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Law of the Land—Recognition and Resurgence in Indigenous Law and Justice Systems

CHRISTINE ZUNI CRUZ

A. Introduction

Indigenous knowledge recognises that we live within the 'contexts of flux, paradox and tension'.[1] Man is less significant in the overall scheme of things than we generally think: for example, even though he can divide time in more ways than is necessary, it does not mean he can control it or dictate precisely when everything will happen, though he tries. Man is important, yes, but not always central, not always in control.

There are different types of law in the Indigenous legal tradition, and they are related—natural law or the law of nature, law of the land, law of relationships, spiritual law—ultimately shaping, dictating, and setting the law and course of life for all. Man's law is meant to operate in balance with other laws. The law of nature and spiritual law will and do operate independently, in the same realm, and in their own realm regardless of whether man's law is in balance or opposition to them, because that is the power of these laws.

Not too long ago, the Department of the Interior's Bureau of Indian Affairs employed the slogan 'Tradition is the Enemy of Progress'.[2] This slogan was actually printed and posted in Navajo country. It sent the message that there is no progress in tradition or that tradition never progresses. Certainly, there are legitimate questions about the relevancy and utility of traditional law. Does it change? Can it be used or misused in the contemporary context?

As in all legal traditions, there are reference points that may not change. In the case of Indigenous legal systems, law contained in creation narratives may be

[1] M Battiste and J (Sákéj) Y Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich, 2003) 42.

[2] *In the White Man's Image*, PBS, produced by C Lesiak and M Jones, 1991 (documentary contains photograph of sign).

constant.[3] However, like all legal traditions, the Indigenous legal tradition is a living law, it is not static, belonging to some bygone era.

Having worked in this area, I can say my experience with the emerging scholarship on Indigenous knowledge has helped me better understand the paradigm shift required when moving between the Indigenous legal tradition and the common law tradition. Indigenous tradition is embedded in an Indigenous knowledge system that informs a way of thinking that is different from Western approaches to knowledge. Indigenous legal tradition as it is contained within Indigenous knowledge reaches into time immemorial and has continued as an unbroken strand in spite of national policies aimed at completely assimilating Indigenous peoples. It continues to operate in the social consciousness of Indigenous peoples and in their everyday lives, even if it is not recognised as 'law' by the undiscerning.

This Chapter draws from my experience as a judge in tribal courts over the past years, and also builds on my teaching and scholarship on the modern law of Indigenous Nations in the United States (US) and in other countries.[4] I believe that Indigenous peoples themselves must be instrumental in promoting an understanding of Indigenous knowledge. We need to reframe the discourse and the approach to Indigenous legal tradition. In some instances, Indigenous peoples themselves must unlearn the language and legacy of conquest; in others, we must re-learn or learn to trust our own knowledge and our way of thinking about that knowledge. It is in essence an exercise of self-determination.

B. Perspectives on Indigenous Law

Indigenous legal tradition, like other aspects of Indigenous knowledge, has been approached from a Western perspective, and this has produced a certain method of inquiry and study and, therefore, a certain result. Karl N Llewellyn and E Adamson Hoebel wrote the classic in the field of legal ethnography—their study of Cheyenne legal tradition, published under the title *The Cheyenne Way*.[5] They

[3] C Zuni Cruz, 'Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law' (2001) 1 *Tribal Law Journal*, available at tlj.unm.edu: 'Traditional law is internal to a particular community, oral, and for the most part, dynamic and not static in nature. There are some who feel that traditional law, such as that contained in creation narratives, for example, can never change. Both these positions can be reconciled.' *Ibid.*

[4] Portions of this Chapter are taken from a conference paper entitled 'Self Determination and Indigenous Nations in the United States: International Human Right, Federal Policy and Indigenous Nationhood', presented at the 2003 Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Research Unit's Native Title Conference in Alice Springs, Northern Territory ntru.aiatsis.govau/conf2003/papers/zunicruz.pdf; and C Zuni Cruz, 'Indigenous Pueblo Culture and Tradition in the Justice System: Maintaining Indigenous Language, Thought, and Law in Judicial Review' in J Anderson (ed), *Land, Rights, Laws: Issues of Native Title*, vol 2, Issues paper no 23 (AIATSIS, 2003) 1–7.

[5] KN Llewellyn and EA Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (7th edn, University of Oklahoma Press, 1983).

studied cases of trouble, carefully gathered from informants, carefully monitored themselves and their informants and their information for quality-control purposes and arrived at postulates and norms of Cheyenne law. Their approach was meant to improve on the decidedly 'unscientific' method through which prior information on 'primitive law' (their term) was obtained largely through random observation and recordings by individuals in a variety of roles who happened to be in the 'field'. Their methodology relies heavily on a Western approach to Indigenous knowledge. It is both useful and problematic. Useful, in the sense that a clear and reliable picture of law ways emerges from the cases of trouble related to the authors. Problematic, in that the aspect of Indigenous knowledge under study, Indigenous law way or Indigenous legal tradition, is approached from an 'objective', categorical Eurocentric manner premised on 'law' or 'case law' as it exists in Western culture. So does this devalue their work? It simply points out the Western scientific approach utilised in this methodology of study. It was a portal of understanding carved out by employing Western knowledge to access and attempt to understand Indigenous knowledge, in this case their law—some might argue it represents an important or innovative accommodation to better access Indigenous knowledge.

Recently, H Patrick Glenn, a comparative law professor from the US, published a text on the legal traditions of the world.[6] He refers to Indigenous law as 'chthonic' law, because it is the law of autochthonic peoples—peoples 'who live ecological lives by being chthonic, that is, by living in or in close harmony with the earth'.[7] He then describes chthonic law 'by criteria internal to itself, as opposed to imposed criteria',[8] an extremely important methodology when approaching Indigenous subjects.[9] I appreciate two things about his work. First, it recognises the distinct existence of a legal tradition of Indigenous peoples, and places it among seven of the most important and complex legal traditions of the world, including Talmudic, civil law, Islamic, common law, Hindu and Asian legal traditions. Second, it provides a broad understanding of chthonic or Indigenous law in terms of its institutions, its form, and its foundational concepts and methodologies, albeit from an external and general point of view.

