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Indigenous Law in North America in the Wake of Conquest†

James W. Zion* & Robert Yazzie**

INTRODUCTION

To what extent do the indigenous peoples of the Americas¹ still use their own law? What is their right, privilege or freedom to have their own laws and procedures to resolve disputes? What is the practice of North American states in dealing with indigenous laws? What is indigenous or traditional law?

“Traditional Indian law” is a popular contemporary topic. In North America, there are numerous conferences on the subject,² and the American alternative dispute resolution (A.D.R.) movement recognizes the uniqueness of Indian dispute resolution.³ Indian nation justice leaders insist that traditional justice is not “alternative dispute

† This article was originally prepared for the technical seminar *Prevencion de Conflictos y Solucion en Comunidades Indigenas*, at the Inter-American Bar Foundation Conference, Cochabamba, Bolivia, (Mar. 21–23, 1995).

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¹ This is the term currently in vogue in international practice to refer to the original inhabitants of North America, among others. The terms “native” and “aboriginal” also apply, with various connotations. We are aware that the term “Indian” is a pejorative in many parts of Latin America. While “Native American” is often used in the United States of America, many people refer to themselves first by their tribal name (e.g., “Navajo”) and then by the generic term “Indian.” That term will be used to refer to the original peoples of the Americas.

² E.g., Traditional Indian Law, Federal Bar Association, 20th Annual Indian Law Conference, Albuquerque, N.M. (Apr. 6–7, 1995); Alternative Justice Dispute Resolution Conference, Native Community Law Office Association of British Columbia, Vancouver, British Columbia (Feb. 24–25, 1995); Tribal Peacemaking Conference, Native American Legal Resource Center, Oklahoma City University School of Law, Tulsa, Okla. (May 21–22, 1993). The National Indian Justice Center of Petaluma, California, also offers an ongoing course on traditional Indian dispute resolution.

³ See Diane LeResche, *Editor's Notes*, in *Special Issue: Native American Perspectives on Peacemaking*, MEDIATION Q., Summer 1993, at 321, 322–23; The Hon. Robert Yazzie, *Traditional Navajo Dispute Resolution in the Navajo Peacemaker Court*, Fifth Annual Frank E.A. Sander Dispute Resolution Lecture, Dispute Resolution Section, American Bar Association (n.d.) (in publication).

resolution,” but their *original* dispute resolution. Indian justice methods and institutions persist into modern times, and they continue to be a viable method of law and justice. They are a legitimate means of self-governance and a model for industrial societies which now recognize the shortcomings of state justice systems and methods.

This article is an overview of traditional Indian law in North America. It will chronicle the continuation of this form of law, with particular emphasis on Navajo traditional law (called “Navajo common law”) as an example. Indigenous law exists within state legal systems, so a better understanding of its place in contemporary North America requires knowledge of the historical development of the international and municipal law doctrines of recognition. With the advent of A.D.R. in North America, it is important to contrast it with Indian methods. The American and Canadian A.D.R. movements incorporate a great deal of state system methods and protocols, so it is important to state that traditional Indian law is *not* A.D.R. and that methods of A.D.R. must *not* be forced on Indian nations, as adjudication was. Traditional or indigenous law is based on social arrangements which are far different from those imported to the Americas from Europe, and the contemporary Navajo justice system, and other systems, revive such ancient procedures in modern settings. It is important for national policy-makers to understand the processes and functioning of traditional Indian justice methods to effectively deal with indigenous populations. Most Indian nations of the Americas refuse to assimilate, and many Indian peoples are still largely autonomous.

This article was prepared for an inter-American conference with representatives from Bolivia, Mexico, Guatemala, Peru, Ecuador, Columbia, Brazil and the United States of America.⁴ The subject is the

⁴One of the principal reasons for the conference was implementation of Article 171 of the Bolivian Constitution, amended on August 12, 1994. Letter from Andres Barreto, Esq., Inter-American Bar Foundation, to James W. Zion (Dec. 29, 1994) (on file with authors). Article 171 provides:

The social, economic and cultural rights of indigenous peoples [of Bolivia] are recognized, respected and protected in the standard of the law, especially those relative to communal lands of origin, guaranteeing the use and supporting the sustainable utilization [of] natural resources, their identity, values, languages, customs and institutions.

The State recognizes the juridical personality of indigenous and rural communities and of rural associations and syndicates.

The natural authorities of indigenous and rural communities may exercise the functions of administering and applying their own rules as an alternative solution to conflicts, in accordance with their customs and procedures, [provided that] they are not contrary to this Constitution and the laws. The Law [will homologate] these functions . . . with the prerogatives of the Powers of State.

relationship of indigenous legal systems with the state systems of those nations, and how Indian justice works. American states continue to frame Indian affairs policies to deal with distinct Indian populations. As was noted at the end of the period of colonialism in 1945, forcing national laws on indigenous peoples works only “when someone is checking up.”⁵ The failure to address the grievances of indigenous peoples causes rebellion and resistance, given their continued distinctness in American societies. Indigenous peoples view impositions by states as political oppression or tyranny, and that is the result of failing to respect Indian ways.⁶ This study is an exercise in practical policy analysis to show that honoring the laws of Indians is in the interests of contemporary governments of the Americas.

