Divorce and Real Property on American Indian Reservations: Lessons for First Nations and Canada

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ABSTRACT

Four case studies of American Indian nations' treatment of matrimonial real property disputes under formal tribal law, customary law, state law, and some mixtures are presented. Derivative lessons suggest that First Nations, supported by the Government of Canada, ought to develop their own rules and adjudication mechanisms to address these disputes.

RÉSUMÉ

Quatre études de cas sur la façon dont les nations amérindiennes traitent les disputes pour les biens immobiliers matrimoniaux sous la loi tribale formelle, le droit coutumier, le droit interne et quelques mélanges sont présentés. Des leçons dérivées suggèrent que les Premières nations, appuyées par le gouvernement du Canada, devraient développer leurs propres règles et méchanismes d'adjudication pour adresser ces disputes.

INTRODUCTION

The *Indian Act*, which determines many aspects of law on First Nations reserves in Canada, does not include provisions for the division of reserve-based real property when marriages break down. Provincial law also is limited with regard to these issues. Under the *First Nations Land Management Act*, a few First Nations have had the opportunity to develop rules for property division that accord with community interests and needs, but the fact remains that most settlements occur in the absence of clear policy. Women and children may suffer (and, anecdotally, *are* suffering) as a result.

The situation in the United States (US) bears comparison. In some American Indian nations, tribal law, either formal or customary, governs divorce and the division of reservation-based real property. There also are Indian nations in which state law holds great sway, and still others that may be more similar to the Canadian situation, where the policy regime that applies - and even what the policy is - may be unclear.

This paper presents case study based learning about the way issues concerning real property on American Indian lands are addressed when couples divorce, offers observations based on the cases, and concludes with lessons learned. Ultimately, it speaks to the relative success of Native sovereignty over matrimonial real property, the usefulness of indigenous policy and dispute resolution systems, and the impact of non-Native dominance over divorce and the disposition of property.

METHODOLOGY

Four sites were selected for the study, based on an *a priori* determination of the type of legal regime that might govern matrimonial real property. We expected that decisions would be governed by formal tribal law in the Navajo Nation, at least partially by informal or customary tribal law in the Hopi Tribe, by state law in the Luiseño Indian nations, and by a somewhat unclear legal regime in the Native Village of Barrow. We contacted key informants at each site and made site visits. Where possible, we reviewed legal cases, tribal constitutions, and tribal codes. Finally, we conducted a brief literature review, to better understand Native views of divorce, property, and gender rights.

THE FOUR CASES
The Navajo Nation

The Navajo Nation is the largest American Indian nation in the United States. With a resident membership of 168,000 and another 80,000 members living near the reservation, it spans 16.2 million acres and stretches across parts of New Mexico, Arizona, and Utah (Navajo Nation Washington Office 2003).

The traditional Navajo justice system relied on Navajo common law and consensus-oriented judicial procedures, and its aim was simple: to restore harmony. These approaches were weakened by the forced introduction of Bureau of Indian Affairs (BIA) Courts of Indian Offenses in 1892 and the Nation's adoption of a Western court system in 1959. Only in the early 1980s were judicial branch officials able to undertake reform. In 1981, the Chief Justice began reintegrating traditional law into the court system. In 1982, the judicial branch created the Peacemaking Division, a forum for community-led, consensus-based dispute resolution based on the Navajo philosophy of *K'e*, which values responsibility, respect, and harmony. Through these reforms, Navajo common and statutory laws have become the laws of preference in the Nation's courts, and 250 Peacemakers help to resolve a wide variety of individual, business, and property disputes. The Nation is now known for having one of the strongest, most independent, and most mature court systems in Indian Country.

Navajo rules governing divorce used to be quite simple. Because couples lived with the wife's clan, a woman seeking to divorce simply placed her husband's saddle (and other personal belongings) outside the door of their home. Instead of focusing on property settlements, traditional divorce practices emphasized family and clan relationships. Today, the familial focus remains, but a more complex set of rules and procedures governs divorce. These guidelines are laid out in the Navajo Nation Code and further specified by judicial rules and common law.

At Navajo (and indeed throughout Indian Country), a variety of real assets may enter into divorce proceedings, including fee land, individual trust land, homesite leases, land-use permits, houses, grazing permits, and mining claims. Significantly, none of these save homes (hogans) are traditional types of real property - the rest are by-products of colonialism, in that the US government created them through the *Dawes Act* ("Allotment Act") and other re-organizations of Indian land and claims. Also traditionally, in a matrilineal and matrilocal society like Navajo, the hogan would not have been in dispute; it would belong to the wife. Yet today, the Navajo courts have jurisdiction over all of these properties in a divorce. The code states, "Each divorce decree shall provide for a fair and just settlement of property rights between the parties" (Navajo Nation Code, Title 9, Chapter 5, Section 404).

