

Land, Rights, Laws: Issues of Native Title



Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title parties

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Abstract

*In this paper Christine Zuni Cruz considers several issues that have emerged from her personal experience working as an Associate Justice on the Pueblo Appellate Court in the United States. These concerns relate to maintaining the culture of the Pueblo within an acknowledged western, and specifically Anglo-American, framework of justice. The key elements discussed include language, process and knowledge. This paper provides a North American perspective on the interface between Indigenous law and western legal frameworks. It therefore has resonance in the contemporary Australian landscape, where efforts to secure Indigenous rights and interests in land encounter difficulties both in regards to language and the challenges of accommodating Indigenous interests within western legal structures.**

Christine Zuni Cruz is an Associate Professor of Law at the University of New Mexico. A member of the Isleta Pueblo she has served as a Tribal Judge and Tribal Gaming Commissioner and is currently an Associate Justice on the Isleta Appellate Court. In 1993 Zuni Cruz established the Southwest Indian Law Clinic which provides a hands-on opportunity to practice Indian law. In her research and teaching Zuni Cruz explores the relationship between law and culture, particularly the impact of law on Indian families, the practice of Indian law and lawyering for native communities and internal traditional and modern law of Indigenous peoples domestically and internationally. Christine Zuni Cruz is the first pueblo woman to earn tenure as a law professor and is editor-in-chief of the Tribal Law Journal, an on-line journal dedicated to the internal law of Indigenous peoples.

INDIGENOUS PUEBLO CULTURE AND TRADITION IN THE JUSTICE SYSTEM: MAINTAINING INDIGENOUS LANGUAGE, THOUGHT AND LAW IN JUDICIAL REVIEW¹

Christine Zuni Cruz²

I have been working in and with the Pueblo Judiciary for approximately twenty years. My first appointment to the Pueblo bench was by the Laguna Pueblo Council in 1983, within a year of my graduation from law school. In addition to working with Laguna Pueblo³, both as the Chief Judge and as Judge Pro Tem, I've worked with the Santa Clara Pueblo Court, the Southwest Intertribal Court of Appeals (SWITCA)⁴, Taos Pueblo Court⁵ and presently with my own pueblo, Isleta. I currently serve as an Associate Justice on the newly created Pueblo of Isleta Appellate Court. It is my experiences in this Court that form the focus of this essay.

In 1999, for the first time in its history,⁶ the Pueblo of Isleta Tribal Council delegated its appellate authority to an internal appellate court for land and property disputes and its civil and criminal appeals to SWITCA. At the beginning of 2001, the Council placed all civil and criminal appellate authority in its internal appellate court, now known as the Pueblo of Isleta Appellate Court. The Pueblo Council continues to retain appellate jurisdiction over membership issues.

In establishing the Appellate Court for Land and Property disputes, the Council wanted to establish an Appellate Court which would apply the traditional law of the Pueblo to land, probate and property disputes. In order to ensure that traditional law would be applied, the Council wanted the Court to be comprised of members of the Pueblo, and in particular, members of the community knowledgeable of traditional law. This ensured a presence of elders on the bench, but not necessarily lawyers. The Council did agree, however, about the need for lawyers as well, including in both the 1999 and 2001 resolutions that a minimum of three members in a nine-judge bench must be lawyers. The Council then asked selected individuals about their interest in the Court. In 1999, the Council appointed seven judges to the bench. I was one of three lawyers, along with Denise Chee and William Bluehouse Johnson, appointed to the Appellate bench with four elders.⁷ Of these seven original appointees to the Appellate Court for Land and Property, five remain as members of the Isleta Appellate Court.⁸

I will address three attenuated points of contestation that emerge between the convergence of the Pueblo's approach to maintaining the culture of the Pueblo within an acknowledged western, and specifically Anglo-American, framework of justice. These points are language, process, and knowledge.

Language

“As noted by the Irish Poet Seamus Heaney, recent recipient of the Nobel Prize in Literature, ‘In any movement towards liberation, it will be necessary to deny the normative authority of the dominant language or literary tradition.’”⁹

I begin with language because it was the first to arise, and for me, arose in a personal context. All of the Judges appointed to the Appellate Court for Land and Property disputes were fluent Tiwa speakers, except for me. At the first meeting I attended, the issue of my fluency arose

with the elders. In this meeting they expressed a need to return to the Council and confirm the appointment to the bench of a Judge who was not a fluent Tiwa speaker. The issues regarding the need for fluent Tiwa speakers were two-fold. Firstly in order to follow the conversation and secondly to appreciate concepts, an understanding of the Tiwa language was necessary. At the council meeting I undertook the responsibility to learn Tiwa as the only other alternatives were that English be used or that I be disqualified from serving on the Court. With these undertakings, the Council affirmed my appointment and the elders accepted the confirmation.