Part I of this study will discuss the development of the right of Indians to be governed by their own law. It will look at the development of various legal theories in Western thought, and their impact on the development of the Spanish, British, American and international rules of recognition of Indian law. Part II will address the myth that the Indians “have no law.” Part III will discuss the A.D.R. movement and its application to Indian law. Part IV gives an overview of the traditional Indian legal system, particularly as it compares to American and European legal systems. Part V sets forth Navajo justice concepts and the process of Navajo dispute resolution. This article concludes, in Part VI, that Indian dispute resolution, far from being an “alternative” method of dispute resolution, is one from which European and American justice systems can learn, and one that is deserving of respect.

CONSTITUCIÓN [Constitution of Aug. 12, 1994] art. 171 (Bol.) [hereinafter BOL. CONST.], reprinted in 2 CONSTITUTIONS OF THE WORLD (Albert P. Blaustein & Gilbert H. Flanz eds., 1994).

⁵ Felix Keesing, *Applied Anthropology in Colonial Administration*, in THE SCIENCE OF MAN IN THE WORLD CRISIS 373, 394 (Ralph Linton ed., 1945).

[S]tudies of cultural processes would seem to indicate that only as change is self-motivated is it really effective. Groups and individuals cannot be compelled by law or by force to modify their customary ways of life and thought. Conversely, they cannot be held back when they want to change. At most, attempts to direct behavior in these arbitrary ways will produce overt conformity to the demanded forms of conduct—when someone is checking up.

Id.

⁶ “Political oppression is easier when there is a racial or cultural distinction between the masters and the oppressed. Tyranny will be harsher in a state established through conquest of one people by another than in a state where all share the same language, culture, and history.” ELI SAGAN, AT THE DAWN OF TYRANNY: THE ORIGINS OF INDIVIDUALISM, POLITICAL OPPRESSION AND THE STATE 278 (1985).

I. THE RIGHT OF INDIANS TO ENJOY THEIR OWN LAW

The concept that distinct peoples should be governed by their own law is ancient and fundamental to Western thought. It begins with Roman law, which had a “practice of leaving conquered peoples to abide by their own laws.”⁷

It was a general principle which marked the early Roman policy in Italy to allow a subject community to retain its own municipal laws, and to administer justice between its own citizens, so far as this was consistent with a state of subjection to Rome. The citizens of such a state would thus have legal rights with reference to each other.⁸

Even Jesus was tried by the “chief priests and elders” before he was taken before Pilate for a Roman trial, and although Pilate “washed his hands” of the affair, he ordered execution under local law, saying, “see ye to it.”⁹ Roman law affected European legal traditions via canon law,¹⁰ and Roman law produced “the most lasting influences on Spanish culture.”¹¹

Thomas Aquinas (1225–1274)¹² squarely faced the issues which would later be the focus of heated international debates when Spain entered the Americas—issues which are still pertinent today: whether all humans are competent to make law; whether “gentiles”¹³ possess reason to make law; whether “sinners” can make law; whether the “custom of the country” is law; and who is bound by the law of different kingdoms. Aquinas answered that law is a rule of human reason which can be made by “the whole people, or someone who is the vicegerent of the whole people.”¹⁴ Gentiles possess natural law, and even rulers in

⁷ LYLE N. McALISTER, *SPAIN & PORTUGAL IN THE NEW WORLD 1492–1700*, at 25 (1984).

⁸ WILLIAM C. MOREY, *OUTLINES OF ROMAN LAW* 64 (1900).

⁹ *Matthew* 27:1–26 (King James).

¹⁰ See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 200, 221–24 (1983).

¹¹ CARLOS FUENTES, *THE BURIED MIRROR: REFLECTIONS ON SPAIN AND THE NEW WORLD* 35 (1992). Fuentes elaborates, “Beyond the national stereotypes, then, a number of significant factors created a Spanish and Spanish American tradition from the time of Roman domination. Nothing reveals the form of the tradition better than the clash with the Other, he or she who is not like you or me.” *Id.* This is still the core of Indian-White conflicts in the Americas. *Id.*

¹² ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 43 (1990).

¹³ Or “heathens,” “infidels,” “foreigners,” “aliens,” “non-Christians,” “Indians” or others who are members of the “Other.” See FUENTES, *supra* note 11, at 35.

¹⁴ See THOMAS AQUINAS, *TREATISE ON LAW (SUMMA THEOLOGICA, QUESTIONS 90–97)* 2–4

the “fomes” of sin (i.e. non-Christians) are capable of making law.¹⁵ Law adapts to place and time, according to the “customs of the country.”¹⁶ Customs are not only “law,” but customary law overcomes positive law, because what people *do* is more important than what they *say*.¹⁷ Finally, people are subject to their own law, because it derives from their own authority as a people.¹⁸ Aquinas was a Dominican, and his influence on Spanish law through Dominican priest-lawyers is strong and obvious.