Glenn makes a series of general observations on the nature of chthonic law. For example, he notes that it is transmitted orally, in everyday life, and that it is communal in nature.[10] Glenn further notes that this type of law 'does not lend itself to complex institutions' as mainstream law does.[11] Instead, authority lies with elders of the community. Chthonic law lends itself more to dispute resolution processes, which are intended to be inclusive, and aim to foster reconciliation

[6] HP Glenn, *Legal Traditions of the World* (Oxford University Press, 2000).
[7] *Ibid*, 57, citing E Goldsmith, *The Way: An Ecological World View* (Rider, 1992).
[8] Glenn, above n 6, 57.
[9] Battiste and Henderson, above n 1, 41.
[10] Glenn, above n 6, 59.
[11] *Ibid*, 60.

over adjudication. This legal tradition believes in the sacredness of the natural world, and has this belief at the core of its tradition.[12]

Marie Battiste and Sákéj Henderson of the University of Saskatchewan recently published a book on Indigenous knowledge—*Protecting Indigenous Knowledge and Heritage: A Global Challenge.*[13] They write from an Indigenous perspective. If one looks at 'law' through a Western lens, then the Indigenous legal tradition is practically unrecognisable. But if one looks at 'law' from an Indigenous perspective, it is in operation everywhere—even in those places where law is not supposed to be, not expected, because it is intertwined with everything else. That is the nature of Indigenous knowledge, and the Indigenous legal tradition is an aspect of that knowledge. It is there to be found in Indigenous communities, even where it is declared to be non-existent.[14]

The most important aspect of Indigenous knowledge is that it stems from an ecological order, as Richardson explains further in his Chapter in this book. This means that it is rooted and grounded in the land. From our Australian Indigenous sisters we hear that the 'Land is Law'. In the US there is a book on the Apache entitled 'Wisdom Sits in Places'.[15] If Indigenous knowledge stems from an ecological order, this tells us that the law of Indigenous peoples is diverse, because the land and its ecologies are diverse; and while there are 'strands of connectedness', these connections arise from Indigenous thinking 'reflect[ing] a cultural interpretation based on observation of processes inherent in nature'.[16] There are other important aspects of Indigenous knowledge that pertain to the Indigenous legal tradition. According to Battiste and Henderson, Indigenous ways of knowing share the following structure:

i) knowledge of and belief in unseen powers in the ecosystem (Unseen Power);
ii) knowledge that all things in the ecosystem are dependent on each other (Inter/Dependency);
iii) knowledge that reality is structured according to most linguistic concepts by which Indigenous peoples describe it (Indigenous Language);
iv) knowledge that personal relationships reinforce the bond between person, communities and ecosystems (Relational);
v) knowledge that sacred traditions and persons who know these traditions are responsible for teaching morals and ethics to practitioners who are then given responsibility for this specialized knowledge and its dissemination (Sacred/Moral/ Ethical); and
vi) knowledge that an extended kinship passes on teaching and social practices from generation to generation (Generational).[17]

This structure reinforces the knowledge; likewise, movement away from this structure weakens the knowledge.

[12] Glenn, above n 6, 73.
[13] Battiste and Henderson, above n 1.
[14] *Ibid*, 35
[15] K Basso, *Wisdom Sits in Places: Landscape and Language among the Western Apache* (University of New Mexico Press, 1996).
[16] Battiste and Henderson, above n 1, 40.
[17] *Ibid*, 42.

In the next section, I will outline historical and current difficulties in 'seeing' and recognising the existence of Indigenous law.

C. Recognition

There are two levels of recognition of Indigenous legal tradition—external recognition and internal recognition. The external recognition and recording of Indigenous knowledge historically has not been accurate, complete, fair or unbiased. In fact, quite contrary to recognition, the suppression of Indigenous legal traditions was, and in many cases continues to be, a formal policy objective of many nations in their attempts to assimilate Indigenous peoples. While external to the Indigenous community, it has affected how the Indigenous legal tradition has been viewed and treated as a category of law. The internal recognition of traditional law is a completely different matter; nevertheless, it too has been affected by the external view of traditional law and has led in part to the imposition and adoption of external non-Indigenous law in Indigenous communities.

1. External Recognition

When contact first occurred, colonists ascribed little value to Indigenous ways. Indigenous peoples were viewed as uncivilised, unlearned, with everything to gain from the civilising influence of the colonist.[18] So unfamiliar was their legal tradition that by convenience and ignorance it was declared non-existent. All aspects of the way of the people were attacked: religion was outlawed, language, political organisation, dispute resolution, social and familial structure were devalued. Many Indigenous peoples did not survive, but those who did were able to retain and protect aspects of this legal tradition.

In 1934, the US government enacted major legislation aimed at 'assisting' tribes with their governance structures,[19] which were badly affected by the allotment period in which millions of acres of land were taken from Indian reservations,[20] by removal of children to boarding schools,[21] and by other policies of the government

[18] FP Prucha, *The Great Father, The United States Government and the American Indians*, vol I (University of Nebraska Press, 1995) 8. 'There was little doubt in the minds of the European (*pace* those who used the noble savage concepts to condemn evils in their own society) that savagism was an inferior mode of existence and must give way to civility (civilization)'.

[19] Indian Reorganization Act 1934 (Wheeler-Howard Act), 48 Stat 984 (codified at 25 USC 461, et seq).

[20] General Allotment Act 1887 (Dawes Act), 24 Stat 388 (codified as amended at 25 USC 331–4, 339, 341, 342, 348, 349, 354, 381).

[21] R Strickland (ed), *Cohen's Handbook of Federal Indian Law* (Michie Bobbs-Merrill, 1982) 140. (Please note that I have cited the 1982 edition throughout this Chapter. There is a new edition that has been substantially revised with new authors: NJ Newton (ed), *Cohen's Handbook of Federal Indian Law* (LexisNexis Matthew Bender, 2005)

aimed at assimilating Indian people into the white population. As a result of the Indian Reorganisation Act, non-traditional governance structures replaced traditional governance, many of which had already broken down.[22] This displacement was sealed for most tribes through the adoption of tribal constitutions.[23] These constitutions incorporated such concepts as representative democracy, individual rights, elections, voting and majority rule, and the concept of three branches of government—executive, judicial and legislative, interestingly without the separation of powers and checks and balances principles ingrained in the US Constitution.[24] They introduced some ideas and structures unknown in the chthonic legal tradition.