The code's emphasis on equity is reinforced in *Shorty v. Shorty*, A-CV-05-08 (Court of Appeals of the Navajo Nation, 1982), which establishes a definition of equity that is not synonymous with equality. Rather, it focuses on the well-being of the divorcing parties and of their families and clans. Among other factors, Navajo conceptions of equity take into account both spouses' economic circumstances, children's needs, and customary Navajo law (such as rules dictated by clan relationships). The idea is that the parties should "start divorced life on some sort of equitable basis" (*Navajo Law Digest* 1995, p. 189).

This consideration gives rise to outcomes that appear dissimilar. In *Johnson v. Johnson*, A-CV-02-79 (Court of Appeals of the Navajo Nation, 1980), the Court awarded land leases to a mother (leases which had been passed from a father to his son and which the son claimed as his separate property), although she was charged to hold them in trust for the children produced by the marriage. In *Livingston v. Livingston*, 5 Nav. R. 35 (Court of Appeals of the Navajo Nation, 1985), the Court ordered a wife to pay her husband, who had been given custody of the children, for his interest in the hogan. The ruling in *Shorty* gave each party the opportunity to purchase the other's interest in the family home, to sell the home and home site lease and equally divide the profits, or to have the wife remain in the home until the youngest child reached majority and then sell and divide the profits. The common thread in these decisions is adherence to Navajo conceptions of equity, fairness, and justice rather than strict (and perhaps more Western) adherence to a "divide equally" rule.

Still other cases support and clarify this claim. *Charley v. Charley*, 3 Nav. R. 30 (Court of Appeals of the Navajo Nation, 1980), states, "Where the state and tribal standards are different, ...the District Court must be fair and just, but it does not need to be equal in the division." *Begay v. Begay*, A-CV-06-89 (Supreme Court of the Navajo Nation, 1989), directs trial judges to consider equal division a starting point and, if they believe an unequal division to be more equitable, to document the reasons why. One reading of the persistent focus of Navajo courts on equitable division is that the standard provides judges with adequate scope to protect parties to suits (especially women and children) who might not be best protected by equal division.

The Hopi Tribe

The 1.56 million-acre Hopi Reservation is located in northeastern Arizona and is home to 7,500 Hopi citizens (Tiller 1996, 210). The Tribe is known for its intense village loyalties and deep traditional village culture. Indeed, the Tribe is a confederation of twelve villages, in which the central tribal council has authority over certain "big picture" issues but more local issues are village-only matters.

In Hopi tradition, marriage is a community relationship, not just a personal one between a husband and wife, and there are specific ceremonial duties the bride, groom, and other family members must perform. Marriage is seen as affecting the cosmos, weather, and crops, which underscores the Hopi belief that marriage is forever. "Wedding robes are only made once and cannot be made again," noted a Hopi elder. (Notwithstanding these traditional decrees, Hopi informants also indicated that, similar to Navajo custom, if a woman wanted a man to leave a relationship, she would place his footwear outside the house.)

Clearly, Hopi customary beliefs and modern practices have diverged. As one Hopi Judge explained, the mere fact that single parents are now common demonstrates that the customs of marriage and family are not adhered to the same way as they were in the past. These contemporary realities, including divorce and the issues it raises, have required the Tribe to craft policies and procedures to address them.

Hopi residents file dissolution of marriage petitions in the Hopi Tribal Court. Because the Hopi code requires a residency term before the tribal court can assume jurisdiction, some divorce proceedings are, of necessity, filed in state courts instead. Yet in either case, if there is property at Hopi linked to one of the parties, the affected village has original jurisdiction to decide any controversies that arise concerning it.

Village power to decide such matters is acknowledged in the Hopi Constitution and in case law. The constitution reserves to individual villages the power to address family disputes and regulate family relations in villages. In *Ross v. Sulu*, No Docket Number Available (Appellate Court of the Hopi Tribe, 1991), the court notes, "Only after the village resolves the underlying dispute pursuant to established custom can the parties come to tribal court for enforcement of their rights as determined by the village...."