Another important canonist who had a major influence on the canon and medieval law doctrines of dealing with “heathen” or “infidel” peoples was Pope Innocent IV (1243–1265), a canon lawyer and contemporary of Aquinas.¹⁹ Innocent IV, in a commentary on an earlier papal decretal by Pope Innocent III, the *Quod super his*, elaborated on the rights of infidel peoples in the Crusades.²⁰ The essential concept that is important for this discussion is that Innocent IV concluded that non-Christians have a right to *dominium* over their property and the right to self-rule, which cannot be taken away unless they violate natural law through sexual perversion or idolatry.²¹

Francisco de Vitoria (c. 1485–1546), hailed as the founder of international law and writer of the first treatise on Indian rights in the Americas, was a leading Thomist.²² He gave the first unequivocal defence of the Indians against their conquerors, asserting that Indians were “true lords in relation to private and public affairs” and had a genuine political society.²³ He refuted the false notion (which was a heresy in Catholic theology) that without grace, Indians could have no polity and said “there can be no doubt Indians possessed true domin-

(“Whether law is something pertaining to reason?”), 7–9 (“Whether the reason of any man is competent to make laws?”) (1987).

¹⁵ See *id.* at 14–16 (“Whether there is a natural law?”), 26–29 (“Whether there is a law in the fomes of sin?”). Current interest in public scandal by politicians keeps the second question alive.

¹⁶ See *id.* at 80–83 (“Whether Isidore’s description of the quality of positive law is appropriate?”).

¹⁷ See *id.* at 110–13 (“Whether custom can obtain force of law?”) (emphasis added).

¹⁸ See *id.* at 98–101 (“Whether all are subject to the law?”).

¹⁹ WILLIAMS, *supra* note 12, at 13, 43.

²⁰ *Id.* at 44.

²¹ See *id.* at 13–14, 45–49; Fr. Michael Joseph Stogre, S.J., M.D., *The Development of Papal Teaching on Aboriginal Rights: 500 Years of Catholic Social Teaching 3–7* (1991) (unpublished manuscript, kindly furnished by Fr. Stogre). Violations of natural law in idolatry and sexual perversions had political consequences. See *infra* note 92 and accompanying text.

²² See QUENTIN SKINNER, *2 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 135–36 (1978); Donald Juneau, *The Light of Dead Stars*, 11 AM. INDIAN L.R. 1, 11 n.55 (1983).

²³ SKINNER, *supra* note 22, at 169 (quoting Vitoria’s first lecture, *The Recently Discovered Indians*).

ion both in public and private affairs.”²⁴ “Vitoria simply revert[ed] . . . to the pivotal Thomist claim that there is an equal capacity in all men, whether or not they are Christian, to establish their own political societies.”²⁵

Another Dominican, Bartolome de las Casas (1474–1566), took Vitoria’s academic discourse into Spanish royal venues and used it on behalf of Indians.²⁶ While his work built on Aquinas’ doctrines, Las Casas argued using Spanish and medieval law rather than basing his positions solely on theology or canon law.²⁷ He established the doctrine that Indians are “human,” and thus possess reason, and that they have their own law and government (and a right to them) which was to be respected by the Spanish Crown.

One of the fora Las Casas used was the papacy. At the time, the Vatican still held some international authority, both spiritual and secular. When Columbus returned from his first voyage to announce what he had found, Spain commenced an international arbitration before the Spanish Pope, Alexander VI.²⁸ While the Pope “donated” most of the New World to Spain,²⁹ the Church was more concerned with the good treatment of the native peoples of the newly-discovered lands, and bestowed a trust upon the Spanish monarchs to see to their well-being. Las Casas took the political debate over the rights of Indians to Pope Paul III who issued the bull *Sublimis Deus* in 1537.³⁰

The bull responded to contemporary debates in Spain. Were Indians “humans” or were they the subjects of “natural slavery,” as found in Aristotle’s works? Did Indians have rights to liberty or to property? The bull resoundingly reaffirmed the humanity and reason of Indians and concluded “that they may and should, freely and legitimately, enjoy

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *id.* at 170. His most famous works appear in English. See, e.g., BARTOLOME DE LAS CASAS, IN DEFENSE OF THE INDIANS (Stafford Poole ed., 1992) (Spain, n.d.); BARTOLOME DE LAS CASAS, A SHORT ACCOUNT OF THE DESTRUCTION OF THE INDIES (Stafford Poole ed., 1992) (Spain, 1552).

²⁷ See Kenneth Pennington, *Bartolome de Las Casas and the Tradition of Medieval Law*, in 39 CHURCH HISTORY 143, 149 (1970).

²⁸ James Muldoon, *Papal Responsibility for the Infidel: Another Look at Alexander VI’s Inter Caetera*, 64 CATHOLIC HIST. REV. 168, 170 (1978); Stogre, *supra* note 21, at 14–20.

²⁹ Juneau, *supra* note 22, at 11. Both Muldoon and Stogre question the “donation” issue, as did Vitoria in his lectures. See Muldoon, *supra* note 28, at 170; Stogre, *supra* note 21, at 14–20.