In 1968, Congress enacted legislation known as the Indian Civil Rights Act, which made certain US constitutional Bill of Rights protections applicable to tribal governments.[25] This Act reinforced the concept of 'individual rights' as paramount within tribal governments. The focus on 'individual rights' is problematic because in the chthonic legal traditions, the relation between the individual and collective is not conceived as an opposition between a citizen and a nation-state. This is to be expected, since Indigenous communities were not organised like modern-day nation-states.[26] Nonetheless, American tribes were faced with a prime directive to recognise and enforce individual rights. Chthonic legal tradition in the US has thus been operating alongside US laws that have imposed non-chthonic legal traditions on peoples whose identity and existence are tied to their chthonic legal tradition.

It is interesting to me that the chthonic legal tradition is now being used as the measure of recognition of land rights and use of land in Australia[27] and Canada[28]; and that legal tradition in the past tense is identified,[29] especially since chthonic

[22] See also *ibid*, 238–9 (Indian governments reached their nadir between the 1870s and 1920s).

[23] *Ibid*, 149. Boilerplate constitutions were prepared by the Bureau of Indian Affairs (BIA) based on federal constitutional and common law rather than tribal custom.

[24] F Pommersheim, 'A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts' (1991–92) 27 *Gonzaga Law Review* 393, 396 (BIA model constitutions omitted protections of Bill of Rights and doctrine of separation of powers, omissions that tribes now are criticised for).

[25] Indian Civil Rights Act 1968, 82 Stat 73, 77 (codified as amended at 25 USC, ss 1301 et seq).

[26] L Sheleff, *The Future of Tradition Customary Law, Common Law and Legal Pluralism* (Frank Cass, 2000) 62–3, quoting P Skalnik, 'Questioning the Concept of State in Southern Ghana' (1983) 9 *Social Dynamics* 11. 'The state is by and large a Euro-Asian invention, whereas the Africans gave the world their systems of chieftainship or their ingenious systems of kinship-based organization': *ibid*, 63.

[27] *Mabo v Queensland (No 2)* (1992) 107 ALR 1 (HC). 'In the result, six members of the Court (Dawson J dissenting) are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants, in *accordance with their laws or customs*, to their *traditional lands*' (Mason CJ, para 2).

[28] *Delgamuukw v British Columbia* [1997] 3 SCR 1010. 'I first consider the source of aboriginal title. As I discussed earlier, aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical act of occupation, and second because aboriginal title originates in part from pre-existing systems of aboriginal law' (Lamer CJ, para 126).

[29] 'The task of the Court is to identify those laws and customs which regulated the lives of the forebears of the present members of the applicants prior to European settlement which are currently acknowledged and observed': G Neate, 'Three Lessons for Australia from *Delgamuukw v British Columbia*' in L Strelein and K Muir (eds), *Native Title in Perspective, Selected Papers from the Native*

legal tradition is living law. It exists not in the past tense, but in the present tense. In the US, our adherence to chthonic legal tradition is being used to limit our jurisdiction over our territories and the people within those territories.[30] It is used in the negative sense[31] in respect to the unacceptability of traditional law being applied to non-Indians and even to other Indians not of a particular tribe,[32] and there is great concern about what this does to the rights they enjoy as American citizens.[33] In some sense, there is a degree of recognition of the very real difference between the chthonic legal tradition that survives in Indigenous communities in the US and the common law tradition of the country. However, the real problem is that there is not a serious understanding of the chthonic legal tradition. Surface views of deep Indigenous concepts without the context of how Indigenous knowledge systems operate lead to misunderstanding. The US Supreme Court justices write of traditional law as if unknowable rules will be applied to unsuspecting non-Indians in some unjust manner within our tribal court forums as justification for asserting that tribal court jurisdiction does not extend to the non-Indians who live, work and enter our borders. In *Duro v Reina*, Justice Kennedy referred to 'unspoken practices and norms' in reference to legal method.[34] I'm still trying to figure out what this refers to within a chthonic legal tradition, which is characterised by orality. In *Nevada v Hicks*, Justice Souter lamented the unwritten nature of traditional law and the difficultly of sorting out the complex mix of law for outsiders.[35] To me, the characterisation of traditional law as problematic because it is oral and unwritten represents an attack on the continued existence of our legal tradition because the underlying message is that we will gain more power and

Title Research Unit 1998–2000 (Aboriginal Studies Press) 227, citing *Yarmirr and Others v Northern Territory of Australia and Others* (1998) 771 FCA, para 85. See also L Mandell, 'The *Delgamuukw* Decision' in Strelein and Muir, *ibid*, 216–17 (evidence of past laws acceptable as proof of Aboriginal title), citing *Delgamuukw*, above n 28, para 148.

[30] *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978) (tribe had no criminal jurisdiction over non-Indian); *Duro v Reina*, 495 US 676 (1990) (tribe had no criminal jurisdiction over non-member Indian), but see 25 USCA s 1301(2) (congressional enactment in response to *Duro* recognising tribal powers of self-government include 'the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians'); *Nevada v Hicks*, 533 US 353 (2001) (tribe had no civil jurisdiction over non-Indian state officials for excessive action within tribal lands).

[31] *Oliphant, ibid*, 211.

[32] *Duro*, above n 30, 693: 'The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, the unique customs, languages, and usages of the tribes they serve influence them. Tribal courts are often "subordinate to the political branches of tribal governments", and their legal methods may depend on "*unspoken practices and norms*" '. *Ibid*, citing Strickland, above n 21, 334–5 (emphasis added).

[33] 'We hesitate to adopt a view of tribal sovereignty that would single out another group of *citizens*, nonmember Indians, for trial by political bodies that do not include them. As *full citizens*, Indians share in the territorial and political sovereignty of the United States'. *Duro, ibid*, 693 (emphasis added).

[34] See above n 32.