An important concept behind the practice of making property decisions in divorce at the village level is that this may be the fairest place for the decisions to be made. Since village decisionmakers have to live with disputants and/or their relatives, there is a strong incentive to create an equitable and peace-promoting resolution. Indeed, informants stressed that much of the focus in such decisionmaking at Hopi has been on the appropriate and equitable use of property as opposed to the determination of ownership, which has not been central to Hopi tradition.

The Luiseño Indian Nations of California

This case is drawn from the experience of several of the seven Luiseño Indian nations in southern California. Because each has a relatively small population and land area (average population is 650 and average land area is 6,050 acres, U.S. Department of the Interior 1999 and 2000, respectively), the larger group provides more examples of the complexities of real property questions in divorce. Before turning to examples, however, it is necessary to consider the ramifications of Public Law 83-280.

Public Law 83-280

This federal law establishes, for six states (including California and Alaska), state jurisdiction over criminal matters and some civil disputes, including divorce, in Indian Country. Therefore, California state courts have concurrent jurisdiction over divorce, and tribal members can seek divorce decrees from either a state or tribal court. However, a variety of factors, including limited funding and a lack of state support (motivated by P.L. 83-280), has meant that most California-based tribes have yet to develop courts. Tribal members are forced to use state courts or not divorce at all. The other wrinkle in the law is that it reiterates states' inability to alienate or encumber Indian property that is held in trust by the federal government. In other words, P.L. 83-280 places some states squarely in the midst of divorce matters by giving them concurrent jurisdiction, but then caps their power by reserving decisions over trust land to tribes.

Anecdotes

In introduction, we note that in Luiseño tradition, divorce was a case of one party simply leaving the home. Due to assimilation, intermarriage, and the imposition of Western law, this method of divorce is no longer possible. Also historically, Luiseño people did not own real property. They lived in villages and, depending on the season, moved from coast to desert. The reservation system changed this pattern and placed an emphasis on boundaries, property designation, and ownership.

The accounts below bear out the greater complications in divorce and property settlements in divorce under the modern regime:

1. A female tribal member sought a divorce from her husband, who was a member of another Native nation. Before marrying, she built a home on land leased from her tribe. In the divorce, the husband claimed he should be compensated $60,000 for improvements to the house, which had been appraised at $160,000. The wife argued that because the house stood on inalienable tribal land, the appraisal was too high. Her lawyer didn't know how to handle this issue, nor did other state court personnel, and the suit stalled for five years, costing the wife over $8,000 in attorney fees.

On reflection, the wife feels that the state system failed her. The players' lack of familiarity with tribal regulations and federal Indian law destroyed any security she felt in the process. She bore the cost of high legal fees and of lost earnings whenever she had to go to court. Although her former spouse is delinquent in child support, her experience has convinced her that pursuing enforcement of the award is not worthwhile. By contrast, she was hopeful about the potential of a tribal court. A tribal court judge would likely have been better informed and, thus, able to craft a more timely resolution that protected both parties' property rights.

2. A tribal member wife and her non-Native husband lived in a home owned by the tribe's housing authority, leased by the wife, and located on trust land. The wife did not feel the home or the land should be considered real property relevant to the case because she did not own them and because her husband, as a non-member, was ineligible to sign a tribal housing authority lease or receive a tribal land assignment. But his attorney was adamant that the properties be part of the case. Despite verifying that the wife did not own the land or the house, he continued to refer to her "receipt" of the home in negotiations. As a result, the settlement papers noted that the house and land went to the wife.

Even after the settlement, the dispute spilled over into arguments about other property. The husband contended that he was due compensation for upgrades to the house, a claim he dropped only when the wife allowed him three of the family's four cars (the settlement had granted them each two).

3. A tribal-member woman seeking a divorce has a home on trust land. Her partner is a member of another tribe and has subjected her to domestic violence. She was initially hesitant to seek relief via the state courts and sought help from her tribal council. The council told her that its only option absent a tribal court was to banish the husband, which it was disinclined to do. In order to gain relief, the woman has had to seek help from the county sheriff and, for her divorce, the state courts. Now she is worried about how issues concerning the family home and land will be decided,

particularly because of the tribal council's reluctance to act on the domestic violence issues.

These anecdotes show that state court dominance can cause hardship for Luiseño band members, and may even increase the possibility of inequitable outcomes. Because state court personnel are unfamiliar with (for instance) tribes' jurisdiction over trust land, housing lease and home ownership regulations in Indian Country, and the remedies that might protect all parties to a suit, state action tends to increase the time and monetary cost required to resolve real property disputes in divorce. These drawbacks, combined with the fact that tribes themselves are ill-equipped to address the division of trust property, so that issues are left unresolved or left to the parties to work out on their own, can also result in inequitable outcomes.