³⁰ See Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11–12 (1942); Alberto de La Hera, *El Derecho de Los Indios a La Libertad y a La Fe*, in 26 ANUARIO DE HISTORIA DEL DERECHO ESPANOL 87 (Instituto Nacional de Estudios Juridicos ed., 1956); Stogre, *supra* note 21, at 21–27.

their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect."³¹

A. *The Spanish Rule of Recognition*

The entry of the Spanish and Portuguese into the Americas actually marks the division between the Middle Ages or Medieval period and the beginning of the Modern period. The situation in the Americas was unique. While the Spanish Crown stated its intention to transplant old world societies and institutions into the new world, it had to frame law and policy to adapt to different geographical and historical circumstances.³² Spanish policy developed a law to deal with issues of liberty, legal status and the treatment of indigenous or "natural" peoples.³³

What was the legal reality Spain faced when it adjusted medieval Castellan law to the necessities of a vast, complex and unknown American reality?³⁴ It was that the Indians whom the settlers³⁵ encountered had their own laws and their own government. Shortly before the arrival of Cortez in Mexico, Montezuma I codified Aztec law in fourteen prescriptions, covering everything from criminal to sumptuary, or dress code, law.³⁶ The peoples of the Americas already had a well-developed international law,³⁷ and their own extensive systems of law and government.³⁸

In the face of reality, and given the need to secure voluntary alliance with Indians, three schools of thought developed about Indian govern-

³¹ Cohen, *supra* note 30, at 12. Cohen asserts that the words of the bull are restated in the Northwest Ordinance of 1787 in its "utmost good faith" towards the Indians. *Id.* In fact, the bull echoes through the centuries in treaties, statutes and documents where one political force or people imposes itself on another, and respect for prior law and rights are declared. This is another fundamental principle of Western law.

³² CLARENCE H. HARING, *THE SPANISH EMPIRE IN AMERICA* 109 (1947).

³³ Beatriz Bernal, *Derecho Indiano*, in *DICCIONARIO JURIDICO MEXICANO* 994 (Instituto de Investigaciones Juridicas ed., 4th ed., 1991).

³⁴ *Id.*

³⁵ "Invaders" to some. A popular American Indian bumper sticker declares: "Indians had lousy immigration laws." Jose Piedra, *Loving Columbus*, in *AMERINDIAN IMAGES AND THE LEGACY OF COLUMBUS* 230, 230 (Rene Jara & Nicholas Spadaccini eds., 1992).

³⁶ See TZVETAN TODOROV, *THE CONQUEST OF AMERICA* 68 (1992).

³⁷ See generally FRANK D. REEVE, *NAVAJO FOREIGN AFFAIRS 1795-1846* (1983) (describing Navajo international law); Wolfgang Preiser, *Early Systems of International Law in Middle and South America*, 18 *LAW & ST.* 72, 85-86 (1978).

³⁸ See, e.g., GONZALO A. BELTRAN, *FORMAS DE GOBIERNO INDEGENA* (1981); LUCIO MENDIETA Y NUNEZ, *EL DERECHO PRECOLONIAL* (1981).

ance and law in the Americas. One, led by Franciscus de Vitoria, held that “Indians, having developed their own society, were entitled to their own institutions and law.”³⁹ The second stated the feudal position of the Spanish monarchy, that there was “one society” and thus one law for all.⁴⁰ The third approach was that there were “two republics,” one Spanish and one Indian, in the Americas.⁴¹ Aside from the doctrinal debates, the “two republics” approach won out as the political and legal reality.

The “two republics” approach required a doctrine of recognition of Indian law.⁴² The general principle, stated in several decrees, was that the “good usages and customs of the Indians [must] be observed” to the extent they were “not contrary to [the] Christian religion.”⁴³ The rule of recognition was stated in royal decrees in 1530, 1542, 1555, 1556, and in the *Recopilación de Leyes de Indias* of 1680.⁴⁴ One decree, which was enshrined in the *Recopilación*, a codification of laws pertaining to the Indies and Indians, stated:

We order and command that the laws and good customs which the Indians anciently had for their good government and order, and their usages and customs which they have observed and kept since they became Christians, and which are not incompatible with our holy religion, or with the laws of this book, as well as those which they have recently made and declared, be kept and executed, and, it being necessary, by these presents we approve and confirm them, together with what we are able to add thereto that is useful to us and appears to us accordant with the service of our Lord God, and our own, and the preservation and Christian government of the natives of these provinces, without prejudice to what has already been done, and their good and just customs and their own statutes.⁴⁵

³⁹ WOODROW BORAH, JUSTICE BY INSURANCE 28 (1983).

⁴⁰ *Id.* This argument is used in industrial societies as well, but it ignores the fact that legal pluralism is central to Western law. See BERMAN, *supra* note 10, at 520–58.

⁴¹ BORAH, *supra* note 39, at 29; see also McALISTER, *supra* note 7, at 391–96 (describing the ordering of the republics).

⁴² See BORAH, *supra* note 39, at 29.

⁴³ *Id.* at 34.

⁴⁴ See *id.*; Bernal, *supra* note 33, at 993; see also Beatriz Bernal, *Recopilacion de Leyes de Indias*, in DICCIONARIO JURIDICO MEXICANO, *supra* note 33, at 2696–99.