[35] 'Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines", tribal law is still frequently unwritten, being based instead "on the values, mores, and example from one generation to another". The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law", which would be unusually difficult to sort out'. *Nevada*, above n 30, 384 (references omitted).

authority if we assimilate, if our law and our government and justice systems are just like the US's system.[36] In my opinion, it is a great deception. It is also a continuation of the message that our legal tradition is inferior, when in fact it is a legitimate legal tradition: different—yes; less than—absolutely not.[37]

2. Internal Recognition

I have addressed very broadly the problems with external recognition of the Indigenous legal tradition. I now turn to issues related to internal recognition. Internally, the Indigenous legal tradition has been affected and impacted by external factors. I will discuss three ways in which the impact of external factors on Indigenous legal traditions is evident—knowledge, language and process.

(a) Knowledge

Today we have Indigenous intellectuals schooled in Western knowledge, but we have had Indigenous intellectuals steeped in Indigenous knowledge from time immemorial. This gives rise to a complex interplay of both Western and Indigenous knowledge frameworks that operate internally. Sometimes they complement one another, sometimes they clash, and sometimes they sit side by side with no apparent conflict. We are, after all, Indigenous people existing in the same technological age as everyone else. Indigenous knowledge, however, operates in a different manner from Western knowledge, and this is where a critical divergence takes place in respect to recognising the Indigenous legal tradition in operation within Indigenous communities. Indigenous knowledge, which contains the Indigenous legal tradition, has characteristics that require a different approach to respecting, accessing, processing, understanding, valuing and applying it. They are not the same approaches we learn in respect to law in our legal institutions.

The role of elders in the creation, dissemination, and survival of Indigenous knowledge and Indigenous legal traditions is central. Because the chthonic legal tradition builds on accumulated knowledge, and is entrusted to certain individuals who have a responsibility for its dissemination, the experts are those who have been given or taken on the responsibility to pursue Indigenous knowledge, including traditional leaders, elders, and community people. The chthonic legal tradition is contained in language. It is contained in the immutable law, the unchanging law, the origin stories, the journey narratives. But it is also in the everyday social

[36] 'We recognized that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared . . . But these are considerations for Congress to weight in deciding whether Indian tribes should finally be authorized to try non-Indians'. *Oliphant*, above n 30, 212.

[37] For a discussion of oral tradition evidence before courts, see J Borrows, 'Listening for a Change: The Courts and Oral Tradition' (2001) 39 *Osgoode Hall Law Journal* 1.

relationships that are reinforced as the proper way to live. It is in no one place, but rather everywhere. This is what makes the Indigenous legal tradition a community endeavour. This is also what alienates it from the tribal court system modelled on the common law tradition and presents the challenge for its incorporation.

I have been working in and with the Pueblo judiciary for approximately 20 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 Pueblo,[38] both as the Chief Judge and as Judge Pro Tem, I have worked with the Santa Clara Pueblo Court, the Southwest Intertribal Court of Appeals,[39] Taos Pueblo Court[40] 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 Chapter.

In 1999, for the first time in its history,[41] 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 a regional court called the Southwest Intertribal Court of Appeals. 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-justice bench must be lawyers. The Council then asked selected individuals about their interest in the court. In 1999, the Council appointed seven justices to the bench. I was one of three lawyers appointed to the Appellate bench with four elders. Of these seven original appointees to the Appellate Court for Land and Property, two remain as members of the Isleta Appellate Court.

The experiences that I had while working with the court serve to highlight some of the ways in which Indigenous legal traditions and mainstream law can be in contention.

[38] See KC Iwamoto with F Cerno Jr, 'Pueblo of Laguna Tribal Government Profile' (2001–02) 2 *Tribal Law Journal*, tlj.unm.edu/archives/vol2/index.php.

[39] CP Zuni, 'Southwest Intertribal Court of Appeals' (1994) 24 *New Mexico Law Review* 309. I served as Court Administrator for the Southwest Intertribal Court of Appeals from 1992 to 1993 and as an Appellate Judge in appointed cases.

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

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

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 there are two knowledge systems 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, whereas the tribal appellate court system functions with the occasional attorney. While the Anglo-American system is largely impersonal, the Isleta Court system operates for a society that is interrelated and known to one another, and the appellate judiciary is a part of that interrelated 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.

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 catalysts that initiated a significant jurisprudential shift; the acts of affirming traditional law and the articulation of the expectation that both lawyers and elders teach and learn from one another were also important. We have only begun the journey.

(b) Language

I like this quote from the Irish Poet Seamus Heaney, 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'.[42] A critical beginning point is to consider the meaning of law in the native language. In Tiwa,[43] for example, there are words for law and custom derived from the Spanish

[42] Quoted in F Pommersheim, 'Tribal Court Jurisprudence: A Snapshot from the Field' (1996) 7 *Vermont Law Review* 21, 44. Pommersheim uses this quote in reference to the development of a tribal jurisprudence. He 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 in reference to the language spoken in tribal courts.

[43] The Tiwa words and translations used here are from a discussion and interview between Isleta Pueblo member and Tiwa language instructor, Doris Lucero, and the author (14–15 October 2000).

words for both[44]; there is also a word referring to white man's law or the law of the courts,[45] demonstrating the introduction of outside law from two separate sources, but also the distinction such law has from traditional law. The word that comes closest to 'law' in Tiwa is the word for tradition—*keynaithue-wa-ee*, which translates 'this is our way of living'.[46] That way of life is elaborated upon in prayer.[47]

Chief Justice Emeritus Robert Yazzie of the Navajo Nation Supreme Court also considers the Navajo word for law—*beehaz-aani*. Yazzie states:

> The Navajo word for 'law' is *beehaz'aani*. It means something fundamental, and something that is absolute and exists from the beginning of time. Navajos believe that the Holy People 'put it there for us from the beginning' for better thinking, planning and guidance. It is the source of a healthy, meaningful life, and thus 'life comes from it'. Navajos say that 'life comes from *beehaz'aani*', because it is the essence of life. The precepts of *beehaz'aani* are stated in prayers and ceremonies that tell us of *hozho*—'the perfect state'. Through these prayers and ceremonies we are taught what ought to be and what ought not to be.[48]

Language was the first issue to arise in my position on the Appellate Court, and it arose for me in a personal context. All the Justices 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 Justice who was not a fluent Tiwa speaker. The issues regarding the need for fluent Tiwa speakers were two-fold. First, in order to follow the conversation, and second, to appreciate concepts, an understanding of the Tiwa language was necessary. At the Council meeting I undertook the responsibility to learn Tiwa,[49] as the only other alternatives were that English be used or that I be disqualified from serving on the court, and the lawyers agreed to aid in interpretation. With these undertakings, the Council affirmed my appointment and the elders accepted the confirmation.

