INTRODUCTION TO TRIBAL LEGAL STUDIES MODULE 4 / WEEK 4 LECTURE

JURISDICTION CONTINUED: PUBLIC LAW 280

Watch: Public Law 280: Jospeph Meyers Overview (17 minutes)

Read: **REVIEW MATERIALS FROM PRIOR WEEK**

What is Public Law 280?

Public Law 280 ("PL 280") was originally enacted in 1953 and did two things to alter the usual allocation of criminal jurisdiction in Indian country. First, it took away the federal government's authority to prosecute Indian country crimes based on 18 USC 1152 (the Indian Country General Crimes Act) and 18 USC 1153 (the Major Crimes Act) on the reservations to which it applied. Second, it authorized the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin to prosecute most crimes that occurred in Indian country. Exceptions were set forth for a few topic areas and on a few reservations, but the main result of Public Law 280 is that for most reservations in the six named states, **federal criminal jurisdiction became extremely limited** while state jurisdiction was greatly expanded.

What is "mandatory PL-280" and "optional PL-280"?

The term "mandatory PL-280" refers to the six states which Congress mandatorily conferred Indian country criminal jurisdiction to: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. Between 1953 and 1968, a number of states other than the original six, also exercised expanded criminal jurisdiction in Indian country. These jurisdictions are often referred to as "optional PL-280" jurisdictions; primarily, these include certain reservations in Florida, Idaho, and Washington.

What does it mean that federal criminal jurisdiction became extremely limited?

Prior to Public Law 280, prosecutions for crimes that occurred on the reservation were carried out by the federal government (federal marshalls) and the tribe (tribal police). After PL 280, prosecutions for crimes on reservations in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin were carried out by local law enforcement (generally, the county sheriff) and the tribe. Remember however, that by this time, the types of crimes a tribe could prosecute were extremely limited. For example, due to passage of the Major Crimes Act, a tribe could not prosecute the crimes such as murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, kidnapping, and felony child abuse. Thus, tribes had little authority to arrest and prosecute criminals or impose the sentences (*penalities like jail time*) that their communities found appropriate.

"Since tribal governments are sovereign nations, they have the jurisdictional authority to prosecute enrolled members of their Indian Nation, based on violation of tribal code. While tribes have the absolute right to prosecute their own members for any crime, they are limited by federal law in the amount of jail time they may impose. Under the Indian Civil Rights Act of 1968, the maximum sentence allowed was one-year incarceration and a $5,000 fine. These sentencing limitations were expanded in July 2010 with the passing of the Tribal Law and Order Act, which is discussed in more detail in Chapter 3, to allow for up to three years of incarceration and a $15,000 fine. Tribal courts are prohibited from prosecuting any non-Native person unless that person submits to jurisdiction." *(Crime and Justice in Indian County. Week 3)*

Tribes were also left to deal with local law enforcement, which often had a history of strained relations and lack of respect for tribal authority. This was further complicated by the fact that local law enforcement was not compensated *(paid*) for providing law enforcement services under PL 280. Local city police and sheriffs

derive payment for their services from taxes but states cannot tax tribal governments. (Today, many tribes "contract" with sheriff's departments for services – meaning, they pay the local sheriff for providing services on the reservation. This is incredibly expensive and unaffordable for some tribes.)

What types of thinking sparked the passage of Public Law 280?

PL 280 represented yet another policy shift in federal Indian policy. Previous policies focused on changing Indians, but also isolating them from whites so tribal people were placed on reservations, put in boarding schools, and tribal shared lands were allotted. By the 1950s, policy-makers advocated assimilation by integration=relocating Indians away from home communities and terminating tribal sovereignty.

PL 280 was based in federal policies of termination=disbanding of tribal governments, making Indians good Americans who could have tribal heritage but without the rights afforded to tribal governments and on tribal lands.

What changes did Public Law 280 make with regard to tribal criminal jurisdiction?