⁴⁵ Juneau, *supra* note 22, at 13. The original Spanish states:

El Emperador Don Cárlos y la Princesa Doña Juana gobernadora en Valladolid, á 6 de

Thus, Spanish law established the rule of recognition of the validity and legitimacy of Indian law, the rule which prevails in North America today. Spanish law instituted other reforms, but it ultimately failed to come to grips with the process of legal pluralism and the “two republics” approach. In 1573, the Crown established the *Juzgado General de Indios* (General Court of Indians) in Mexico to deal with disputes between Spaniards and Indians.⁴⁶ The 1513 amendments of the *Laws of Burgos* had provided, in Article IV, that when Indians were “so apt and ready to become Christians, and so civilized and educated, that they will be capable of governing themselves . . . [they] shall be allowed to live by themselves”⁴⁷ That provision anticipated self-government for Indians, and whether they were Christians or not, Indian versions of the Spanish municipality, with judges, the *cabeza* or *cabecera*, were established.⁴⁸ The “presiding native figure” was called *gobernador* or *juez gobernador*, with judicial powers to hold court for minor offenses and civil cases.⁴⁹

How well did Indian judges adapt to Spanish legal institutions? One account assesses their work as follows:

The cases decided by Indian judges, like those decided by corregidores, provide a revealing record of the petty squabbles of Indian life—over property, debts, horses, women, mar-

Agosto de 1555.

Que se guarden las leyes que los indios tenían antiguamente para su gobierno, y las que se hicieren de nuevo.

Ordenamos y mandamos, que las leyes y buenas costumbres que antiguamente tenían los Indios para su buen gobierno y policía, y sus usos y costumbres observadas y guardadas despues que son cristianos, y que no se encuentran con nuestra sagrada religion, ni con las leyes de este libro, y las que han hecho y ordenado de nuevo se guarden y ejecuten; y siendo necesario, por la presente las aprobamos y confirmamos, con tanto que Nos podamos añadir lo que fuéremos servido, y nos pareciere que conviene al servicio de Dios nuestro Señor, y al nuestro, y a la conservacion y policía christiana de los naturales do aquellas provincias, no perjudicando á lo que tienen hecho, ni á las buenas y justas costumbres y estatutos suyos.

Id. at 13 n.64. There is a slightly different English translation in SPANISH LAWS CONCERNING DISCOVERIES, PACIFICATIONS AND SETTLEMENTS AMONG THE INDIANS 50 (S. Lyman Tyler ed., 1980).

⁴⁶ See generally BORAH, *supra* note 39 (extensive history of the court); CHARLES R. CUTTER, *THE PROTECTOR DE INDIOS IN COLONIAL NEW MEXICO 1659–1821* (1986) (experience in *Nuevo Mexico*); SILVIO A. ZAVALA, *LAS INSTITUCIONES JURIDICAS EN LA CONQUISTA DE AMERICA* (1971).

⁴⁷ LESLEY B. SIMPSON, *THE LAWS OF BURGOS OF 1512–1513*, at 44–45 (1978).

⁴⁸ CHARLES GIBSON, *THE AZTECS UNDER SPANISH RULE* 33, 167 (1964). An Indian municipality in Mexico was called a *governadoryotl*. *Id.*

⁴⁹ *Id.*

ket goods, and other matters without end. Spaniards occasionally complained that Indian *alcaldes* possessed only a limited understanding of their judicial obligations and that they jailed *maceguales* [“ordinary Indians”] unjustly. On the other hand, records of Indian judicial procedure indicate at times a remarkable sense of legalism, in absolute imitation of Spanish procedures. A number of records of Nahuatl court minutes have survived, with accusations, charges, interrogations, depositions, sworn testimonies, sentences, and the full corpus of Hispanic legal form.⁵⁰

Ultimately, the Spanish were unable to understand traditional Indian law, and used Spanish law in the *Juzgado General de Indios*, despite the royal command to guard and execute the laws of Indians. The Spanish municipal-judicial form was thus imposed on Indian communities.⁵¹

Throughout the period of Spanish Empire in the Americas, there were tensions between the Crown in the enforcement of its humanitarian obligations towards the Indians and their nations, and the settlers, who resented special rights and treatments for the Indians. Ultimately, when the nineteenth century period of revolution dawned, with “liberal” revolutions to free the Americas from European imperial control, the settlers won.⁵² In Mexico, the solution to the “Indian problem” was simple: a Spanish statute of February 9, 1811 decreed the judicial equality of Spaniards and Indians, and the Plan of Iguala of February 14, 1822 established the same principle, following Mexico’s independence.⁵³ *Derecho Indiano*, the Spanish regime of Indian law, died with the revolution, but the hopes and identities of Indian peoples persisted.⁵⁴

⁵⁰ *Id.* at 180.

⁵¹ And it exists to this day among the Pueblos of New Mexico. See JOE S. SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF INDIAN HISTORY 13 (1992); WATSON SMITH & JOHN M. ROBERTS, ZUNI LAW: A FIELD OF VALUES 28–34 (1973); M. Estellie Smith, *Pueblo Councils: An Example of Stratified Egalitarianism*, in THE DEVELOPMENT OF POLITICAL ORGANIZATION IN NATIVE NORTH AMERICA 32, 36 (Elizabeth Tooker ed., 1983); Ada P. Melton, Traditional and Contemporary Justice in Pueblo Communities (n.d.) (manuscript on file with authors).

⁵² See HARING, *supra* note 32, at 314–25.

⁵³ See G. Emlen Hall & David J. Weber, *Mexican Liberals and the Pueblo Indians, 1821–1829*, 59 N.M. HIST. REV. 1, 5, 7–8 (1984).

