights and ICRA:
 - a. Under ICRA
 1. Establishment of religion by tribal government is not prohibited
 2. Right to counsel for defendants is at their expense (interpreted as free in Bill of Rights)
 3. Limits criminal penalties to 1 yr. In jail and/or a \$5,000 fine for single offense (Bill of Rights doesn’t address)
 4. No right to indictment by grand jury (only right to jury trial of 6 in cases of possible imprisonment) – if no possible jail, then tribe does not have to provide a jury trial
 5. Federal courts not authorized (only tribal courts) to review actions taken by tribes unless person was being temporarily held or imprisoned / Federal government could not enforce the ICRA’s extension of constitutional rights to individuals under tribal governments. Santa Clara v. Martinez
4. 1988 Amendments to Sect. 16 / Timelines and Procedure for a Secretarial Election
 - a. Limit the Secretary of Interior’s discretion to disapprove a constitution

- b. Secretary can disapprove only if the proposed constitution is contrary to applicable laws
- c. Secretary of Interior must provide technical assistance as needed, review the final draft and call an election and approve the document
- d. From request for election, 225 days for Sec. to approve the adopted Constitution
- e. Federal regs to conduct a secretarial election are contained in 25 CFR Part 81 (in 2015, parts 81 and 82 were merged into Part 81 and updated)
- f. If tribe is requesting a secretarial election, it should notify the area office. Within 180 days of notice, Secretary of Interior must call and hold an election to adopt or ratify a proposed constitution / amendment or revoke an existing government doc.
- g. 1994 Amendments to Sec. 16 / eliminating the distinction between historic and created tribes
- h. Per Sec. Opinion, Tribes that had consolidated for purposes of the IRA could not assert as many sovereign powers as other tribes (i.e. Three Affiliated Tribe / no power to condemn land of community powers)
- i. 1994 Amendments ended the distinction – unwarranted attempt to limit the powers of the tribal governments and to control what powers tribes could enumerate in their constitutions

XII. Application of Federal Laws to Tribes

- A. Two categories of Federal Law
 - 1. Laws that expressly Exempt Tribes
 - a. Title VII of the Civil Rights Act: expressly exempts “Indian tribes” from the definition of “employer”
 - b. Act makes it unlawful for employers to discriminate in hiring, firing and compensation
 - c. Rational: respect for Native American rights of self-government and tribal employment opportunities
 - d. Preferential hiring of Indians by employers on or near reservations is lawful
 - e. EEOC’s position that employment decisions based upon tribal affiliation violate title vii (but pre-dates passage of amendments to Indian Self Determination Act allowing such Preference
 - f. Americans with Disabilities Act (“ADA”): exempts tribes by adopting the same definition of “employer” used in Title VII of the Civil Rights Act
 - 2. The other Federal Laws that are silent as to their application to the Tribes:
 - a. Tuscora Rule: Federal laws of general applicability apply to tribes [Federal Power Commission v. Tuscarora Indian Nation (1960)]
 - b. Donovan exceptions: 9th Circuit (i.e. California Courts) Recognized 3 exceptions to the Tuscora Rule:
 - 1. Law touches exclusive rights of self-governance in purely intramural matters
 - 2. Application would abrogate a treaty right
 - 3. Evidence that congress did not intend that the law apply to native Americans on their reservations

- a. In any of these situations, congress must expressly apply a law to Indians otherwise they are outside the statute
- c. Age Discrimination Employment act (“ADEA”) held not to apply to tribes
- d. Family medical leave act (“FMLA”) Secretary of Labor says applies to tribes, but unclear
- e. Fair labor standards act (“FLSA”) 7th Circuit has held it does not apply to tribes
- f. Sections 1981, 1983 And 1985 (Civil War Era Anti-Discrimination Laws) held not applicable to tribes
- g. “ERISA” / “OSHA” Laws held applicable to tribes by 9th Circuit

XIII. Functions of Government

- A. Governments have three duties to perform: whether performed by one person or three or more branches, they will exercise legislative, executive and judicial functions
 - 1. Executive Function
 - a. To carry out and put into effect all of the tribe’s laws
 - b. Includes law enforcement, establishment of policies, decision making and creation of institutions to carry out the laws
 - 1. Performed by tribal officials, tribal council, committees and tribal administrators
 - 2. Typical powers include:
 - a. Tribal administration
 - b. Oversight of laws
 - c. Resolutions and other acts
 - d. Calling special sessions
 - e. Appointment of selected officials and employees

