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40th Anniversary of the Indian Civil Rights Act: *Finding a Way Back to Indigenous Justice*

FEAR, SUPERSTITION, AND myth can lead to a path of disenlightenment and stunt the growth of a society that chooses not to accept change. Today, there are still many myths, superstitions, and fears of Native Americans and their "strange" ways. Can Native people, who, according to some, have such mysterious customs, be trusted to administer justice fairly?

These sentiments could be heard in the 19th century, the 20th century, and sadly the 21st century. Such fear, superstition, and myth were often negatively associated with Native people's inability to assimilate into Western culture. Ironically, those same three features can prevent many from embracing the uniqueness of the country's Native people. What becomes lost is society's opportunity to grow and learn from the remarkable contributions of tribal jurisprudence.

This year marks the 40th anniversary of the Indian Civil Rights Act (ICRA),[1] which was passed in 1968 to provide citizens of tribal governments Bill of Rights protections similar to those found in the U.S. Constitution. Controversy did not elude this legislation when it was passed, and the act has not lost the spotlight within federal Indian law. From its inception, questions surrounded the application of the ICRA, and, as time pushed on, the scope of the ICRA has evolved as litigation defined its boundaries. After 40 years, the effectiveness of the law is still being discussed. To some, the ICRA's limited application may appear to be a dodged bullet; to others, it may appear to have been false hope.

In 1896, the U.S. Supreme Court held in *Talton v. Mayes* that tribal governments were not bound by the limitations of the U.S. Constitution.[2] In this Allotment Era case, the Court recognized that tribal authority did not originate from the U.S Constitution but predated the Constitution and was independent of federal authority. The inapplicability of the Bill of Rights protections raised concern among those critical of tribal governments. During the era of the *Talton* decision, this criticism was largely based on frustration over Native people's reluctance to give up their traditional ways and fully assimilate into Western culture. The fact that Native people possessed their own legal traditions that worked for hundreds of years did not override the concern that those legal traditions did not look and feel "American."

The Western systems of justice to which most Native people were exposed at the end of the 19th century came from the Courts of Indian Offenses (C.F.R. Courts). These courts were set up by the secretary of interior in 1883 as a way to assimilate Native people by punishing them for practicing their traditional ways of life. The federal policy toward Native people shifted drastically during the 1930s. With the passage of the Indian Reorganization Act (IRA)[3] in 1934, the establishment of tribal governments was encouraged by the federal government. As a result, the federal government designed boilerplate constitutions that established the framework that many tribal governments still use today. Despite the encouragement of tribal governance, tribes were expected to adopt Western forms of government. Notwithstanding the passage of the Indian Reorganization Act, the U.S. Bill of Rights still did not apply to tribal governments, and that provoked some to take a closer look at tribal justice.

The momentum that built up during the Civil Rights Movement of the late 1960s raised questions as to why Indians living on reservations did not share in the benefits provided by the Bill of Rights. Sen. Sam Ervin (D-N.C.) spearheaded a study for which field research was conducted by the Senate Committee on Constitutional Rights. For several years, research and testimony were gathered regarding the conditions of tribal courts. Sen. Ervin came to the conclusion that tribal justice systems operated inefficiently because of "tribal judges inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system."[4]

The language of the ICRA reflects the immense debate that took place over the legislation. The act lists 10 Bill of Rights protections that tribal governments must not violate. Tribal governments must not exercise authority that (1) violates freedom of religion, speech, and assembly; (2) subjects a person to unreasonable searches; (3) violates a person's protection against double jeopardy; (4) subjects a person to self-incrimination; (5) denies just compensation for a civil wrongdoing; (6) denies the accused a speedy and public trial; (7) subjects a person to cruel and unusual punishment; (8) violates an individual's due

process and equal protection under the law; (9) enacts ex post facto laws; and (10) denies the accused the right to a jury trial if an offense is punishable by imprisonment.[5] Left out of the ICRA are requirements against the establishment of religion as well as requirements that a tribe must provide legal counsel to the accused and also a trial by jury. In only one instance did the act specify federal court review of the ICRA claims: habeas corpus.[6]

Upon its enactment, the Indian Civil Rights Act was met with mixed reactions from members of Indian country. To those who disagreed with tribal council actions and tribal court decisions, the ICRA was a welcomed piece of legislation. Others felt that the ICRA was an attack on their traditional culture because it sought to interpret individual rights through a lens that was foreign to many tribes. In particular, the Pueblo Nations of New Mexico felt that the ICRA would completely disrupt their theocratic forms of government. These concerns found their way into the language of the statute and eventually limited the scope of the act by the time it was passed.