⁵⁴ The *governadoryoll* continues to exist in village courts in Mexico, under state law. See generally LAURA NADER, JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (1990).

B. *The British Rule of Recognition*

Spanish law was built by decree. The English had an administrative body akin to the Council of the Indies to fix policy in the Americas, called the Privy Council, and they established the office of Commissioner of Indian Affairs to regulate Indian policy,⁵⁵ but the rule of recognition was established by the English courts.⁵⁶ English common law is based on judicial decisions, not royal decrees or legislative-administrative enactments as it was on the continent.

The question of the recognition of the law of another people first arose in *The Case of Tanistry* (1608), where the validity of the Irish (*brehon*) customary law of inheritance was raised.⁵⁷ The court ruled that the indigenous laws of a country survive British rule, if they are reasonable, certain, of immemorial usage and compatible with crown sovereignty.⁵⁸ In *Calvin's Case*, Lord Coke ruled that the laws of a conquered Christian nation survive, but those of an "infidel" nation do not.⁵⁹ In *Omichund v. Barker*, the chief justice rejected Coke's view as being contrary to scripture, common sense and humanity.⁶⁰

The English colonists raised questions of the distinctness of Indians as a people for the purposes of land rights, and many legal writers point to *The Mohegan Indians v. Connecticut* to establish the distinctness, and thus the sovereignty, of Indians.⁶¹ A member of a royal commission, Commissioner Horsmanden, "was of the opinion that the Indians were a distinct people, that the property of the soil was in the Indians, and that royal charters did not *ipso facto* inappropriate lands delimited therein to subjects until fair and honest purchases thereof were made

⁵⁵ See FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 5–25* (1962); see also BRUCE CLARK, *CROWN SOVEREIGNTY: THE EXISTING ABORIGINAL RIGHT OF SELF-GOVERNMENT IN CANADA 66–67* (1990).

⁵⁶ The English experimented with native policy in Scotland and Ireland contemporaneously with their colonization of America. See generally William C. MacLeod, *Celt and Indian: Britain's Old World Frontier in Relation to the New*, in *BEYOND THE FRONTIER: SOCIAL PROGRESS AND CULTURAL CHANGE* 25, 24–41 (Paul Bohannon & Fred Plog eds., 1967) (contrasting British and Spanish policy). While the British did not cite the Spanish *Derecho Indiano*, its principles are obvious in both British, and later American Indian policy and law. See *id.*

⁵⁷ *The Case of Tanistry*, 80 Eng. Rep. 516, 520 (K.B. 1608).

⁵⁸ *Id.* The custom did not survive the test. *Id.*

⁵⁹ *Calvin's Case*, 77 Eng. Rep. 377, 398 (K.B. 1608).

⁶⁰ *Omichund v. Barker*, 125 Eng. Rep. 1310, 1312 (Ch. 1744).

⁶¹ See JOSEPH H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 422–42* (1950) (discussing the case, a land arbitration, in full).

from the natives.”⁶² The arbitration decision was affirmed in London on January 15, 1773.⁶³

The question was closed in the 1774 decision by Lord Campbell, *Campbell v. Hall*, which held that the laws of an acquired territory remain in force until altered by the Crown.⁶⁴ This became the rule for the British Empire and later the British Commonwealth countries.⁶⁵ The English courts established the rule of recognition, and it was confirmed in the Royal Proclamation of 1763.⁶⁶ Thus, the foundation was laid for American state practice.

C. *The American Rule of Recognition*

The United States is also a common law jurisdiction. While most American Indian affairs law⁶⁷ is based on Spanish and English colonial law,⁶⁸ a series of American court decisions establish the American rule of recognition of the laws of Indians. None of them cite Spanish colonial practice, and only a few cite British decisions (particularly *Campbell v. Hall*), but the Spanish and English origins are obvious.

The first American Indian case, *Johnson v. M'Intosh*, involved the question of the legality of purchases from Indians and the application of Indian law.⁶⁹ The Court held that “a person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”⁷⁰ The question of the continuing validity and application of Indian criminal law arose in *Ex Parte Crow Dog*, where the Court ruled that customary Indian criminal law applies in Indian Country.⁷¹ The application of traditional Indian

⁶² *Id.* at 434.

⁶³ *Id.* at 442.

⁶⁴ *Campbell v. Hall*, 98 Eng. Rep. 1045, 1047–49 (K.B. 1774).

⁶⁵ See generally CLARK, *supra* note 55; PAUL MCHUGH, *THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI* (1991).

⁶⁶ See Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 356 (1989). In 1982, the English Court of Appeals said that the Proclamation was still good law and is an “Indian Bill of Rights.” *Queen v. Secretary of State*, [1982] Q.B. 892, 894 (C.A.), *reprinted in* ABORIGINAL PEOPLES AND THE LAW 150, 155 (Bradford W. Morse ed., 1985).

⁶⁷ The official title bestowed by the American Bar Association.

⁶⁸ See PRUCHA, *supra* note 55, at 41–50; Cohen, *supra* note 30, at 1–2.

⁶⁹ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 543–62 (1823).

⁷⁰ *Id.* at 593.