The Native Village of Barrow

The Native Village of Barrow (NVB) is one of more than 200 Native villages (tribes) in Alaska. It is the northernmost village in the Arctic Slope Borough, and thus, is geographically remote. The people are Inupiaq and share language and culture with the indigenous people of northern Canada and Greenland.

We initially expected that this isolated area might be far from the interest of the state, and because NVB has a fledging tribal court, its capacity to address divorce and property concerns in divorce might also be limited. Thus, we thought NVB might be a case in which there was a "policy vacuum."

This expectation was not entirely borne out. Inquiries revealed that while the tribal court is not yet ready to hear divorce cases, state courts actively hear cases involving NVB members. When pressed on the issue of Native real property, however, the local Superior Court judge conceded that he could not rule on the division of trust land. Decisions affecting trust properties must be made outside the state system, and in NVB, there is currently no regularized system for doing so. While NVB has a court, codes are not in place that would allow its judges to rule on matrimonial real property held in trust. Instead, affected families tend to work these issues out on their own and report settlements back to the Director of Realty for NVB, who then registers the information with the BIA Land Office; if issues cannot be resolved locally, a US Department of the Interior administrative law judge in Anchorage may make a ruling.

Viewed historically, both divorce and property issues have become more complicated in NVB. With regard to divorce, in the past, "Neither husband nor wife had recourse to legal sanctions enforced at a higher level, so family conflicts were worked out between spouses, each calling upon close consanguine kin for assistance as needed. Husband or wife could terminate the union at any time by simply packing up and leaving" (Blackman 1989, 150). Informants noted that even today, some people do not divorce unless they wish to marry someone else.

With regard to property, for the Inupiaq "the issue of land ownership had always been one of 'relation' rather than possession. That is, the right to use a given site was based on one's relation to previous generations of kin who hunted in the area and the animals located there" (Chance 2003, webpage). Modern divergence from this tradition has created a complicated landholding pattern in Alaska, one that is largely dictated by the *Alaska Native Claims Settlement Act*. The *Act* extinguished Native title to some 365 million acres, paid compensation to 13 regional Native corporations, conveyed fee simple title to 40 million acres to the regional corporations and 200-plus village corporations, and left Alaska tribes themselves without "reservation" land bases. While existing and petitioned allotments were not extinguished, the *Act* also ended the process through which individual Alaska Natives could acquire allotted trust land. This history means that in NVB, tribal members live on a mixture of fee and trust land, and that the corporations and BIA wield substantial decision-making power over real property.

Reflecting on changes in divorce and landholding practices, one informant reasoned that as Western divorce becomes increasingly common, property disputes in divorce also will increase. Once the tribal court is able to hear divorce cases, these future litigants will be able to file in either tribal or state court. Her expectation is that many will choose tribal court, due to the judges' better understanding of Alaska Natives' property claims; however, some disputants may still choose state court, based on the perception that in a small

community like Barrow, it is impossible for tribal decisionmakers to be impartial. Weighing the pros and cons, she suggested that providing the option of filing in either tribal or state court (which, it must be stressed, is possible only in P.L. 83-280 states) may be the best alternative, and certainly better than having no choice at all (which is the current situation).

In summary, the situation in NVB is similar to that of the Luiseño nations, in which state courts can settle most issues in divorces that involve tribal members but cannot make decisions about matrimonial real property held in trust. Yet there also appears to be a more active informal system for addressing such property concerns (supported in part by the NVB Director of Realty), as well a formal venue (the tribal court) in which claims can be heard once applicable codes are developed.

OBSERVATIONS

The cases lead to several important observations about the division of matrimonial real property on American Indian reservations.

First, there are two tribes in our sample with well-developed policy for the disposition of real property when couples divorce. The Navajo Nation has the most explicit set of rules, with a mention of property issues in its code, common law, and case law. The Hopi Tribe also has rules, although they are less transparent, as property issues typically are resolved at the village level according to local custom.

These nations are not alone. Many American Indian nations have at least some formal (and probably more informal or customary) rules for resolving real property questions in divorce. For example, divorce codes for the Chitimacha Tribe of Louisiana and the Fort Peck Assiniboine and Sioux Tribes recognize tribal court authority to make orders regarding the distribution of trust land. The Eastern Band of Cherokee's code states that the tribal council must decide the division of trust property when couples divorce. The Mashantucket Pequot Nation's code notes that the tribal court may order the division or sale of non-trust real property.