- f. Signer of official documents
- g. Prepare and present budgets

B. Legislative Function

1. The primary purpose of government: the job of making laws
2. Typically performed by the tribal council
3. Can be operating principles (i.e. Constitutional Law) or principles for behavior (i.e. Tribal Ordinances)

C. Judicial Function

1. Task of determining whether actions are proper according to the law
2. Interpretation of laws
3. Responsible for deciding disputes among citizens and reviewing the propriety of governmental action
4. Typically performed by tribal courts and judges
5. Council meetings / Official acts
 - a. Goal: promote public participation in tribal council meetings
 - b. Object is to provide information about meetings and allow people to monitor tribal council performance
 - c. Historically, care, custody, management and access to tribal records has been a problem
6. Ethics and removal of officials: often allowed for felony convictions
7. Popular participation: initiative, referendum and recall
 - a. Initiative: citizens enact laws directly
 - b. Recall: ability of citizens to recall officials who have been found corrupt
 - c. Referendum: reject unpopular law/express will
8. Sovereign immunity: typically asserted in the

constitution

9. Amendments and Revisions to Constitution
 - a. Amendment: minor change (i.e. Tribal name)
 - b. Revision: extensive change (i.e.. Form of Government)
 - c. Procedures vary for each under Indian Reorganization Act
 - d. Severability: if a portion of the constitution is found invalid, the rest remains intact
 - e. Savings Clause: saves validity of prior government acts for being invalid after the constitution is adopted
 - f. Adoption & Certification: Indian Reorganization Act mandates that these are prescribed by the BIA. Record circumstances leading to adoption of the tribal constitution and indicate who authenticated the adoption action

XIV Separation of Powers

- A. Presidential system of government has some separation of powers. For example, the chief executive is elected independently of the other branches
- B. By avoiding the concentration of power in any one branch of government, the risks of corruption and “tyranny of the majority” are minimized

XV. Checks And Balances

- A. Presidential system also has “checks and balances,” so that the three branches are not completely disconnected from one another
 1. i.e., the veto power of the president with the right of legislative override

XVI. Tribal Constitutions

A. Function and Purpose of a Constitution

1. Constitutional Features for Promoting Good Government

- a. Separation of Powers: Many early tribal constitutions based on the IRA model, concentrate the 3 functions of government in one entity
- b. Problem: tribal council conflicts of interest while trying to perform all 3 functions
- c. Many tribes have adopted constitutional provisions for meaningful checks and balances
- d. Independent Judiciary: Constitutional provisions that establish the court separate from the influence of the tribe's legislative and executive function are encouraged
- e. Legislative Department: Creation of a separate department of the gov't to establish the broad policy of the tribe (i.e. Tribal council).
- f. Executive Department: Legislators should not be expected to execute the laws they pass / problems of "political favoritism" / limited resources – best to hire tribal administrator to manage the tribe's executive functions
- g. Objective Election Procedures: Common problem – Recommendations: An objective election board, ongoing election ordinance with voter registration, absentee voting, secret balloting, method of settling election disputes with appeal to objective tribal court and petitioning procedures
- h. Apportionment

2. Removal of Federal Intervention Provisions

- a. Secretarial Review: Many tribal constitutions

requires Secretary to review certain tribal enactments as condition to becoming effective.

1. Rational: IRA era tribal member concern of possible abuse by elected leaders
 2. BUT, There is No Federal Laws require Secretarial Review, only terms of tribal constitutions
 3. To promote self-government, Department of Interior has been encouraging tribes to remove from their constitutions, through the amendment process, Secretarial Review provisions
- b. Secretarial Approval: In powers articles of many constitutions is language stating that particular kinds of enactments are subject to approval by the Secretary of Interior. (tribal law not effective until Secretary or designee sign a formal approval statement of the enactment)
 - c. Secretarial approval (unlike Secretarial Review is required for a few kinds of tribal legislation. (i.e. most tribal laws dealing with trust assets)
 - d. Generally, no time limit during which Secretary must act upon tribal laws subject to his approval (unlike the review process)
 - e. Except in few cases where required, Department of Interior encourages tribes to propose constitutional amendments that would remove secretarial approval requirements.
 - f. Where Secretarial Approval is retained due to statutory provisions, a clause is often added to avoid having to conduct a further amendment to the constitution in the event Congress removes such requirement from the statute (i.e. Attorney fees)
 1. Examples when Federal Approval is

required by statute:

- a. tribal gaming ordinances (IGRA),
 - b. tribal liquor ordinances (18 USC 1161),
 - c. tribal code governing descent and distribution of trust or restricted lands (25 U.S.C. 2201),
 - d. tribal environmental quality codes
- g. Department of Interior position is that if the tribe attempts to amend the constitution without Secretarial Approval, the Secretary need not be bound by such modification nor recognize actions taken pursuant to that amendment – views constitution like an agreement which benefits both parties and expresses the government to government relationship
3. General Considerations in Adopting / Revising a Constitution
- a. No “one size fits all” for tribes, although probably advisable to have some type of written constitution
 - b. Objectives; preserve tribal customs, assert tribal sovereignty, articulate strong principles of government-to-government relations and adopt a form of governance that is widely accepted
 - c. Keep the Constitution short and clear and concise using non-technical language
 - d. Draft as a fundamental framework for long-term tribal governance not to solve temporary or short-term problems
 - e. Must have political mandate / tribal support
4. Writing and Revising a Constitution
- a. Recommend: Tribal Constitution Committee
 - b. Committee should be as non-partisan,

objective and non-political as possible
because:

1. Has a duty to the tribal membership at large
2. Committee will be able to compromise and negotiate among competing factions
3. If Committee becomes aligned with a faction of tribe, it will lose credibility and will not have support of the tribe as a whole

c. Structure and Format

1. Typically, "Articles, Sections and Clauses"

2. Common arrangement of tribal constitution:

a. Preamble

b. Article I Name, Organization and Jurisdiction

c. Article II Membership

d. Article III Rights of Members

e. Article IV Civil Rights

f. Article V Tribal Lands and Property Management

g. Article VI Elections and Voting

h. Article VII Division of Governmental

i. Article VIII The General Council

k. Article IX Executive Authority

l. Article X Legislative Authority

m. Article XI Judicial Authority

n. Article XII Tribal Clerk or Secretary of Tribal Affairs

o. Article XIV Ethics and Removal of Officials

p. Article XV Popular Participation in Tribal Government

- q. Article XVI Tribal Intergovernmental Relations
- r. Article XVII Sovereign Immunity
- s. Article XVIII Amendments to the Constitution
- t. Article XIII Council Meetings and Official Acts
- u. Article XIX Severability
- v. Article XX Savings Provisions
- w. Article XXI Adoption

3. Recommend: Draft the Strongest Constitution Possible

- a. Be proactive, assert strongest position in terms of tribal sovereign authority to govern internal affairs
- b. Currently, tribes are not asserting all of the powers they otherwise might if their constitution were modernized

5. Preamble

- a. Typically, describe in declaratory language why the constitution is being adopted
- b. Rational is often to secure community rights guaranteed to tribes by their inherent sovereignty, treaties or law
- c. Often state constitution is compact between Community and their government
- d. Otherwise, serves no practical purpose

6. Name, Organization and Jurisdiction

- a. Initial articles describe the legal name of the tribe, the supreme law status of the constitution and scope of tribal jurisdiction
- b. Ideally, constitution should be viewed as supreme law of the reservation and applicable to all who live on or enter the jurisdiction of the tribe

- c. Need broad but reasonable assertion of tribal jurisdiction over land, resources, persons, firms, corps. Visitors and other activities to assure tribe regulatory authority over activity on the reservation
7. Membership and Rights of Members
- a. Normally, membership criteria and enrollment are exclusively a matter of internal tribal governance
 - b. Two views on drafting: One, is that membership criteria should be very specific and written directly into the constitution; Second, is that pre-existing members should be protected, but future criteria should be defined by tribal ordinance
 - c. Middle Position: Place base membership criteria in constitution and put other requirements in ordinance
 - d. Regardless, must determine if federal restrictions (i.e. IRA)
8. Rights of Members
- a. Sometimes included to avoid abuse of discretionary authority
 - b. Rational: Make it more difficult for tribal governments to enact policies that infringe on specified rights (i.e. Guarantee members “a safe and clean environment”)
 - c. Critics: constitution should cover only basic right