During the first 10 years after passage of the ICRA, lower federal courts applied a loose interpretation of the statute, holding that ICRA established a federal cause of action for any tribal government's exercise of authority that they felt violated the rights enumerated in the act. This broad application continued until 1978, when the U.S. Supreme Court heard the case of *Santa Clara Pueblo vs. Martinez*,[7] in which the Court ruled that citizenship should be denied to persons who did not meet the tribal nation's traditional requirements. The Court decided in favor of Santa Clara Pueblo's ability to determine citizenship according to customary standards based on a strict interpretation of ICRA. The decision narrowed the federal courts' ability to review ICRA claims to only those of habeas corpus, as specified in the statute. The Supreme Court rejected the lower court's expansive interpretation of the act and construed a narrow reading that left the ICRA with little force outside of habeas corpus.

Since the *Martinez* ruling, the ICRA has largely been left to tribal courts to enforce and interpret. Some tribal governments have adopted the content of the ICRA verbatim into their tribal constitutions. Other tribal nations have interpreted the ICRA through their own cultural lens to ensure that cultural norms are not displaced. It was feared that, if *Martinez* had not been decided the way it was, federal courts would be overwhelmed with ICRA claims. Furthermore, that type of federal review of tribal government actions would have stifled self-determination efforts by tribal nations and would have continued a paternalistic oversight of tribal governments.

Two major amendments to the ICRA have taken place since 1968. The first amendment, passed in 1986, extended sentencing limitations from the six months set originally to one year and raised fines from $500 to $5,000. Tribal courts have worked around this limitation by adding together consecutive one-year sentences for criminal offenses in order to increase the length of the sentence. The second amendment to the ICRA came in 1991 with the extension of tribal criminal jurisdiction over Indians who were not members of the tribe. This amendment was a direct reaction to the U.S. Supreme Court's ruling in *Duro v. Reina*, which held that tribes lacked authority to criminally prosecute Indians who were not tribal members because of the lack of congressional action on the issue.[8] This amendment, known as the "Duro Fix," lifted the restriction of the *Duro* decision. The language of the amendment was carefully drafted so that the jurisdiction over Indians who were not members of the tribe was not a delegation of federal authority to tribal nations but, rather a recognition of inherent tribal sovereignty. The validity of the Duro Fix amendment was upheld by the U.S. Supreme Court in *U.S. v. Lara*,[9] in which the Court found that Congress, through its legislation, had properly lifted the restrictions that had been set by the *Duro* decision.

It is easy to assume that the ICRA was passed because tribal governments did not possess the concept of protection of individual rights. However, this misconception overlooks the rich and diverse justice systems that were practiced by tribal nations. Indigenous justice systems addressed many of the concerns that the ICRA sought to remedy. Many of those indigenous justice systems were displaced by the federal government as a means to assimilate Native people and root out all forms of indigenous governance. Tribal governments established under the Indian Reorganization Act replaced indigenous governing systems and introduced a system that was foreign to many tribal nations. Similarly, many of the standard governments established by this act did not provide for a strong independent judiciary and only through time did individual nations amend their constitutions to provide for a stronger judicial branch within their tribal government.

The ICRA still maintains a presence within Indian country despite the limitations articulated in *Martinez*. Many tribes have adopted the ICRA into their tribal constitutions, making the act's provisions enforceable under tribal law. For many tribes, enforcing the ICRA has been a problem as a result of their underfunded law enforcement and judicial systems. With more problems arising on the reservations, the funding does not match the needs that enforcing the ICRA demands.

After 40 years, Native people hold many perspectives on whether the ICRA is beneficial. Many still feel that the legislation does not belong to them because it was forced upon tribal governments. Others believe that the ICRA places needed pressure on trib-

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Endnotes

[1]29 U.S.C. §§ 151–159 (2000).

