

## Engaging Tribal Citizens to Strengthen Governance and Culture

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The findings and practical implications outlined below are taken from my paper "Key Concepts in the Finding, Definition, and Consideration of Custom Law in Tribal Lawmaking" to be published in the Spring 2008 American Indian Law Review. My research explored methods for finding local custom with an eye to the needs of tribal lawmaking bodies and judges in tribal courts using more or less western adversarial process. This topic and the research has been informed by my work as a legal clinician entrusted to advise tribes on the drafting of tribal constitutions and laws and my work with the tribal common law as a tribal appellate judge. I have been concerned with the defacto policymaking of drafting attorneys and judges and the lack of useful theories or even guidelines for respecting and reliably working with custom.

### **Summary of Findings**

My research focused on useful methodologies for identifying local values and ways (a.k.a. "customs and traditions") and for capturing and integrating them into written tribal laws (constitutions, statutes, and/or written judicial opinions and orders). My findings are as follows:

- (1) *"Custom" is law and it permeates every subject category within the written laws;*
- (2) *Custom law exists and operates underneath written tribal laws in many contemporary tribal societies - A functional definition of substantive custom is one that distinguishes "custom as a kernel of law" (what people feel/believe/do given certain values); "custom of a legal nature in its natural setting" (legal norms vs. social norms where the traditional system somehow backs or recognizes the norm);" and "custom that is enforceable under tribal law" (custom that is incorporated into written tribal law in a policymaking process);*
- (3) *Custom law varies among groups at the sub-tribal level (villages, clans, bands, etc.) - Tribal societies are comprised of multiple legal levels with variances in their legal structure and substantive bodies of custom;*
- (4) *Tribal legislators, judges, and adhoc elders may not be the most reliable sources to identify and define customary law elements - Some sources are more reliable than others for identifying and defining relevant legal norms (custom that is law in its natural setting). For example, traditional authorities from the same village or clan who have decided similar cases in the past would be more reliable (this is known as the trouble case method).*
- (5) *Custom law often naturally arises from kinship, ceremonial, and other relationships and*

looks like duties and obligations with rules in case of breach of duty; and

(6) *All contemporary tribal societies arguably have "new custom laws" that are naturally arising and that are in the process of being internalized by members* - Customs, or generally accepted practices and values change but may still be considered "custom that is law."

### **Practical Implications**

- (1) Identifying and integrating custom and tradition concepts into the tribe's written law is a policymaking activity that should be undertaken responsibly and for good reasons;
- (2) Local community members should be involved in the custom identification and definition process before law drafting teams work with the custom AND be engaged in a discussion of when it is just to extend custom over minorities and reformers;
- (3) Law drafting teams should include representation from knowledgeable traditional or local authorities from all relevant legal levels (villages, clans, bands, etc.) if they were not part of the process above in number 2;
- (4) Tribal judges may not be able to take judicial notice of custom and tradition where they do not come from the same legal level as the parties before them;
- (5) Tribal court establishment and judicial codes should be amended to include provisions that say where custom and tradition should fall in the list of mandatory and persuasive legal authorities that tribal judges are required to follow in their decision-making; and
- (6) Tribal leaders should consider whether they have the resources to establish and fund advisory bodies to the judiciary to identify, consider the relevance of, and define the nature of custom applicable in specific cases and certified to them by a tribal judge.

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### Key Concepts in Working with Custom Law



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### Big Picture Question



- What are the issues and concerns with respect to integrating customs and traditions into contemporary tribal written laws?
  - Constitutions
  - Codes
  - Judge-made case law

### Policymaking

"Policymaking" – picking and choosing bits of custom and tradition and putting them into written tribal law for a good reason.

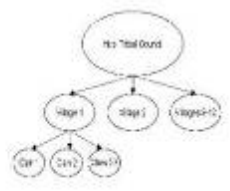
<p><b>Custom or Tradition</b>                  Mother's sister = mom</p>	<p><b>Tribal Policy</b>                  Mother's sister has a right to notice of court proceedings involving her sister's children</p>
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### Critiques


- Don't mess with it
- No one agrees about it
- It doesn't apply anymore or it is a waste of time
- It's too hard to work with

### Problems with Norm Collection: Identification of Legal Levels

- Subgroups have naturally arising custom law



### Problems with Norm Collection: Authority & "Trouble-Case Method"



- Traditional Authority
  - advisements/decisions in past but similar disputes
- The deciding principle is the custom law

### Problems with Norm Collection & Interpretation: Relationships, Duties, & Obligations

- Many custom law principles concern ...
  - Relationships
  - Writings
  - In cases of breach of duty
  - Rules about who than owes what to whom



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### Problems with Norm Application: Considerations of Justice

- Are tribes bound to being customs and tradition in line with ...
  - Human rights principles
  - U.S. civil rights and property principles
  - Local morality
- Is it just to adopt a group or subgroup's custom law and apply it to ...
  - The whole tribe
  - Minorities
  - Reformers
- Should the tribal public have an opportunity to comment upon proposed tribal legislation including custom law?

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### Practical Implications for Tribal Leaders

1. Policymaking w/custom is good when done responsibly and for a good reason
2. The tribal community should be involved in a structured discussion of custom
3. The law drafting team should include traditional or local authorities' input on custom
4. The court establishment or judicial codes should be amended to include provisions ...
  - Mandating or directing the judges' use of custom
  - Establishing custom law advisory bodies
  - Funding custom law advisory bodies to archive custom on an ongoing basis in particular areas

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### Structured Process for Working with Tribal Communities to Identify Relevant Custom & Tradition

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### Social Norms & Legal Norms

"Social Norm" – A felt standard of proper behavior.  
"Legal Norm" – A felt standard of proper behavior backed by official recognition or sanction.

1. Identify a social norm in your community.  
What is something that everyone says you should or shouldn't do?
2. Identify an unwritten legal norm in your community.  
What is something that everyone says you should or shouldn't do?  
What happens to you if you do or omit doing this thing?

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### Tradition & Current Practice

"Tradition" – Old values or ways of doing things.  
"Current Practice" – Current, generally accepted ways of doing things.

Identify a tradition in your community.  
What is the old way of doing things?  
How have things changed?  
Is there a different practice for this tradition now?

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### Traditional Authority & Modern Secular Authority

"Traditional Authority" – The old offices or respected leaders.

"Modern Secular Authority" – Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community.

- (1) Identify several traditional authorities in your community.
- (2) Identify several tribal secular leaders.

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### Legal norms vary within different, traditional and secular "legal levels"

Example: The Hopi Tribe



Identify your community's legal levels. Identify a legal norm that may be different from one place to the next. Is there written tribal law that recognizes the different norms/rules for different groups?

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### Policymaking

"Policymaking" – picking and choosing bits of custom and tradition and putting them in your written tribal law for a good reason.

<p><u>Custom or Tradition</u> Mother's sister = mom</p>	<p><u>Tribal Policy</u> Mother's sister has a right to notice of court proceedings involving her sister's children</p>
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Can you think of an example where your tribe has done this?

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