XVII. TRIBAL ORDINANCE/CODE DEVELOPMENT

A. Terminology

1. Ordinance
 2. Depending on the Tribe's preferred terminology, may also be called:
 - a. Code
 - b. Act
 - c. Statute
- B. Definition of Ordinance from the Pascua Yaqui Tribe:
1. "Tribal Ordinance or Ordinance" shall mean those laws passed by the Tribal Council on matters of general and permanent interest to the members of the Tribe and which are the laws, rules, or regulations of the Tribe.
 2. Codes/ordinances/statutes
 - a. Voted on by the tribal council
 1. Provide details of government structures and procedures
 2. Describe laws for citizen behavior
- C. Functions of Ordinances
1. Provide details for tribal government structures and Procedures
 - a. tribal court structure, election procedures
 - b. outline the laws that the tribal government will enforce
 - c. curfew and vandalism of tribal property
 2. Regulate activities in the tribe or village
 - a. the taking of artifacts and environmental regulation
 3. Provide for a smooth flow of government and continuity between administrations
 4. Promote respect from other governments and institutions
 5. Protect Native cultural uniqueness if appropriately drafted

D. General Considerations

1. Tribes that have more lengthy and detailed constitutions need more tribal government structure and procedure ordinances than those with short constitutions
2. Tribes vary widely in ordinance development, and some have none, very few, or outdated ordinances
3. The structure and general procedures for tribal courts should be written in ordinances if they are not in the constitution.
4. Written ordinances should clearly outline guidelines for types of cases the court will handle, laws the tribal court is expected to enforce, and provide guidelines for making decisions

E. Codification – Organization

1. If a tribe only has a few ordinances, they are easy to keep track of and find without putting them into a special order.
2. If a tribe has many ordinances, however, they need to be put into a systematic format so that they can be easily accessed.
3. Codification is the systematic organization of laws. A tribal ‘code’ or ‘code of ordinances’ is the collection of tribal ordinances.

F. Written Laws may be arranged into:

1. Titles
2. Chapters
3. Sections

G. Ordinances commonly have the following pattern:

1. name
2. purpose
3. definitions
4. body

H. Overview of Types of Tribal Ordinances

1. Two basic kinds of ordinances:
 - a. Those that set up structures and procedures

for the tribal government enforced by tribal councils and by political pressure from tribal members

- b. Those that regulate activities and behaviors, enforced by tribal councils and courts
- 2. Possible Tribal Codes
 - a. Title 1: Tribal Government Structures and Procedures
 - b. Title 2: Law and Order
 - c. Title 3: Domestic Relations
 - d. Title 4: Health and Safety
 - e. Title 5: Land Management
 - f. Title 6: Natural and Cultural Resources
 - g. Title 7: Tribal Business Operations

XVIII. Tribal Government Structures and Procedures Ordinances

- A. Old IRA constitutions don't describe the structure of the government, so that could go under this category. (i.e. Structure of the council, number of members, qualifications, quorums, terms, recall, removal, etc.)
- B. Other constitutions may either be missing these elements or need more details provided by having an ordinance on these things:
 - 1. Relation of unwritten law to written law
 - 2. Jurisdiction of the tribe
 - 3. Policies on sovereign immunity
 - 4. Procedure for adopting, amending and repealing ordinances
 - 5. Ethic standards for tribal council and officials
 - 6. Types of meetings, notification of meetings, quorums for tribal meetings
 - 7. Election procedures
 - 8. Popular participation in government, initiative, referendum, recall, removal

9. Rights of members
 10. Membership and enrollment
 11. Cooperative agreements
 12. Tribal court structure
 13. Tribal court procedures
 14. Appellate court structure and procedures
- C. Civil Law and Order Ordinances
1. Alaska-specific note: Jurisdiction for Alaska tribes is less secure for handling these types of cases than it is for child custody for example, but it is much easier to assert jurisdiction when approaching these issues as civil than as criminal
 2. Some tribes have agreements with the state for handling juvenile law and order cases, others handle these cases without a written agreement
- D. Types of Ordinances include:
1. Underage drinking
 2. Trespass
 3. Vandalism
 4. Theft
 5. Minor assaults
 6. Truancy
 7. Juvenile curfew
 8. Disorderly conduct
 9. Animal control
 10. Traffic - speeding and such
 11. Regulating firearm use in the village
 12. Alcohol regulation
- E. Domestic Relations Ordinances
1. Child custody disputes and formalizing agreements
 2. Child protection
 3. Terminating parental rights
 4. Foster home licensing
 5. Adoptions