By contrast, the Luiseño Indian nations and the Native Village of Barrow are examples of tribes that lack formal rules to guide decisionmaking about real property in divorce. As a result, problems can arise. Rulings may be inconsistent, inappropriate (especially if made by a state court), or not made at all. The NVB case draws particular attention to the importance of tribal policy, as a tribal court exists there but the tribe has yet to develop law for the court to interpret, act upon, and enforce. Thus, the Village continues to cede jurisdiction over divorce to the state and accept the partial solutions state courts are able to offer.

Second, there is a critical difference between Native nations that have both rules for settling matrimonial real property questions as well as tribal dispute resolution forums, and nations that do not have the two. Again, the Navajo Nation and Hopi Tribe offer positive examples. They have, as noted above, code and custom for the resolution of such questions, and they possess indigenous forums that are able to hear cases. These tribes, in possession of both rules and dispute resolution mechanisms, are able to offer complete solutions to the issues at hand.

NVB has a court but no rules governing divorce or real property disputes in divorce, which makes the court ineffective with regard to these issues. The Luiseño tribes have neither rules nor courts. Already, there is pressure in the Native Village of Barrow to develop law so the court can exercise its jurisdiction. The Luiseño are one step behind: members believe that the development of court infrastructure would create a similar pressure for policy development, so that important real property questions (such as who may stay in a family home, what counts as real property, and how property on trust land should be valued) can be resolved. Indeed, concerns like these have led several of the Luiseño nations to begin work on an intertribal court system.

Third, in our sample, parties to the cases generally viewed the outcomes from tribal dispute resolution processes as equitable, whereas state court-mediated outcomes were less often seen as fair. This greater dissatisfaction stems from several problems litigants experience in state courts: judges and lawyers usually do not understand the issues concerning real property in Indian Country, non-Indian courts do not apply indigenous standards, the courts lack jurisdiction over trust property, and appeals can be difficult.

The Navajo and Hopi cases are important examples of equitable decisionmaking by tribal courts. Navajo courts are empowered to take many factors into account in their divorce settlements, which leads to resolutions that are equitable by Navajo standards. At Hopi, informants noted that only village leaders know the traditions that will result in indigenously equitable solutions to real property disputes. Moreover, a resolution based on foreign law and grounded in non-Hopi beliefs would run the risk of disregarding other community interests, which could cause further conflict among village members.

When an initial settlement *is* considered unfair, indigenous systems also offer more appropriate and approachable means of appeal. Both the Navajo and Hopi systems have higher courts that are able to hear questions raised by lower bodies' rulings, and these courts are used when matrimonial real property questions arise. In fact, a number of Navajo cases examined for this research were appeals. By contrast, when state court settlements are unsatisfactory, anecdotal evidence suggests that parties may be too disenchanted by the system to continue along the state route of appeal.

This is not to say that tribal systems are necessarily fair and state systems unfair. As one NVB informant noted, the close relationships of Village members might threaten the equitability of tribal court outcomes. Yet the advantage offered by state forums would have to be substantial - it would have to offset the equity-compromising disadvantages noted above.

Tribal forums may produce results that are more equitable for non-members as well. Like tribal members, they would avoid wasting time and money as state court personnel acquainted themselves with Native real property issues. And although the options for real property division will be different from the options that exist when two non-Indians divorce, tribal courts' greater familiarity with the possibilities increases the probability that *some* remunerative property settlement will be reached, which is fairer than the alternative of no settlement.

Fourth, tribal courts that are in good form are better able to deal with situations in which there is a lack of clarity in law or practice. Their complete jurisdiction helps judges see the full picture, and as needed, craft new case law. Navajo courts have even adopted the practice common in US courts of recommending legislation. Such evolution may be possible in state law, but it is less likely, may not fit each tribe in the state's borders, and could not reach out to trust property issues.

Fifth, much of the confusion over the division of on-reservation matrimonial real property is the result of US government policy. For example, the kinds of real property that are disputed have generally been created by US policy, whether they are trust lands, fee lands, mining claims, grazing sites, etc. Disputants and courts have had to find ways to work with these types of property and even to deal with the concept of "real property," which is foreign to many Native societies.