The Appellate Court for Land and Property disputes conducted 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. I follow Tiwa through interpretation provided by the other Justices. The end result, that I learn Tiwa, also placed the role of teaching language on others, if only because at

[44] *Na-ley* translates to 'law'. *Ley* is the Spanish word for law. *Na-costumbre* is custom. *Costumbre* is the Spanish word for custom. *Ibid.*

[45] *Na-shachee* translates to white man's law or laws of the court. *Ibid.*

[46] *Ibid.* As Doris Lucero, *ibid*, elaborates: 'Our way of life is good. There was honor among the people. That's why we survived. We helped each other. We cared. We loved each other. That's the way it should be.'

[47] *Ibid. Key-wah-wai-ee* or 'This is the way of life' is connected to *keynaithue-wa-ee*. Detail of that way of life is provided through prayers.

[48] R Yazzie, '"Life Comes from It": Navajo Justice Concepts' (1994) 24 *New Mexico Law Review* 175 (footnotes omitted).

[49] It has not been an easy obligation to fulfil.

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.

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.

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 with. 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.

Maintaining native language is of fundamental importance to the continuance of Indigenous knowledge.[50] The Isleta Appellate Court's internal decision regarding the use of Tiwa is in fact supported by Congressional legislation,[51] though support of Indigenous language was not always US government policy.[52] The Native American Languages Act specifically states that '[i]t 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'.[53] Further, the Act states that the 'right of Native Americans to express themselves

[50] Battiste and Henderson, above n 1, 48. See also AM Dussias, 'Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages' (1999) 60 *Ohio State Law Journal* 901, 923.

[51] Native American Languages Act 1990, 25 USC s 2903(6).

[52] Dussias, above n 50, 905, noting: 'The US 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.'

[53] 25 USC s 2903(6).

through the use of Native American languages shall not be restricted in any public proceeding'.[54]

(c) 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 the majority was in error, and that a lone dissenter was correct and could convince the majority of the correctness of his or her 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.[55] 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 proved to be important to the success of building relationships and understanding among the Justices. Majority rule is less democratic than consensus, as 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.

D. Resurgence

It is through our legal traditions that we, as Indigenous peoples, know that we have the right to self-determination. It is the chthonic legal tradition that gives us our identity as peoples separate and distinct from other peoples in the world. It is critical to us. Yet it is, in part, why we experience/have experienced the attacks we have endured on so many levels. The suppression of our religion,[56] our language,[57] the

[54] 25 USC s 2904.

[55] Since the creation of the first Appellate Court in 1999, only one case was decided by a majority decision. All the rest were decided by consensus.

[56] Prucha, above n 18, 647, citing 'Rules for the Courts of Indian Offenses, April 10, 1883'.

[57] Strickland, above n 21, 140.

removal from and destruction and taking of our traditional lands,[58] the imposition of political organisation,[59] the physical removal of our children,[60] Western education,[61] all these impact and continue to impact our legal tradition, our identity. Assimilation has been a goal of US federal policy toward its Indigenous population.[62] If we do not begin to see how our legal tradition is of utmost importance in our internal self-determination, we risk assimilating ourselves in the belief we are exercising self-determination. Our chthonic legal tradition—our journey narratives, our origin stories provide the legal basis for our legitimate claim to self-determination. And once you begin with the chthonic legal tradition, everything else that has to do with self-determination (that is, nation-building) flows from it.

My main point here is that Indigenous peoples faced with maintaining chthonic legal tradition within a nation-state structure that imposes non-chthonic legal norms upon them must take special care that their chthonic legal tradition is preserved. As tribes in the US are contemplating 'nation-building', it is imperative that we understand the importance of the chthonic legal tradition to our very existence as we reconsider our governance systems and how we are responding to the imposition of non-chthonic legal norms on our governments. I believe one of the most important steps is to consider what every act toward nation-building we engage in does to our chthonic legal tradition, as well as thinking about nation-building as reinforcing our chthonic legal tradition.

Today, as some Indigenous legal scholars look critically at tribal governance systems, this shift from Indigenous concepts of political and social organisation is seen as a starting point for more severe political crises that tribes are experiencing today.[63] It is no surprise that Indigenous peoples who continue to operate within a chthonic legal tradition encounter problems in trying to operate under governmental systems that are not related to the way they organise the rest of their lives.[64] So, as Indigenous nation-building is discussed in the US at present, there has been a movement to rewrite constitutions to reflect the chthonic legal tradition of

[58] See, eg, LA French, *The Winds of Injustice: American Indians and The US Government* (Garland Publishing, 1994) 45–60 (brief discussion of the removal and allotment policies as they impacted selected tribes).

[59] Indian Reorganization Act 1934, above n 19.

[60] Strickland, above n 21, 140, noting: 'Off-reservation federal boarding schools were founded in 1879. Reformists thought them an ideal method of assimilation, since youth were completely removed from the family and from the barbarism of tribal life'. See also Indian Child Welfare Act 1978, 92 Stat 3069: 'Congress finds that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.'

[61] Strickland, above n 21, 139–41.

[62] *Ibid*, 128–9.

[63] See generally R Porter, 'Strengthening Tribal Sovereignty through Government Reform: What are the Issues?' (1997) 7 *Kansas Journal of Law and Policy* 72 (discussing the impact of colonisation on tribal governments); R Porter, 'Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies' (1997) 28 *Columbia Human Rights Law Review* 235 (discussing Seneca civil war and the consequences of the transformation of Indigenous dispute resolution associated with the adoption of the Anglo-American legal tradition).

[64] See generally Zuni Cruz, above n 3.

Indigenous nations. Unfortunately, an ever-present concern is how much difference will be tolerated by the federal government, as well as recognising that a degree of assimilation to Western ideas is evident in the very starting point—the re-drafting of a constitution.