6. Guardianships
7. Marriage
8. Probate
9. Elder Protection
10. Domestic Violence
- F. Health and safety Ordinances
 1. Animal Control
 2. Abandoned Vehicle
 3. Nuisances
 4. Fireworks
 5. Environmental Regulations
 6. Outhouse and Human Waste
 7. Solid Waste
 8. Littering
 9. Burn Barrels
 10. Hazardous Waste
 11. Hazardous Materials
 12. Water Quality
- G. Land Management Ordinances
 1. Types of ordinances include:
 2. Council powers over land issues
 3. Rights of tribal members and land use
 4. Acquisition of land procedures
 5. Managing tribally owned lands
 6. Tribal land assignments
 7. Land use planning policies and procedures
- H. Natural and Cultural Resources Ordinances
 1. Types of ordinances include:
 - b. Artifacts and Human remains
 - c. Cultural use of Wildlife
 - d. Protocol for Research on the tribe, tribal land, and Tribal cultural resources
 - e. Management policies and procedures for natural resources
- I. Tribal Business Ordinances

1. Types of ordinances include:
 - a. TERO – Tribal Employment Rights Ordinance
 - b. Management policies and procedures for tribal businesses

XIX. Procedures and Issues of Concern for Adopting, Amending, and Repealing Ordinances

- A. A tribe's legislative powers are typically exercised by the tribal council
- B. The full council may work on ordinances, or they may assign a special committee or individual to prepare drafts for full council review
- C. Unlike city governments, tribal councils have no required formal procedure for working with ordinances
- D. However, many councils have adopted or are considering adopting an ordinance outlining such procedures, including posting notice and allowing tribal members an opportunity to speak

XX. Procedure For Adopting, Amending, Or Repealing Them Usually Follows The Idea Of 'Due Process':

- A. Notice to tribal members that an ordinance will be on the agenda at a tribal council meeting
- B. Opportunity for tribal members to speak at the meeting about the ordinance
- C. The ordinance is fairly considered by the tribal council and the decision to adopt is done under any written guidance the council has governing these procedures
- D. If a tribe is just beginning ordinance work, the first decision is to determine which approach to take: a whole code, one title at a time, or one ordinance at a time
- E. Information about the ordinance topic should be collected, including sample ordinances from other

tribes and governments.

- F. In drafting ordinances, the services of a skilled consultant may or may not be needed, however, proposed ordinances should be reviewed by tribal legal counsel
- G. Typically, the full council meets in an open council
- H. The council may hold a community meeting to discuss an ordinance proposal, especially on controversial issues.
 - I. It's a good idea to require a super majority vote, such as 6 out of 7, to adopt, amend, or repeal ordinances.
 - J. Ordinances may contain language that requires them to be sent to a vote of the tribal members in order to amend or repeal them.
- K. The adoption of ordinances is formalized by a resolution or by signatures on a certificate of adoption.
- L. Tribal ordinances should be made available to the community and not filed away in council offices. It is also a good idea to send copies of adopted Ordinance to the agency outside the village for long term record keeping.

XXI. Use of Consultants for Code Development

- A. Wise use of consultants, legal or otherwise, and consultation with tribal Elders is recommended
- B. If there is any question about legal issues, tribal attorneys should be consulted, preferably the one/s who would represent the tribe in the event that a legal battle occurs
- C. Recommendations for consultant credentials:
 - 1. Ability to clearly communicate with the council both orally and in writing
 - 2. Flexibility to produce what the tribe wants, rather than what they want

3. Knowledgeable about tribal/village life as well as knowledge about federal Indian law
4. An understanding of the relationship between written and unwritten tribal law
5. Experience in working with similar tribes in ordinance drafting
6. A sense of humor helps a lot

XXII. Tribal Enrollment Recent Developments and General Information

A. Generally

1. Tribes have the inherent authority to determine who can join the tribe; considered central to its existence as an independent political community . (Martinez 1978)
2. Authority includes power to disenroll, tribal adoption and determination of membership benefits (Roff v. Burney 1897 / Cherokee Intermarriage Cases 1906)
3. Congress has power to limit tribal membership control, but few tribes have been limited in their enrollment decision
4. Federal courts have no authority to resolve enrollment disputes
5. Rationale: a tribe's ability to determine membership "lies at the very core of tribal self-determination: indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations." (Smith v. Babbitt 8th Cir. 1996)
6. Also, Dept. of Interior's grievance process (Interior Board of Indian Appeals) not available to hear tribal membership disputes. 43 C.F.R. Sec. 4.330
7. Judicial forum for membership disputes, if it

exists, will be in tribal court.