None, PL 280 only altered the allocation of federal and state criminal jurisdiction. It did not reduce nor expand tribal criminal jurisdiction.Tribes were able to retain jurisdiction under Public Law 280 due to their inherent sovereignty (*ability to make laws for their own communities*).

What changes did Public Law 280 make with regard to federal criminal jurisdiction?

Jurisdiction Before PL 280

- Federal government has plenary power (*Kagama* decision)
- Federal government has jurisdiction over Major Crimes (Major Crimes Act, 1885)
- State has no authority over tribes
- Tribes maintain civil and criminal jurisdiction over all but major crimes

Jurisdiction After PL 280

- Federal government has plenary power (*Kagama* decision)
- State government has jurisdiction over crime
- Tribes maintain civil jurisdiction
- Only affects tribes in named states
- Treaty rights not affected

What are some of the problems associated with PL 280?

Typically, the tribal Experience with PL 280 has not been positive. Many tribes report an absence of police presence, long response times, the need for better community relations, and an increase in lawlessness. Poor community relations often result from differing views of punishment and law enforcement between tribes and local sheriffs. Generally speasking, these differences may include:

Tribal:

- Holistic
- Oral customary law
- Spiritual invoked in prayer and ceremony
- Focus and restoring community & relationships

Ango-American:

- Vertical – authority is centralized
- Written statutes, complex language
- Seperation of church and state
- Focus on punishment & retribution

When a worldview that favors retribution and punishment is forced on a worldview that favors restoration of community and family, the penalties can be entremely different and severely undermine family and community.

What is the Tribal Law & Order Act?

The Tribal Law & Order Act (TLOA) is a comprehensive federal law that attempted to improve public safety in Indian Country. It was signed into law on July 29, 2010. The TLOA deals with crime prevention, policing, information sharing, prosecution, courts, corrections, and other Indian country criminal justice issues. It was designed to address some of the shortcomings of PL 280.

How does the Tribal Law & Order Act affect criminal jurisdiction in Indian Country subject to "mandatory" Public Law 280 jurisdiction?

Section 221 of the Act authorizes **tribal governments** to request that the US Department of Justice re-assume federal criminal jurisdiction over that tribe's Indian country. If the DOJ grants the request, the federal government may once again prosecute Indian Country General Crimes Act and Major Crimes Act cases from that reservation, located in a mandatory PL-280 jurisdiction.