Additionally, US policy accounts for some of the underdevelopment of tribal courts. As noted, P.L. 83-280 limits some tribes' incentives to develop courts. The *Indian Reorganization Act* (IRA) has had even broader impact. The constitutions of tribes organized under the IRA (some 200 of the 560 Native nations in the US, Porter 1997), and even tribal constitutions merely based on the IRA model (a category that includes even more tribes), often note only that tribal councils are empowered to create judiciaries. Even when an IRA council creates a judicial body, it frequently lacks independence.

Notably, the Bureau of Indian Affairs has not significantly impeded the disposition of reservation-based matrimonial real property. Typically, the Bureau only records changes to trust land holdings that result from divorce proceedings, so the main possibilities of a harmful effect are if it has kept bad records (some probate records are in terrible shape) or if it is very slow in taking action.

Finally, we note that informants in this research focused more on self-governance concerns than on gender-related issues. Even when asked directly, none of our interviewees felt that the policy questions surrounding matrimonial real property disputes touched on particular "women's issues." Indeed, the only reference made to gender concerns at all underscored the preference one Native woman would have had for a tribal (and, hence, self-governance-promoting) hearing: The wife in one of the Luiseño examples criticized the state court judge for acting like she "was not even there, *which is difficult for Indian women*, especially when there are children involved,

because they want to speak up about their children in court. But the judges and attorneys always tell the mothers to be quiet."

Various justifications can be offered for American Indian women's focus on their nations' rights to sovereignty ahead of specific gender rights. Echoing the preceding paragraph, many may feel that gender rights are better protected in culturally appropriate forums. It also has been argued that colonialism is an overriding problem: "We are *American Indian women*, in that order. We are oppressed, first and foremost, as American Indians, as peoples colonized by the United States of America, *not* as women" (Lorelei DeCora Means, quoted in Jaimes and Halsey 1992, 314). Further, many American Indian women do not support, and disassociate themselves from, Western conceptions of feminism (Jaimes and Halsey 1992; Monture-Okannee 1993; Shoemaker 1995). This is not to say that gender concerns are unimportant to American Indian women. Osburn (1995), for example, argues that colonizers either assumed the existence of or imposed patriarchal social structures in their interactions with Native cultures, to Native women's detriment. The point here is only that gender issues have not been dominant in the constellation of rights issues with which American Indian women struggle.

It also may be that in the US setting, conflicts between self-government rights and gender rights have been few. The overwhelming attention focused on one example - *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (U.S. Supreme Court 1978), in which the Court upholds the Pueblo's right to establish its own membership rules and, hence, Julia Martinez's children are denied membership - may itself be evidence of the paucity of additional examples. Nonetheless, we too turn to the case in our conclusion, as the controversy surrounding its outcome provides a critical perspective for assessing the policy lessons that emerge from this research.

LESSONS AND IMPLICATIONS OF THE U.S. EXPERIENCE

The examples and observations give rise to several lessons for First Nations and Canada as activists and government officials struggle to create better regimes for the division of matrimonial real property on Native lands.

> 1. Tribal sovereignty over matrimonial real property issues has been more successful than the alternative(s).

This study attempted to examine four situations among American Indian nations: governance of matrimonial real property decisions by formal tribal law, by tribal custom, by state law, and by an unclear legal regime. In the end, we found that two rather than four situations are typical: those in which tribal law (often a mix of formal law and custom) dominates and those in which there is a combination of state law and tribal responsibility. Upon examination, we conclude that the resolution of real property disputes under tribal law and by tribal courts has been more successful than dispute resolution under the alternative regime. Here we stress that the record demonstrates the importance of both rules and dispute resolution mechanisms. Native nations with one but not the other cannot offer the same advantages in the disposition of matrimonial real property in divorce. Because they possess jurisdiction over most reservation-based real property likely to enter divorce disputes and because tribal court actors tend to be more knowledgeable of the laws relating to such property, tribal forums applying tribal law are able to make complete settlements that are generally perceived as fair.

> 2. If external bodies must rule in matrimonial real property disputes, the participation of knowledgeable decisionmakers would improve outcomes.

One of the advantages of tribal forums is the greater likelihood that decisionmakers are knowledgeable about the laws and customs that affect rights to reservation-based real property. When decisionmaking must occur in non-tribal forums, the quality of the dispute processes and outcomes would improve if this knowledge could be replicated.

For example, some Native nations lack the resources to administer their own courts, and one option for them is to participate in multi-tribal courts. Judges are less likely to share litigants'

traditions, but they *are* likely to have a good understanding of on-reservation real property issues, which increases the probability that concerns will be settled in the best manner that tribal and federal law allow. This is also an idea proposed by First Nations women, some of whom desire "a specialized tribunal administered by First Nations to provide increased access and greater cultural awareness in judicial-type decisionmaking concerning matrimonial real property in the reserve context" (Cornet and Lendor 2002, 46).