8. Many tribes, however, have not granted their tribal courts jurisdiction to hear enrollment issues
9. Where no tribal court jurisdiction exists, enrollment disputes often decided by the enrollment board or tribal council
10. Forum for membership disputes typically contained in tribal constitution and / or enrollment ordinance

B. Recent Developments:

1. Las Vegas Paiute Tribe Disenrollment Case (2002)
2. Tribal Council enacted resolutions limiting membership to those of Southern Paiute descent, resulting in 14 of 54 members being disenrolled
3. Disenrolled brought action in tribal court arguing they'd been denied due process and equal protection
4. Resolutions interpreted Constitution and Bylaws regarding membership of the tribe to mean that "quarter-blood" requirement referred to "Southern Paiute blood."
5. Resolutions also required complete review of "past and present" membership applications for compliance
6. Without holding an evidentiary hearing, Tribal Trial Court held disenrollment was Unconstitutional
7. Tribal Court of Appeals reversed, finding that the trial court was required to hold an evidentiary hearing, that such a hearing was necessary before it could determine that the disenrollment's were unconstitutional
8. Trial Court needed an evidentiary hearing to

conclude that the Tribal Council improperly amended the Constitutional membership requirements

9. Evidentiary hearing must be held to determine if original census rolls contained any persons not of Southern Paiute blood
10. If rolls do contain such persons, then tribal court is required to find the tribal council resolutions unconstitutional
11. If rolls do not contain such persons, than tribal court is required to dismiss petitioners claims
12. Dakota Indian membership claims against the Shakopee Mdewakanton, Prairie Island Indian and Lower Sioux Communities Alleges that the Interior Department has not fulfilled its trust responsibility
13. Suit filed November 17, 2003 in U.S. Court of Federal Claims in Washington, D.C.
14. Enrollment claims appear predicated on deprivation of member benefits, primarily casino profits received in the form of per capita payments
15. No indication as to whether U.S. Court of Federal Claims will hear the dispute
16. However, if Court follows other federal court decisions it will likely dismiss the action

XXIII. Tribal Constitutions

A. Civil Rights

1. Recommended because of the inapplicability of the Bill of Rights in Indian Country / ICRA
2. Options:
 - a. Silence: ICRA still applicable but doesn't inform about civil rights protections
 - b. Incorporate ICRA by reference or

- c. Insert full text of ICRA into constitution
(Recommended- take more seriously,
promotes reference and learning)
- 3. Tribal Property
 - a. Provision on the status and use of tribal
property
 - b. Property use, occupancy and rights have been
frequent sources of dispute within tribe
 - c. Some tribes have developed special property
rights language in their constitution
 - d. Some, just general language for tribe to pass
law
 - e. Others, more elaborate property management
rights
- 4. Elections and Voting
 - a. Essential governance function that should
promote voter participation and protect voter
and candidacy rights
 - b. Management of the election process: Option
 - 1. tribal council
 - 2. tribal official (i.e. Tribal administrator) or
 - 3. independent election commission (preferred
by BIA)
 - 4. Voting and Control of the Voting Process
 - a. Most tribes permit adult members to
vote in tribal elections
 - b. Some tribes impose additional
requirements for voting eligibility
including: residency, property ownership
or allotment and non-violation of
selected restrictions such as
banishment, criminal conviction or
abandonment of citizenship
 - c. Positions to be Elected: Usually tribal
chief and council of 3-11 people / others

may include vice chief, clerk or judges
(should distinguish between constitution
Officers and statutory officials

- d. Methods of Election: straight or staggered terms ? Run at large or by district? (if district, must watch apportionment to ensure “one-person-one-vote principle”
- e. Qualifications for Office: Include: core qualifications to run for office, circumstances to deny candidate-elect form seating and removal from office
- f. Nominations and Elections: Process, election timing, casting of votes and management of election disputes
- g. Other forms of Public Participation: i.e. Referendum, initiative and recall.