Nonetheless, we must remember that those who preceded us kept our traditions alive, even while they were forced to adopt the outer manifestations of imposed European institutions. It is a phenomenon that has been called 'cultural camouflage'. In a historical study of the Creek Indians in the US, Sydney Harring recounts how tribal governments took on the trappings of mainstream American institutions.

> Much of the historical emphasis on these governments focuses on how 'civilized', meaning Americanized, they were: popularly elected chiefs, bicameral legislatures, universal male suffrage, secret ballots, two-tiered court systems, courthouses, high sheriffs, light-horsemen and schools. But a closer look reveals that a good many of the forms that the Americans imposed on the tribes were adopted but much less of the substance. Tribal values and tribal sovereignty lived within institutions that looked American. There can be no question that this was one part of a conscious Creek strategy to protect tribal traditions and sovereignty.[65]

Chief Justice Emeritus Robert Yazzie explains why the Navajo created the courts of the Navajo Nation in 1959 to look like mainstream American courts. He refers to the American system of adjudication as the 'Law Way' and traditional Navajo procedure as the 'Life Way'.

> The [Courts of the Navajo Nation] were created out of a fear of a State take-over of criminal and civil jurisdiction, and as a defense. They were designed to look like justice of the peace courts with the hope that, with the appearance of The Law Way, the state would leave us alone.[66]

Education in our traditional law is crucial, then, to ensure our survival. But Western education is also a necessity in the struggle for self-determination and nation-building. That education is essential to prepare us to engage the outside system, to protect our interests in that system, and to keep abreast and, hopefully, ahead. Nonetheless, it is important to recognise Western education as a double-edged sword. What it represents, in terms of values, approaches and ideas, can be counter to maintaining a chthonic legal tradition within our nations.[67] Here I will use two examples from the legal field.

Chief Justice Emeritus Robert Yazzie, in an address to Indigenous law students, asked them to be careful that the tools they acquired in law school were not used to destroy the home that they returned to.[68] He told them that some of their

[65] SL Harring, 'Crazy Snake and the Creek Struggle for Sovereignty: The Native American Legal Culture and American Law' (1990) 34 *American Journal of Legal History* 365, 369.

[66] Quoted in The Harvard Project on American Indian Economic Development, *The State of the Native Nations* (Oxford University Press, 2007) 48.

[67] C Zuni Cruz, 'Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples' (2006) 82 *North Dakota Law Review* 863.

[68] R Yazzie, 'Law School as a Journey' (1993) 46 *Arkansas Law Review* 271.

Western education was not going to be useful within Indigenous communities, and that, in some instances, it could be destructive.[69] Robert Porter considers a 1978 study by Linda Medcalf on the impact on Indian tribes of the first generation of lawyers representing Native Americans in his article examining how Anglo-American legal tradition detrimentally impacts Indigenous societies.[70] Porter explains:

> Medcalf concluded that, despite their best intentions, lawyers working on behalf of Indian people failed in their stated mission of strengthening native communities and had contributed to the breakdown of native culture by imposing upon the Indians the full panoply of Anglo-American values, particularly the emphasis on individual rights.[71]

There is Western knowledge and there is Indigenous knowledge. Indigenous knowledge and approaches are crucial in the struggle for self-determination. Western formal education must be informed by Indigenous knowledge within Indigenous communities. Porter explains that Medcalf recognised

> that the tribal lawyers she studied were, in one sense, successful because they were able to assert tribal rights to obtain political and economic power for their native clients. She concludes, however, that American trained lawyers ultimately fail because they do not provide their native clients with a meaningful choice between retaining a distinct tribal existence and adopting a lifestyle indistinguishable from American society.[72]

One way to counteract this tendency is to practise a community lawyering approach for Indigenous communities. Lawyers should not see themselves in the same role they are taught in law school, where they are experts on knowledge and impose their ideas on their clients. Lawyers cannot focus solely on the problems of individuals. They must become aware of the needs of the community and help translate concepts to non-Indigenous tribunals. The role of the lawyer is not only as a zealous advocate, but also, in issues affecting the community, a facilitator for a consensus-building process that will restore balance in the community.[73] In order to practise in this way, lawyers must also be acutely aware of the legal traditions of the community.

Brenda Small, a Cree from James Bay in Canada, captures the issue nicely when she reflects on her experience in law school:

> We cannot study law and go back home and expect that this knowledge will save our people. We cannot pretend that just because we have learned the white man's law, we are

[69] R Yazzie, 'Law School as a Journey' (1993) 46 *Arkansas Law Review* 271.

[70] Porter, 'Strengthening Tribal Sovereignty through Peacemaking', above n 63, 283, citing L Medcalf, *Law and Identity: Lawyers, Native Americans and Legal Practice* (Sage Publications, 1978).

[71] *Ibid.*

[72] *Ibid*, 284–5 (footnotes omitted).

[73] C Zuni Cruz, '[On the] Road Back In: Community Lawyering in Indigenous Communities' (1999) 5 *Clinical Law Review* 557. See also S Imai, 'A Counter-pedagogy for Social Justice: Core Skills for Community-based Lawyering' (2002) 9 *Clinical Law Review* 195; Zuni Cruz, above n 67, 867; J (Sákéj) Y Henderson, 'Postcolonial Indigenous Legal Consciousness' (2002) 1 *Indigenous Law Journal* 1, 53–4.

> in a better position to enhance the survival of our people. In fact, such conclusions are full of a learned arrogance that fails to recognize that the survival of our people has been assured because of our own strengths.
>
> We can be present at the law school but that doesn't mean that we ought to become the instruments or vehicles for the intrusiveness of the white man's law. Instead, we must retain a vision of the world that is based on own ethics and beliefs. In essence, the law we need to know best are those presented to us in the wind, in the river and across the skies.[74]

In his description of the language of the Anishinabek, John Borrows talks about the relationship of the law and the land:

> The Anishinabek people have a number of legal principles that guide their relationship with other living beings in a conservationist mode. Rocks (land) are animate or living in verb-oriented Algonkian languages such as Anishnabemowin. Their active nature means rocks have an agency of their own which must be respected when Anishinabek people use them.[75]

This brings me to a second way in which to counter the tendency for Indigenous lawyers to reproduce Western law: language. Fluency in the native language is crucial to understanding ways of thinking that are important to Indigenous concepts. Because language orders thought, focuses attention, and establishes relationships, its value to law cannot be mistaken. Whether one is seeking to explain and understand either Anglo-American legal concepts or Indigenous concepts, being bilingual assists in one's explanation and understanding. Encouraging bilingualism in native lawyers is an important aspect of preparing them to function well as lawyers in their own communities.[76] The support for acquiring or strengthening native language skill among native law students is not currently part of 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 fluent 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 prevent the tribal justice system from getting too far away from the community, both by fostering an understanding of traditional law and avoiding over-reliance on Anglo-American concepts embedded in American law and the English language.