[2]*San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), *reh'g en banc denied* (June 8, 2007) (affirming the jurisdictional findings of *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004)), enforcing *San Manuel Indian Bingo & Casino*, 345 N.L.R.B. No. 79 (Sept. 30, 2005).

[3]25 U.S.C. §§ 2701–2721; 18 U.S.C. §§ 1166–1168 (2000).

[4]25 U.S.C. § 2710(b)(2)(B).

[5]341 N.L.R.B. 1055.

[6]345 N.L.R.B. No. 79.

[7]29 U.S.C. § 159.

[8]29 U.S.C. § 158.

[9]Kevin J. Allis, *The NLRB San Manuel Indian Bingo & Casino Fallout: Dealing with Union Organizational Efforts*, 17 INDIAN GAMING 28, 28–29 (May 2007), available at www.indiangaming.com/istore/May07_Allis2.pdf (last visited Dec. 4, 2007).

[10]For more information and strategies, *see* Philip B. Wilson, THE NEXT 52 WEEKS: ONE YEAR TO TRANSFORM YOUR WORK ENVIRONMENT (2004), available at www.lrims.com/contact-us.html (last visited, Nov. 25, 2007).

[11]For strategies, *see generally*, Donald P. Wilson, TOTAL VICTORY! THE COMPLETE MANAGEMENT GUIDE TO A SUCCESSFUL NLRB REPRESENTATION ELECTION (2d ed., 1997), available at www.lrims.com/contact-us.html (last visited, Nov. 25, 2007).

[12]For more information about this effort, readers may contact Richard Guest at richardg@narf.org or John Dossett at jdossett@ncai.org.

[13]*Morton v. Mancari*, 417 U.S. 535 (1974).

[14]25 U.S.C. § 2702(2).

[15]*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[16]*Serv-Air Inc. v. NLRB*, 395 F.2d 557 (10th Cir. 1968); *TRW Inc. v. NLRB*, 393 F.2d 771 (6th Cir. 1968); cf. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949) (denying use of a meeting hall was not a violation).

[17]*See Hammary Mfg. Corp.*, 265 N.L.R.B. 57 (1982), amending 258 N.L.R.B. 1319 (1981).

[18]*Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

[19]For example, *Gallup Inc.*, 334 N.L.R.B. 366 (2001), *enforced*, 62 F. App'x 557 (5th Cir. 2003).

[20]For example, *Cannondale Corp.*, 310 N.L.R.B. 845 (1993).

[21]For example, *Bankers Club*, 218 N.L.R.B. 22 (1975).

[22]For example, *F.P. Adams Co.*, 166 N.L.R.B. 967, 968 (1967).

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al governments to assure that protections of individual rights are consistent with those afforded by the U.S. Bill of Rights. As a matter of perspective, the ICRA can be seen as positive or negative for Native people, and, depending on what circumstances one faces at a given time, the ICRA can be one's friend or one's enemy.

Today, a revitalization of indigenous justice systems is taking place within various tribal nations. Peacemaking processes like those found among the Navajo Nation, as well as other forms of indigenous dispute resolution systems, are gaining new life after being suppressed by assimilation policies. These indigenous processes are successful because they rely on cultural values to restore harmony to troubling situations. Moreover, tribal courts are using customary law as a tool of adjudication that is strengthening their court systems. Hope is coming to tribal nations that are coping with devastating problems, and it is coming in the form of indigenous jurisprudence. The ICRA has lent its hand to the fight, but as tribal nations find their way back to indigenous justice, they are realizing that the solutions to many of their problems have always been with them. **TFL**

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Endnotes

[1]Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303.

[2]*Talton v. Mayes*, 163 U.S. 376 (1896).

[3]Indian Reorganization Act, 25 U.S.C. 478.

[4]Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights At Thirty Years*, IDAHO L. REV. 469 (1998).

[5]ICRA, *supra* n. 1 at § 1302.

[6]*Id.* at § 1303.

[7]*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[8]*Duro v. Reina*, 495 U.S. 676 (1990).

[9]*U.S. v. Lara*, 541 U.S. 193 (2004).