The Appellate Court for Land and Property disputes conducts its meetings and its Court proceedings in Tiwa. The Isleta Appellate Court has continued this practice. My responsibilities to the Court now have me immersed in Tiwa twice a week. With the assistance of the two fellow attorneys I am able to follow Tiwa with their interpretation. The end result, that I undertook a responsibility to learn Tiwa, also placed the role of teaching language on others, if only because it is at the meetings and hearings Tiwa is spoken. Had English become the discursive language of the Court or had I been disqualified, the impetus to learn, the opportunity for immersion, and the opportunity to teach would have been lost. The exclusive use of English was never a possibility with the elders appointed to the Court. Their language of choice is Tiwa, because English, though all are fluent, is their second language. The Council reminded us that we (attorneys and younger people) had to learn from our elders, and likewise that our elders (non-attorneys and older people) had to learn from us as well. In this respect, we are bridges of understanding to one another. This principle has gone well beyond language.

Importance of Language within the Court System

The emphasis on the use of the language in official meetings of the Court and in Court proceedings has fostered a truly unique feel to the Court. Much appellate practice before the Court is by *pro se* or unrepresented parties who prefer to address the Court in Tiwa. For parties who are not proficient or who do not speak the language, accommodation is made. For instance, this includes the use of spokespersons to speak on their behalf or to assist in translation, for those who are not Tiwa speakers, and the use of both English and Tiwa by the bench during proceedings involving parties with mixed levels of fluency in Tiwa or with no Tiwa fluency, including non-member Indians and non-Indians.

Loss of Language

Many indigenous languages in the United States and in the world are in danger of extinction.¹⁰ The 1990 the U.S. Census showed that there was a total of 2,338 Tiwa speakers in the United States.¹¹ Four Pueblos in New Mexico speak the Tiwa language: Isleta Pueblo, Sandia Pueblo, Picuris Pueblo and Taos Pueblo. The 1990 U.S. Census showed the following population figures for each Pueblo: 3,306 – Isleta Pueblo; 1,875 – Taos Pueblo; 245 – Picuris Pueblo and 291 – Sandia Pueblo.¹² According to 1990 Census figures, less than half the total population of the four Tiwa speaking Pueblos spoke Tiwa.

Maintaining native language is of fundamental importance to the continuance of indigenous knowledge.¹³ The Isleta Appellate Court's internal decision regarding the use of Tiwa is in

fact supported by Congressional legislation,¹⁴ though support of indigenous language was not always U.S. government policy.¹⁵ The Native American Languages Act (NALA) specifically states:

It is the policy of the United States to...fully recognize the inherent right of Indian tribes and other Native American governing bodies...to take action on, and give official status to, their Native American languages for the purpose of conducting their own business...¹⁶

Further, the Act states that the,

right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding...¹⁷

Importance of language within the court system

The use of Tiwa by the Isleta Appellate Court represents a decision wholly apart from Federal policy. The Court uses it because it is the language of the people. It makes the Court accessible to the people in the language they are most comfortable. It encourages the use of the language and emphasises the importance of the language for both those who are bilingual and those who are not. Given the endangered nature of native languages, the official use and encouragement of the use of the native language by the Court is critical. The encouragement of bilingualism (Tiwa and English) over monolingualism (English only) is not lost when official Pueblo business is conducted in Tiwa.

Language as important to understanding indigenous law concepts

Language orders thought, focuses attention, and establishes relationships in such a way, that its importance to law cannot be mistaken. Fluency in the native language is crucial to understanding ways of thinking that are important to indigenous concepts. Whether one is seeking to explain and understand either Anglo-American legal concepts or indigenous concepts, being bilingual assists in one's explanation or in one's understanding.