XXIV. Tribal Elections

A. General Information And Recent Developments

1. Generally –

- a. Right to form a government is the first element of sovereignty (Martinez 1978)
- b. Includes right to establish qualifications for office, determine how tribal officials are chosen and define their powers
- c. Tribe can require that candidates for office be enrolled and speak the tribe’s language (Shortbull 8th Cir. 1982)
- d. Tribe can disqualify persons with felony convictions from office or those who have engaged in misconduct during a prior term in office (Means v. Oglala Sioux Tribal Council 1984)
- e. Tribe has power to determine who may vote

in tribal elections. (Wounded Head v. Oglala Sioux Tribal Council 8th Cir. 1975)

B. Federal Review of Tribal Elections:

1. Generally, tribal elections are not subject to federal review (essential to the right of self-government)
2. Only two narrow exceptions:
 - a. Recognition by federal officials of temporary government pending resolution of election dispute by tribe under tribal law
 - b. Amendment of IRA tribe's constitution requires consent of Sec. of Int., but consent required unless adoption would result in violation of federal law
3. Recent Developments:
 - a. Yellow Bird v. Three Affiliated Tribes Tribal Election Board, et al. 29 ILR 6018 (Feb. 2002) [Fort Berthold District Court sustains finding of tribal election board that an election for tribal council position was conducted properly]
 - b. Begay v. Navajo Nation Election Administration, 30 ILR 6035 (April 2003) [Navajo Nation Supreme Court finds that candidate for President of the Nation was denied due process and equal protection of Navajo law because of disparate application of the Navajo Election Code]
4. Revisions, Amendments & Adoption
 - a. Organizing & Staffing for Adoption Success
 1. If IRA tribe, must follow BIA process and have constitution approved by the Sec. of Interior
 2. Constitution Committee: Ideally, independent, broadly representative of the community and comprised largely of

tribal citizens

3. Outside Experts: legal and survey research, training and delivery
4. Analyzing Your Community: Three Important Tools
 - a. Data Collection: Get demographic data of tribe (i.e. socio-economic picture, including education and income statistics)
 - b. Focus Surveys: Composed of small groups of tribal citizens and elected officials who are influential in the tribe / Use to determine satisfaction with tribal governance
 - c. Constitutional Survey: Set of questions posed to a small sample percentage (10%-30%) of total adult population
 1. i.e., “Are you satisfied with the present form of government?” / “Would like to directly propose laws for tribal council consideration?”
5. After data collection, focus survey and general survey the constitution committee can determine if there is political support for tribal constitutional change
6. Education and community meetings to inform and involve the people early in the process , as initial drafts are developed, are important
7. Public attention will likely grow after initial draft
8. Draft text should have section by section explanation
9. Potential Barriers to Adoption of a New or

Revised Constitution:

- a. Obstruction / delay by incumbent office holders
 - b. Climate of change, but no community consensus
 - c. Constitution tries to accomplish too much
 - d. Failure to inform and educate the community
 - e. Constitution document is too difficult to understand
 - f. Election changes are unacceptable to the community
 - g. Form of government is unacceptable to the community
10. Common Problems:
- a. Borrowed too much from other constitutions / legal systems
 - b. Constitution committee not representative of the community
 - c. Too many non-tribal members involved in shaping constitution

INTERNATIONAL LAWS

Applicable International laws that should be taken into consideration and inserted into a revised Constitutions or new Governing Documents. These laws have provided strong precedent for many countries.

1. The United Nations Declaration on The Rights of Indigenous People

- a. In March of 2022 the United States announced it's support of this Declaration.

<https://www.achp.gov/united-nations-declaration>.

2. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

a. This a declaration is not a legally binding treaty, the jurisprudence of both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights holds it to be a source of binding international obligations for the Organization of American States (OAS) member states.

b. The terms of the Declaration are still enforced with respect to those states that have not ratified the Convention, such as the United States, and Canada.

<https://www.oas.org/juridico/english/ga-res98/eres1591.htm>

3. The Committee for Elimination of Racial Discrimination (CERD)

<https://en.unesco.org/indigenous-peoples/undrip>

4. International Labor Organization Convention 169

a. The Indigenous and Tribal Peoples Convention, 1989 is an International Labour Organization Convention, also known as ILO Convention 169, or C169. It is the major binding international convention concerning indigenous peoples and tribal peoples.

b. The United States has not ratified this. The rational for the decrease in signatories can be partially attributed to Convention 169's inclusion of Indigenous peoples' right to

self-determination. Many nation-states are apprehensive of such provisions, arguing that Indigenous autonomy undermines their own sovereignty and governance.

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:..>