Of course, many other tribes - including those in the process of developing courts and developing rules to govern matrimonial real property disputes - must continue to rely on non-Indian courts. We stress that even in these cases, if court personnel have basic knowledge of the issues surrounding on-reservation real property, disputants' sense of wasted time would likely decrease, and the actual content of settlements improve.

> 3. It takes time for Native nations to develop appropriate rules and adjudication mechanisms to govern matrimonial real property disputes.

Native nations developing rules and systems to govern the division of matrimonial real property face a number of decisions about what will work best for their citizens. This can be slow going. As shown in the Luiseño and NVB cases, development also may be slowed by financial constraints, human capital constraints, and the need for institutional coordination. Thus, the process takes time, and an unpredictable amount for each Native nation.

One possible difficulty is that some parties to divorces may be harmed while waiting for particular Native nations to put rules and systems capable of addressing matrimonial real property questions in place. With that in mind, we believe it is advisable to speed the processes of code and court development along. One approach is to provide incentives for progress. Examples exist in other areas of law: The US Department of Justice Drug Courts Program Office has provided funding to American Indian tribes for the development of drug courts, institutions aimed at combating alcohol and drug use, and the US Congress has provided funding through the *Children's Justice Act* to spur the creation and improvement of tribal children's codes.

Taken together, the lessons of the American Indian experience offer a clear policy prescription for First Nations and Canada: Native nations ought to develop their own rules and adjudication mechanisms for addressing matrimonial real property disputes, and Canada ought to allow and support (with law, resources, and time) the development of such institutions. The ultimate goal would be for each Native nation to possess rules and adjudication mechanisms uniquely suited to its circumstances, as indeed, nations such as the Navajo Nation and Hopi Tribe already have.

We expect (in line with the controversy surrounding *Santa Clara Pueblo v. Martinez*) that certain parties to divorces or certain rights groups will view this variation among Native nations, and between Native nations and mainstream society, as a problem with indigenous law and processes. These differences, interpreted as a "problem," could then be used as a reason to circumvent tribal rulings altogether.

This would be inappropriate. One reason is that only indigenously chosen rules and systems are supportive of Native nations' self-government, which is desirable for reasons beyond tribes' differential success at resolving matrimonial real property concerns. Evidence from the American Indian setting demonstrates that greater socio-economic success tends to accompany greater self-rule (Cornell and Kalt 1998). To chip away at self-government, even in ways that seem unrelated to socio-economic outcomes, tends to diminish that success.

Another reason these issues ought to be resolved by tribes themselves is that Western law is not based on Native beliefs and principles. Thus, solutions designed by non-Natives can be a poor fit and create more problems. This may be especially true when dealing with issues that affect Native women, whose history is different from European women's history (Shoemaker 1995). Furthermore, individual Native nations' histories vary, so there is not even one indigenous solution to the perceived

problems with the division of matrimonial real property on Native lands (compare Mihesuah 1998).

Some feminist scholars have argued that such resolute faith in Native nations' law and processes is misplaced, as current tribal rules and procedures actually stem from the imposed, patriarchal practices of colonizers. Indeed, this is the generalized version of the most persuasive argument against the *Martinez* outcome (MacKinnon 1987; Resnick 1989). Yet there is a fundamental problem with this interpretation of indigenous law and processes, particularly in the US context: it suggests that Native nations are monolithically and continuously the powerless victims of colonial oppression. For instance, MacKinnon and Resnick contend that early in the twentieth century tribes were forced to adopt laws discriminating against women as a means of protecting tribal land. Arguing from the example of Santa Clara Pueblo, they miss the fact that many tribes - even those suffering the same threat of land loss - upheld less gendered rules when transcribing their constitutions in the Indian Reorganization era. They also miss the fact that the Pueblo nations had long experienced the pressures of colonization (resisting first the Spanish, and later, Native raiders from the north and west, Mexicans, and Americans) and had learned ways to undermine the advances of colonizers and keep their cultures relatively intact (Spicer 1962). Rather than suggesting that the laws written down by Santa Clara in the 1930s were a necessary accommodation given even more worrisome colonial advances, a broader interpretation of the tribal legal milieu parallels our conclusion above, that there is a *variety* of culturally legitimate Native legal regimes, and suggests that in transcribing its national membership/citizenship rules, Santa Clara Pueblo made a positive choice for a particular cultural practice. (We understand that in Canada, MacKinnon and Resnick's argument may have more traction, given a history of patriarchal relations created by the *Indian Act*. Yet the point remains that some First Nations *have* broken away from the strictures - patriarchal and otherwise - of the *Indian Act* and are constituting themselves in more workable and more indigenous ways. Like US-based Native nations, First Nations have a degree of choice.)