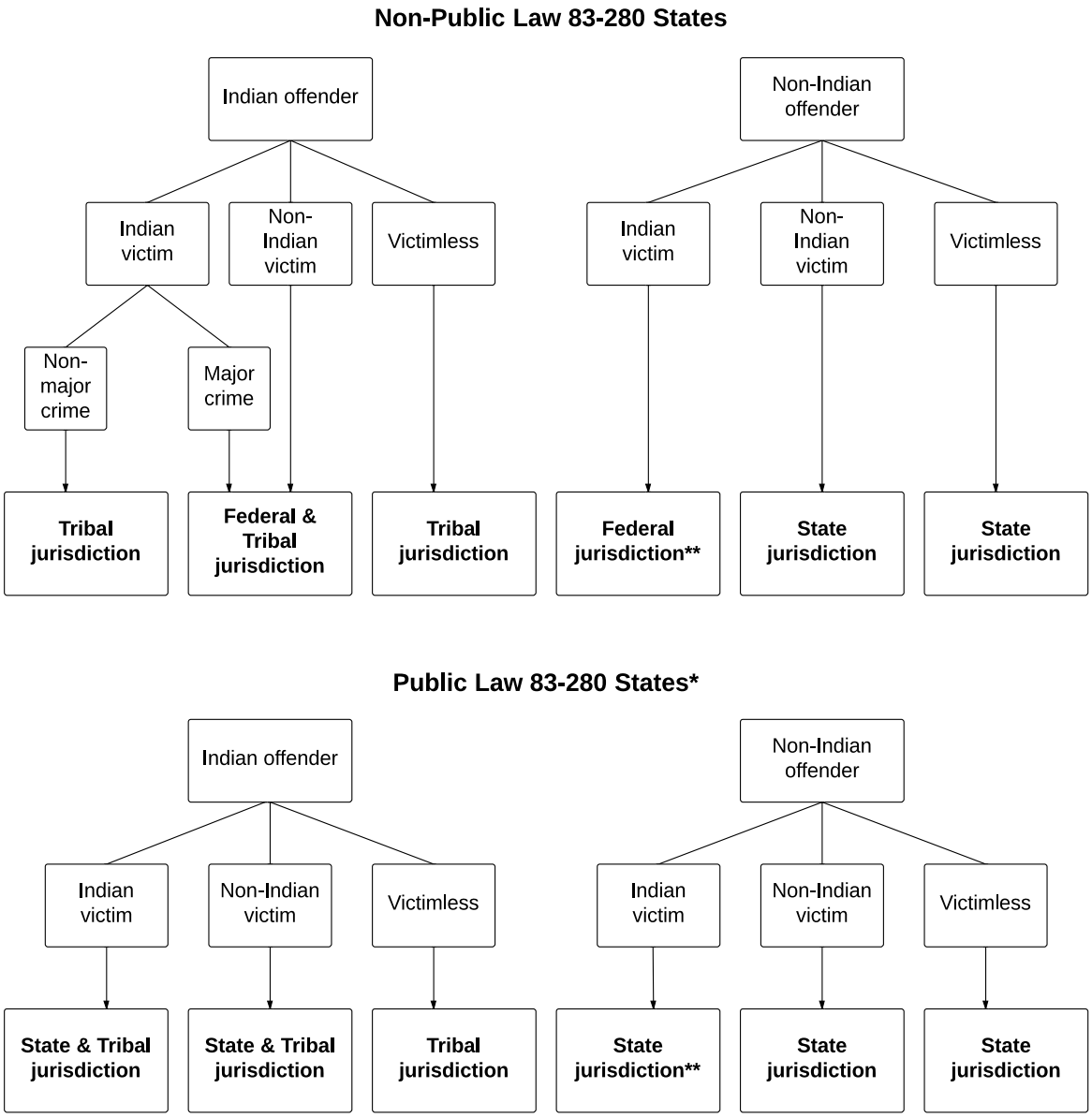
Why does this matter? It shows a shift in federal thinking. The reason only states could request retrocession before was based largely on the notion that tribes were not civilized or sophisticated enough to make decisions about their own governance. Now the federal government acknowledges that tribes can make decisions about whether they want to deal with the state or the federal government to prosecute crimes on tribal lands.

(Source: United States District Attorneys Office, United States Department of Justice, Frequently Asked Questions about Public Law 83-280. Available at https://www.justice.gov/usao-mn/Public-Law%2083-280)

Table 1.1 Major Statutes and Cases Affecting Indian Country Criminal Jurisdiction