⁷¹ *Ex Parte Crowdog*, 109 U.S. 556, 572 (1883). “Indian Country” is a term of art, beginning with the Royal Proclamation of 1763, which defines Indian lands. It is codified at 18 U.S.C. § 1151.

probate law in Indian Country was affirmed in *Jones v. Meehan* in 1899.⁷² The U.S. Supreme Court upheld the authority of Indian nations to exclusively regulate domestic relations in 1916 in *United States v. Quiver*.⁷³

In more recent years, the United States Supreme Court began manipulating the rule of recognition. In the 1978 decision of *Oliphant v. Suquamish Indian Tribe*,⁷⁴ the Court ruled that Indian nations have no inherent jurisdictional power over non-Indian offenders within Indian Country, citing language from *Crow Dog*, which said that it would be unfair to subject non-Indians to “alien” customary law.⁷⁵ The decision recognized its validity, however.⁷⁶ Shortly after *Oliphant*, the Court specifically upheld the authority of the Navajo Nation to apply its traditional criminal law.⁷⁷ In *Duro v. Reina*,⁷⁸ the Court used the same reasoning as in *Oliphant*, i.e., that it would be unfair to apply a law to someone who didn’t know it, to strip Indian nations of criminal jurisdiction over non-member Indians from other Indian nations.⁷⁹ Congress overturned the Court in legislation.⁸⁰

The American rule of recognition validates the legitimacy of Indian nation laws, and particularly traditional laws. It echoes the continuous tradition from Roman times, the *Sublimis Deus* of 1537, and the Spanish and English doctrines that Indian law is legitimate, such that Indians have the right to make and be bound by it. Only recently, the same principle has been stated in international law.

D. *The International Rule of Recognition*

As noted, there is a long history to the right of disparate peoples to have and enjoy their own law, as there is a history of guaranteeing the rights to liberty and property in treaties and other legal documents when one state takes over another state or its citizens. The United Nations General Assembly adopted the International Covenant on Civil and Political Rights⁸¹ (Covenant) in 1966, and it went into force

⁷² *Jones v. Meehan*, 175 U.S. 1, 29 (1899).

⁷³ *United States v. Quiver*, 241 U.S. 602, 606 (1916).

⁷⁴ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁷⁵ *Id.* at 212.

⁷⁶ *See id.* at 211–12.

⁷⁷ *United States v. Wheeler*, 435 U.S. 313, 332 (1978).

⁷⁸ *Duro v. Reina*, 495 U.S. 676 (1990).

⁷⁹ *See id.* at 694–98.

⁸⁰ *See* 25 U.S.C. § 1301(2) (1994).

⁸¹ Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter Covenant on Civil and Political Rights].

on March 23, 1976.⁸² It is a codification of customary international law, and Article 27 guarantees the right of persons belonging to ethnic, religious and linguistic minorities to “enjoy their own culture.”⁸³ Among the customary rights which are protected in Article 27 is the right to “preservation of customs and legal traditions.”⁸⁴ The official U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities report on the Covenant (Capotorti Report) does not mention Roman law, *Sublimis Deus*, or the Spanish, English and American rules outlined above, but it clearly describes the right “to preserve the customs and traditions which form an integral part of their way of life” as an “element in any system of protection of minorities.”⁸⁵ The Capotorti Report indicates that this is a controversial area, and one can see echoes of the “one law” and “two republics” conflict within the concept that “minorities” have a right to their own law.⁸⁶ In 1987, the U.N. *Study of the Problem of Discrimination Against Indigenous Populations*⁸⁷ (Cobo Report) reiterated the continuing force of customs and traditions,⁸⁸ and recommended measures to assure equality in the administration of justice and legal assistance.⁸⁹ The Cobo Report is much weaker than the Capotorti Report.⁹⁰ Obviously, many national governments resist the notion that “minority” groups (which most often include indigenous peoples) should have separate legal systems or laws.⁹¹

⁸² PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 25 (1983).

⁸³ Covenant on Civil and Political Rights, *supra* note 81, art. 27, at 56.

⁸⁴ *Id.*

⁸⁵ Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. ESCOR, 32d Sess., U.N. Doc. E/CN.4/Sub.2/384/Rev.1, at 66 (1979) [hereinafter Capotorti Report].

⁸⁶ *Id.* at 66–67.

⁸⁷ José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, 36th Sess., U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Vol. V, Conclusions, Proposals and Recommendations) (1987) [hereinafter Cobo Report].

⁸⁸ *Id.* at 13–14.

⁸⁹ *Id.* at 44–45.

⁹⁰ Compare Cobo Report, *supra* note 87, with Capotorti Report, *supra* note 85.

⁹¹ A review of ratification reservations of the Covenant on Civil and Political Rights (Covenant) shows a great deal of denial that there even *are* “minority” groups in some of the ratifying states. See SIEGHART, *supra* note 82, at 445–66. When the United States ratified the Covenant in 1992, the Senate made a reservation, unusual for U.S. international law, that ratification would have no effect without implementing legislation (under the Treaty Clause of the U.S. Constitution, art. VI, § 2, treaties are self-enforcing). See 138 CONG. REC. S4781–84 (daily ed. Apr. 2, 1992) (ratification proceedings). As of 1983, the Bolivia Conference participants that ratified the Covenant are

Modern states that resist the Indian rights outlined above are going against centuries of fundamental tradition—the human rights tradition that native peoples have the right to govern themselves through law. It is an international customary right which arises from consistent European state practice. It is a right which should be dormant no longer.