Indigenous language as a necessary tool of Indian lawyers

Encouraging bilingualism in native lawyers who will serve their communities, is an important aspect of preparing lawyers to function well in native communities. The support for acquiring or strengthening native language skill among native law students is not currently a part of present American Indian legal training. Based on my experience, I believe this is a drawback in preparing native lawyers for work within their native communities. Supporting, facilitating, and otherwise encouraging native students to become bilingual in their native language is an important aspect of the skills needed by students to be effective within their own communities. Bilingualism in the native legal community will help the tribal justice system from getting too far away from the community, both in terms of an understanding of traditional law and in the over-reliance on Anglo-American concepts embedded in American law and the English language.

Finally, it is necessary to recognise that present U.S. law does not provide the type of support, protection, and recognition of enforceable rights to make it a source of significant hope for bringing indigenous language from the brink of extinction. The responsibility for this task lies

within each indigenous nation. U.S. policy was sufficient to bring indigenous languages to the critical point they stand at today. However it is clear that U.S. policy is not sufficient to help indigenous peoples bring them back. The bitter irony of the situation is not without precedent. It is up to those of us who do not speak the language to learn. It is up to those who do speak the language to teach. The incorporation of custom and tradition in the tribal justice system cannot be considered without taking into consideration the language of discourse in the tribal justice system.

Process

I want to focus on one particular aspect of process, though there are many to which I could refer. Very early on, as we began deliberating cases before us, the possibility that we might not all agree on an outcome emerged. The Council resolution provided the option to enter majority and minority decisions. The attorneys, familiar with the concept, accepted the possibility that a judge might have to pen a dissent. However, when that possibility actually was encountered, the elders empathically disagreed. The possibility that a lone dissenter was correct and the majority in error, and could convince the majority of the correctness of their position had to be seriously considered.

Consensus was established as the preferred method for decision-making, not only because of the Court's desire to be in agreement or correct, but because consensus is the traditional method for arriving at decisions in Pueblo communities.¹⁸ We would talk the matter over until there was consensus. However, the outgrowth of employing consensus in the group proved to be much more than ensuring correctness. Consensus necessitates the need to hear from everyone, to listen carefully, and to consider positions. It builds group cohesion and generates respect for everyone's opinion. As a result consensus meant that we had to bridge the gap between different generations, between western law-trained professionals and non-law trained lay people, between western education and indigenous knowledge. It has proven to be important to the success of building relationships and understanding among the Justices. Majority rule is less democratic than consensus, forcing the position of the majority on the group can, in fact, be more harmful in small communities where there is a greater need for people to operate out of agreement rather than out of expedience.

Knowledge or making the invisible visible

From the outset the elders exposed the attorneys' western knowledge of the law and procedure as laden with values and concepts in conflict with the indigenous worldview of the people of Isleta. It is clear that two knowledge systems are vying for superiority in the development of tribal court systems. Perhaps the appointment of elders and lawyers to the appellate bench was the greatest mechanism for alerting both to this stark reality. The development of rules of procedure for the Appellate Court proved to be an exercise in taking legalese out of procedure and limiting and tailoring rules to the use of the Court primarily by lay people as opposed to attorneys. The greatest challenge was explaining the need for certain rules to the elders and obtaining their consensus, as well as anticipating rules necessary to accommodate a type of customary practice expected by the people and envisioned by the elders. Wholesale importation of the State of New Mexico's Rules of Appellate Procedure was not an option. It was here that the indoctrination and influence of a western legal education was most obvious.

The Anglo-American appellate system is designed for use by attorneys, the tribal appellate court system functions with the occasional attorney. The Anglo-American system is largely impersonal, the Isleta Court system operates for a society that is inter-related and known to one another, and the appellate judiciary is a part of that inter-related society. The procedural rules developed by Anglo-American courts arise from underlying legal principles, which may or may not exist in the Pueblo, either in adopted form or in traditional approaches to the law.

Conclusion

The creation of an Appellate Court comprised of elders and lawyers has had a profound effect on the direction of the Court. Had the Court been comprised only of lawyers, much of the influence of the elders would have been lost. The Council's acts of delegating its appellate authority and pooling non-lawyers with lawyers on the appellate bench were not the only catalyst that initiated a significant jurisprudential shift; the acts of affirming traditional law and the articulation of the expectation that both lawyers and elders are to teach and learn from one another were also important. We have only begun the journey.