Act or Case	Reference	Year	Description
Trade and Intercourse Act	1 Stat. 137 § 137	1790	Asserts that a State can punish crimes committed by non-Indians against Indians under the laws of the State.
General Crimes Act	18 U.S.C. § 1817	1817	General Federal laws for the punishment of non-Indian crimes are upheld on Tribal lands; Indian offenses remain under Tribal jurisdiction.
Assimilative Crimes Act	18 U.S.C. § 13	1825	Extends coverage through Federal enforcement of certain state criminal laws in certain Federal enclaves.
Worcester v. Georgia	31 U.S. (6 Pet.) 515	1832	State laws have no rule of force in Indian country
United States v. McBratney	104 U.S. 621	1881	Provides for exclusive State criminal jurisdiction over crimes between non-Indians for offenses committed in Indian country; rule later extended for "victimless" crimes.
Ex parte Crow Dog	109 U.S. 556	1883	Reaffirms Tribal self-governance and the absence of State jurisdictional authority in Indian country, as well as Federal jurisdiction in cases of intra-tribal crimes.
Major Crimes Act	18 U.S.C. § 1153	1885	Extends Federal jurisdiction to include authority over Indians who commit 7 (later amended to 16) felonies.
United States v. Kagama	118 U.S. 375	1886	Upholds the Major Crimes Act based on Congress' plenary power over Indian affairs.
General Allotment Act (Dawes Act)	25 U.S.C. § 331	1887	Created individual Indian land parcels, held in trust by the Federal government for individual Indians and Indian households, out of reservation lands, eventually leading to so-called "checker-boarded" jurisdiction as some parcels moved from trust to fee status.
Indian Country Act	18 U.S.C. § 1151	1948	Defines the scope of Federal criminal jurisdiction over Indian lands.
Public Law 83-280	18 U.S.C. § 1162; 25 U.S.C. § 1360	1953	Transfers Federal jurisdiction over Indian lands to 5 mandatory States (Alaska added upon statehood), excepting 3 Tribes, without Tribes' consent; optional for other States, also without Tribes' consent.
Public Law 83-280, amended	18 U.S.C. § 1162; 25 U.S.C. § 1360	1968	Allows States to request retrocession of Indian country jurisdiction (a return of jurisdiction to the Federal government).
Indian Civil Rights Act (ICRA)	25 U.S.C. § 1301	1968	Details rights Tribes must provide defendants in their courts while restricting Tribal courts to misdemeanor sentencing only.
Indian Self-Determination and Education Assistance Act	25 U.S.C. § 450	1975	Allows for the reassertion of control over Tribal services through self-governance contracts and other mechanisms.
Oliphant v. Susquamish Indian Tribe	435 U.S. 191	1978	Holds that Tribal courts lack any criminal jurisdiction over non-Indians for offenses committed on Indian lands.
United States v. Wheeler	495 U.S. 313	1978	Double jeopardy does not apply in cases subject to concurrent Federal and Tribal criminal jurisdiction.
Duro v. Reina	495 U.S. 676	1990	Prevents Tribal courts from exercising criminal jurisdiction over Indians who are not members of that tribe.
ICRA, amended	25 U.S.C. § 1301	1991	So-called "Duro fix" reaffirms Tribal criminal jurisdiction over all Indians, not just member Indians.
Tribal governments' consent for federal capital punishment	18 U.S.C. § 3598	1994	Requires that no Indian may be subject to a capital sentence unless the governing body of the Tribe has first consented to the imposition of the death penalty for crimes committed on the tribe's lands.
United States v. Lara	541 U.S. 193	2004	Affirms that separate Federal and Tribal prosecutions do not violate double jeopardy when a tribe prosecutes a non-member Indian.
Tribal Law and Order Act	25 U.S.C. § 2801	2010	Enhances Federal collaboration with Tribal law enforcement agencies, expands Tribal courts' sentencing authority to felony jurisdiction by amending ICRA to permit incarceration for up to three years per offense, while allowing multiple offenses to be "stacked"
Violence Against Women Reauthorization Act	127 Stat. 54	2013	Restores Tribal criminal jurisdiction over non-Indians in Indian country for certain crimes involving domestic and dating violence and related protection orders.

Figure 1.1 General Summary of Criminal Jurisdiction on Indian Lands
(Details vary by Tribe and State)



* Under the *Tribal Law and Order Act of 2010*, Tribes can opt for added concurrent Federal jurisdiction, with Federal consent. Neither this Tribe-by-Tribe issue nor the various configurations of "Optional 280" status is shown in this chart.
** Under the *Violence Against Women Act Reauthorization of 2013* (VAWA Amendments), after 2015, Tribes may exercise Special Domestic Violence Jurisdiction with the Federal government and with States for certain domestic violence crimes.