[74] Quoted in S Imai, *Aboriginal Law Handbook* (2nd edn, Carswell, 1999) iii. See also Zuni Cruz, above n 67, and Henderson, above n 73.

[75] J Borrows, *Indigenous Legal Traditions in Canada* (Law Commission of Canada, 2006) 38.

[76] Borrows, *ibid* (at 188) makes a point that I feel is crucial: 'Immersion is important: a program would fail to adequately teach Indigenous law if it did not provide learning opportunities outside of law schools. While there is great value in formal classroom instruction, Indigenous law must also be learned in an applied and practical context. Indigenous laws are often the product of specific relationships to land, plants, animals, water, people, etc. To fully appreciate Indigenous law, students need to be immersed with the people whose law they want to more fully understand. This immersion must also be intensive, and focused on one tradition at a time in order to expose students to each tradition's depth and complexity. Students' education in Indigenous law is incomplete if they do not delve deeper into legal traditions of their choice for either three summer terms or one final year.'

In this regard, Borrows is thinking of a creative way of addressing these issues. He proposes developing a four-year degree that will combine a Bachelor of Laws (equivalent to an American JD) with a Bachelor of Indigenous Law. There will be a cohort of 24 students who study in the law school and in surrounding Indigenous communities. They will take many of the courses from the regular curriculum, such as contract, criminal and administrative law, but each course will have an additional Indigenous perspective. Students will be required to spend some terms in the communities, where they will study specific Indigenous laws. For example, near the University of Victoria, students could study Salish Legal Traditions, Salish Language and Law, and Salish Legal Writing and Advanced Legal Research.[77]

I hope reforms in legal education and new approaches to lawyering can feed the resurgence in traditional systems of justice. No other jurisdiction has a system as extensive as the American Tribal Court system that has around 275 tribal courts administering tribal law.[78] However, there are justice initiatives in other countries as well. In Canada, the Indian Act provides for the appointment of Indigenous justices of the peace who have limited jurisdiction to try offences under that Act.[79] Only a few justices of the peace were ever appointed and they did not have jurisdiction to apply Indigenous law. Australia had some Aboriginal courts to try local matters.[80] Queensland, for example, had a court consisting of two Indigenous people appointed as justices of the peace to hear matters relating to the breach of community by-laws.[81] However, this system has been replaced with 'community councils' that can only give advice to regular judges.

More common in Australia and Canada is Aboriginal participation in sentencing of offenders. In these initiatives, when the accused pleads guilty or accepts responsibility for an offence, there are opportunities for members of the community to participate in deciding on the appropriate sentence. Australia appears to be heading in this direction with the establishment of sentencing courts in a number of jurisdictions, including Queensland, South Australia, Victoria, New South Wales and Western Australia.[82] In these courts, the purpose is to 'to make the Court process less alienating and the Orders of the Court more culturally appro-

[77] J Borrows, *Indigenous Legal Traditions in Canada* (Law Commission of Canada, 2006), 177–90.

[78] See the National Tribal Resource Center, www.tribalresourcecenter.org; and DH Getches, CF Wilkinson, RA Williams Jr, *Cases and Materials on Federal Indian Law* (5th edn, West Publishing, 2005) 420.

[79] Indian Act, RSC 1985, c I-5, s 107.

[80] See G Nettheim, GD Meyers and D Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Aboriginal Studies Press, 2002) 281; Australian Law Commission, *The Recognition of Aboriginal Customary Laws* (Australian Government Publishing Service, 1986) vol 2, 30–52.

[81] The Community Services (Aborigines) Act 1991 (Qld). The court provisions in this statute appear to have been repealed. Under the Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984 (Qld), there are now only 'community councils' that can give advice in regular court proceedings.

[82] For an overview, see Law Reform Commission of Western Australia, *Aboriginal Customary Law*, project 94 (Government of Western Australia, 2006), ch 7, 'Aboriginal Courts'.

priate for Indigenous people who come into contact with the criminal justice system'.[83] However, the proceedings are squarely within the larger justice system. The Department of Attorney General of Western Australia makes this clear in its description of the Kalgoorlie-Boulder Community Court, stating that this court 'does not involve different laws or use customary Aboriginal law'.[84]

A variation of this model, called the 'sentencing circle', is used in Canada and some parts of Australia. Typically, the accused, who has taken responsibility for the offence, will sit in a circle with the victim, relatives, the judge, the Crown attorney, the defence lawyer and other community members. The circle will make a recommendation to the Crown about the appropriate sentence. While the Royal Commission on Aboriginal Peoples has reported success with a number of initiatives, the most interesting is a process at Hollow Water First Nation dealing with sexual offenders.[85] Here, the First Nation had to address pervasive sexual abuse in a community where 75 per cent of the residents were victims and 35 per cent were victimisers. A group of residents, mostly women, began developing an approach and took two years of study before developing the process. After the offender acknowledges responsibility and is accepted by the group, the offender is allowed to stay in the community but is subject to a 13-step process that takes five years. The description of the process is important:

> The [Community Holistic Circle Healing] is not a program or project. It is a process with individuals coming back into balance. A process of a community healing itself. It is a process which one day will allow our children and grandchildren to once again walk with their heads high as they travel around the Medicine Wheel of Life.[86]

Sentencing circles can be problematic if they are not established properly, and there have been some criticisms that they can revictimise victims of spousal abuse by exposing them to their assailants.[87]

A very interesting model for addressing disputes between the settler government and Māori people in Aotearoa/New Zealand is the Waitangi Tribunal, established in 1975. The Tribunal has Māori and non-Māori judges as well as Māori elders on its panel, and it has developed a procedure that incorporates Māori practices. The hearings are held on Māori territory, the Māori language is used in parts of the proceedings and Māori protocols are followed:

[83] For an overview of the Murri Court, see A Hennessy, Magistrate, 'Justice for all—Victims, Defendants, Prisoners and Community: Indigenous Sentencing Practice' (presented to the Australia International Society for Reform of the Criminal Law Conference, Brisbane July 2006) 2, at www.isrcl.org/Papers/2006/Hennessy.pdf.