If, when a Native nation has the opportunity to thoughtfully craft its own codes and formalize its legal practices, these rules and procedures nonetheless give rise to divisions of matrimonial real property that women's rights advocates view as unacceptable, another argument is that the Native nation's culture must itself be patriarchal. What, then, is the right response? Western feminists acknowledge that this is a difficult question (Higgins 1996, Okin 1999), and yet have tended to view gender rights as fundamental human rights with "trumping" value (Volpp 2001) - in this case, trumping value over an indigenous nation's right to self-determination.

We are hesitant to agree. First, we reiterate the points made above, that American Indian women have tended to focus on their nations' rights to sovereignty and self-determination ahead of gender rights, and that chipping away at self-government in any way is likely to have knock-on effects. Second, we raise the point that while it is convenient to discuss "a Native nation's culture," that culture, indeed the culture of every society, is in flux. If it is already difficult to justify "sanitizing indigenous cultures" (paraphrasing Gana 1995, 140-41) with the fell swoop of national or international human rights laws because of the potentially destabilizing effect of those actions, feminists should find it even more difficult to do so when a number of Native nations are already on self-directed paths of cultural change that point toward an outcome more in line with the mainstream. We offer the "problematic" Pueblos themselves as an example; Prindeville (2004) has found a mounting, internally driven, wholly indigenous pressure for improving the status of women in those societies. Third, we fall back on our own belief in the trumping value of sovereignty, that as sovereigns, Native nations have the right to establish policy, law, and methods of dispute resolution without interference from outside nations such as the United States or Canada. In line with writing that directly addresses the intersection between tribal sovereignty and the cultural differences between American Indian societies and mainstream society, our viewpoint is nuanced by the understanding that "if sovereignty means anything, it means the ability of tribes to talk about very serious issues and to choose from the array of choices which are available" (Pommersheim 1997,

466) and that sovereignty includes "maintaining the customs, traditions and values that define one tribe from another while simultaneously creating change from within to ensure an existence that the tribe defines itself" (Skenandore 2002, 370). In negotiating these important self-definitional and cultural issues, some Native nations in the US have chosen patriarchy, some egalitarian systems, and some matriarchy. For instance, among the Haudenosaunee, clan mothers wield tremendous political and social power, and male citizens tend to say "that's the way it is for us."

For those still unhappy with the policy prescription - Native sovereignty over divisions of matrimonial real property, backed by culturally appropriate codes and institutions for mediating these divisions - a remaining refuge is to criticize indigenous dispute resolution mechanisms themselves (compare *Nevada v. Hicks*, 533 U.S. 353 (U.S. Supreme Court 2001)), Souter, D., concurring, pp. 384-85). We agree that Native courts do not always "get it right." Some American Indian tribes' courts are tremendously flawed, in that politics influence personnel appointments and decisions, judges and other staff are inadequately trained, the laws enforced by the court are culturally inappropriate, etc. Tribal courts suffering from such problems are less likely to offer the advantages in the resolution of matrimonial real property disputes noted above. Yet these are not "Indian problems." They are more general problems of judicial development, from which no court system is exempt, and to avoid the development and use of indigenous dispute resolution mechanisms is not a way to avoid them.

In sum, we stand behind the implication of this research, that indigenous nations in Canada (constituted at the band level or above - this is a question of the appropriate "self" in "self government") ought to develop their own rules and adjudication mechanisms for addressing matrimonial real property disputes and that the Government of Canada ought to support them in this process. For those who remain fearful that Native jurisdiction will produce negative results for Native women, we suggest that a more fundamental problem is the incentive for those who gain power from illegitimate, *Indian Act* governments to abuse that power. In that case, the most productive course of action for both First Nations citizens and concerned outsiders is to work toward the creation of more legitimate First Nations governments (where "legitimate" is indigenously defined). This interpretation is a question for further research, and yet, the suggestion underscores the importance of crafting culturally appropriate, indigenously supported laws and institutions of government. Why not begin with mechanisms that support First Nations' jurisdiction over matrimonial real property disputes?

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