* Although it is usual practice for *Land Rights Laws: Issues of Native Title* to peer-review papers for publication, this paper has not been peer-reviewed

¹ A version of this essay entitled "Preserving Tribal Culture and Tradition in the Justice System" was originally presented at the New Mexico Tribal-State Judicial Consortium's Cross-Court Cultural Exchange, October 25, 2001, hosted by the Pueblo of Laguna. A revised version was presented at the Northern Plains Indian Law Center, University of North Dakota School of Law on April 2, 2002. This essay is an excerpt of the paper presented and is a work in progress.

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³ See, Coco Iwamoto with Frank Cerno, Jr., ed., Pueblo of Laguna Government Profile, (2001) 1 Tribal L. J. <http://tlj.unm.edu>

⁴ See Christine P. Zuni, *Southwest Inter-tribal Court of Appeals*, (1994) 24 N.M.L. Rev. 309. I served as court administrator for SWITCA from 1992 to 1993 and as Appellate Judge in appointed cases.

⁵ See Ernesto Lujan, *Taos Pueblo Court*, 1994, Indigenous Justice Conference materials (on file with author). The 1994 Indigenous Justice Conference was hosted by the Pueblo of Santa Clara and the Office of Indian Affairs in Santa Fe, New Mexico.

⁶ Under the Pueblo of Isleta Constitution, the Council has appellate court authority, which it can delegate. The 1999 delegation was the first time since the adoption of the Constitution by the Pueblo of Isleta in the 1940s that the Pueblo Council chose to delegate this authority.

⁷ These included tribal members John Padilla, Sr., Edward Abeita, Tony Lucero, and John Jojola.

⁸ The current members of the Isleta Appellate Court are Chief Justice Edward Abeita, and Associate Justices Tony Lucero, William Bluehouse Johnson, Denise Chee, and myself.

⁹ Frank Pommershiern, *Tribal Court Jurisprudence: A Snapshot from the Field*, (1996) 21 Vermont L. Rev. 7. Professor Pommershiern uses this quote in reference to the development of a tribal jurisprudence. He further states, "Although literature is not law, in periods of liberation, law too will confront dominant norms." The Heaney quote grabbed my attention and I use it literally in reference to the language spoken in tribal courts.

¹⁰ James Estes, *How many indigenous American languages are spoken in the United States? By how many speakers?* (visited February 10, 2002) (<http://www.ncbe.gwu.edu/askncbe/faqs/20natlang.htm>). The figures used for Southern Tiwa speakers, which would include only the Pueblos of Isleta and Sandia, is based on 1980 census figures. When the combined 1980 figures for Southern and Northern Tiwa speakers (2,558) is compared to the 1990 census figure for Tiwa speakers (2,338), which includes both Northern and Southern Tiwa speakers (Taos Pueblo, Picuris Pueblo, Isleta Pueblo, Sandia Pueblo), it is clear that there is a decline in Tiwa speakers.

¹¹ U.S. Bureau of the Census, Characteristics of American Indians by Tribe and Language, U.S. Summary, American Indian Languages Spoken at Home by American Indian Persons 5 Years and Over in Households: 1990, Table 17, p.869, (visited February 10, 2002) (<http://www.census.gov/population/socdemo/race/indian/cp-3-7/tab17/pdf>).

¹² U.S. Bureau of the Census, Characteristics of American Indians by Tribe and Language, U.S. Summary, American Indian Population by Selected Tribes: 1990, Table 1, p. 19, (visited February 10, 2002) (<http://www.census.gov/population/socdemo/race/indian/cp-3-7/tab01.pdf>).

¹³ See Marie Battiste and James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage, A Global Challenge* Saskatoon, S.K: Purich Press, 2000. See also, Allison M. Dussias, *Waging War With Words: Native American's Continuing Struggle Against The Suppression of Their Languages*, (1999) 60 Ohio St. L.J. 901, 923.

¹⁴ See Native American Languages Act of 1990, 25 U.S.C. § 2903(6) (1994 & Supp. 1997).

¹⁵ See Dussias, *supra* note 13, at 905. (“The U.S. government adopted the policy of eradicating the allegedly inferior Native American languages and replacing them with English in the schools that it established and supported to educate Indian children.”)

¹⁶ Id. §§ 2903, 2903(6) (1994).

¹⁷ Id. § 2904.

¹⁸ Since the creation of the first Appellate Court in 1999, only one case has not been decided by majority decision.

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