[84] See the website of Western Australia's Department of the Attorney General: www.justice.wa.gov.au/A/aboriginal_court.aspx?uid=6986-7860-4445-5582.

[85] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: Aboriginal People and Criminal Justice in Canada* (Canada Communications Group, 1996) 159–67.

[86] *Ibid*, 169.

[87] E LaRocque, 'Re-examining Culturally Appropriate Models in Criminal Justice Applications' in M Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (UBC Press, 1997) 75–97.

> By holding hearings on *marae*, participating in *powhiri*, listening to *karanga*, *whaikorero* and *waiata*, and immersing itself in a Maori environment, the Tribunal develops context within which to interpret oral and written evidence.[88]

The justice initiatives described above—the sentencing circles, the sentencing courts and the Waitangi Tribunal—face the same challenges as the tribal courts in the US. While they provide for greater participation of Indigenous people, there is a constant struggle to promote the use of Indigenous laws. I hope that, with reforms in legal education and new approaches to lawyering, a new generation of lawyers can shape these institutions to be consistent with Indigenous legal traditions. Nonetheless, it is important to note that even limited justice initiatives can be very powerful. A non-Indigenous defence lawyer attended an Elders hearing in northern Canada conducted in the Cree language, and had this to say:

> As you are aware, I have attended in the Northern Courts as Duty Counsel for the past six or seven years and as such am well acquainted with the various Courts in the Northern communities. I have seen on many occasions the veiled and often open contempt with which the natives hold the judicial system which is obviously viewed by many as a continuing aspect of white supremacy and dominance. This lack of respect for the Court is quite apparent from the demeanor of witnesses, onlookers and Defendants in many of the cases. However, during the Elders Court, it became quite apparent to me that the Elders took their job very seriously. They conducted the Court in a manner that was totally unique and foreign to my experience as an Ontario lawyer. They did not ask for example the Defendants how they pleaded but simply asked them as to whether or not they did what was alleged. This direct confrontation elicited from most what I perceive to be an honest answer (in all the cases that I observed the answer was in the affirmative) and the Elders proceeded to lecture the accused as to how they had embarrassed the community at large, their families in particular and themselves, i.e., the Defendants, even more specifically. The accused obviously held the Elders in respect and certainly displayed shame and remorse that I had not observed in my other experiences in the Courts in the North generally and in this one in particular.[89]

E. Conclusion

Allow me to conclude by reiterating my major point. Our Indigenous legal tradition is central to our claim for self-determination. Our chthonic legal tradition is central to our identity. More of our attention should be focused on this legal tradition and its relationship to all that is proposed, imposed, contemplated,

[88] G Phillipson, 'Talking and Writing History: Evidence to the Waitangi Tribunal' in J Hayward and NR Wheen (eds), *The Waitangi Tribunal* (Bridget Williams Books, 2004) 41. The Māori terms can be translated as follows: *marae*—ceremonial centre of a particular descent group used for public business; *powhiri*—beckoning forward, welcome; *karanga*—call or summons; *whaikorero*—ceremonial speech; *waiata*—song. For an observation that the Waitangi Tribunal process is still very much Western oriented, see R Boast, 'Waitangi Tribunal Procedure', *ibid*, 53–64.

[89] Quoted in Royal Commission on Aboriginal Peoples, above n 85, 107.

envisioned and ultimately accepted by Indigenous peoples. Everything should be reconcilable to our legal tradition. If it is not, we must rethink what it is we are doing.

Law is a dynamic force. Western written law contains Western values, beliefs, and precepts that dictate thinking, behaviour and approach to justice. Once law is adopted, it begins its work.[90] If any law must be written, and applied to us, it should be law we fashion and create based on our own understanding of law, with knowledge of the importance of the relationships critical to our communities. It should also be based on what we know motivates and influences our social structure, with an understanding of our social reality and our separate consciousness as Indigenous peoples.

The challenge of incorporating traditional law lies in doing so in modern tribal societies, where colonialism and imperialism have been internalised and have affected tribal institutions and thought. The challenge lies in negotiating that clash between values and principles embedded in traditional law and those embedded in Western law. Decolonisation is not easily accomplished, whether one is struggling to build a nation-state or exercising self-determination within a nation. There are fears and risks to confront, and through it all the responsibility for mistakes is our own. Perhaps the greatest price to pay, however, is failing to take a risk to break out of colonial patterns because the familiar paths of oppression have made the paths of self-determination and liberation unfamiliar.

Of course there are real issues at stake—jurisdiction, economic development opportunities, federal funding—but these things are not necessarily assured, even if tribes mirror external law. The idea of creating law that is uniquely our own, based on our values, should encourage dialogue, ignite debate, and be tested and explored in practice. I believe the threat to our cultural survival as distinct Indigenous people is real, and we have survived in the face of this threat, but we must do what we can when we see the opportunity to reinforce our way of life. Significant encroachment in the area of internal tribal law has occurred, but it has not garnered the same type of attention that other encroachments have, and, perhaps more significantly, Indigenous nations themselves have facilitated this encroachment, both through their own actions and failure to act.[91] Law is of great cultural significance, and not to be so easily acquired and borrowed. What written law we have should be influenced by our way of thinking.

[90] 'Law is an adjunct of society. When the latter changes, the former must also adjust': MC Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Transnational Publishers, 2000) 202.

[91] As former Pueblo of Isleta Tribal Court Associate Judge Raquel Montoya-Lewis points out, the basis of this facilitation can be internalised oppression. It can also occur because legal advisors to Indigenous communities lack a vision of the role of tradithat said, it is also important to point out that the primary sources of traditional law are in Indigenous communities, not in the legal institutions.