II. THE “INDIANS HAVE NO LAW” MYTH

The medieval law doctrine regarding the right of “heathens,” “infidels” and other non-Christians to exercise *dominium* or legal jurisdiction with their own law was that there was no justification for conquest or the imposition of authority over others *unless* they lived in violation of natural law. The usual excuses were idolatry or sexual aberrations. Crushing idolatry was one excuse for invasion and conquest, and the religious justifications of the conquest of the Indians of the Americas are a source of shame for the later European value of religious toleration.

This is not the place to go into the subject in detail, but Columbus and his close followers were exceedingly interested in the sexual practices of Indians.⁹² Was it that the Europeans were sexually repressed? Was it that they found Indians exotic? Or was it that the obsession with sexuality we see in the reports of explorers and adventurers was a premeditated and precise effort to document Indian sexual practices in order to place them in the category of violators of natural law so as to justify invasion? We leave that point to others.

There was another pretext for invasion and conquest: that Indians had “no law.” That theme flows throughout the Spanish debates, and it persisted into later years. A Dutch visitor to colonial New York, Adriaen Van der Donck, noticed “how uncommon” crimes were among Hudson River Indians: “With us, a watchful police is supported, and crimes are more frequent than among them.”⁹³

Not recognizing the sanctioning functions performed by means that he had himself described, he was baffled to understand how there could be so little crime “where there is

Columbia (Oct. 29, 1969), Ecuador (Mar. 6, 1969), Mexico (Mar. 23, 1981), and Peru (Apr. 28, 1978). See SEIGHART, *supra* note 82, at 447–49 (table).

⁹² See Piedra, *supra* note 35, at 230.

⁹³ FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST* 111 (1975).

no regard paid to the administration of justice.” A lawyer himself, Van der Donck could recognize due process only when it appeared in the forms to which he had been trained. That fault was shared by other Europeans contemporary with himself and in following generations.⁹⁴

Colonel James Smith was held captive by Delaware Indians from 1755 through 1759, and he wrote about their laws and customs that: “As they are illiterate, they consequently have no written code of laws. What they execute as laws, are either old customs, or the immediate result of new councils.”⁹⁵ Smith said that Indians did not have laws and that their customs were “very pernicious, and disturb the public weal.”⁹⁶

Thomas Jefferson, the American philosopher-scientist-lawyer-politician, wrote to James Madison on January 30, 1787 to discuss the proposed form of United States government and cited three forms, including “Without government, as among our Indians.”⁹⁷ On June 20, 1803, Jefferson wrote to Captain Meriwether Lewis to give instructions about what he was to record on the expedition through the newly-acquired Louisiana Territory and included “peculiarities in their [the Indians] laws, customs & dispositions.”⁹⁸ It is curious that a man like Jefferson, who was very familiar with Indian life, would articulate the “no law” myth yet recognize it when laying the groundwork for the “Manifest Destiny” of the United States.

These are but a few of the “Indians have no laws” conclusions. Were the explorers, war captains, captives, visitors and observers simply ignorant? Was it that they could not “see” Indian law at work? Or was it that they refused to recognize it existed? The many observations of Indian society sent back to Europe clearly showed that there was such a thing as Indian law and government. The mistake (if there was one)

⁹⁴ *Id.* at 111–12.

⁹⁵ ARCHIBALD LOUDON, A SELECTION OF SOME OF THE MOST INTERESTING NARRATIVES OF OUTRAGES COMMITTED BY THE INDIANS IN THEIR WARS WITH THE WHITE PEOPLE 240 (Arno Press 1971) (1808).

⁹⁶ *Id.* He did admit that the criminal customs he saw were not as bad, unjust or cruel “as the bloody penal laws of England, which we have so long shamefully practised, and which are in force in this state [Kentucky], until our penitentiary house is finished, which is now building, and then they are to be repealed.” *Id.* at 241. Smith said that perhaps Indian law had some advantages: “They are not oppressed or perplexed with expensive litigation—They are not injured by legal robbery—They have no splendid villains that make themselves grand and great upon other peoples labor—They have neither church or state erected as money-making machines.” *Id.*

⁹⁷ THE PORTABLE THOMAS JEFFERSON 415, 416 (Merrill D. Peterson ed., 1975).

⁹⁸ *Id.* at 308, 310.

arose from a legal heresy used to excuse the imposition of alien law and government on Indian nations.

Surely, Indian law is different. There are language barriers to knowing it. It is expressed in different ways. However, there is such a thing as the legal tradition of Indian law, as there is with the Roman law, continental law and English common law traditions. This too is part of the consideration policy-makers must take of the right of Indians to enjoy their own law.

III. ALTERNATIVE DISPUTE RESOLUTION

There are important policy reasons to reserve comparing Indian law with A.D.R. While the reference to this term in Article 171 of the Bolivian Constitution (1994 amendment)⁹⁹ is an important step forward, there are dangers in the use of the term. To Indians, their legal traditions are the first or original methods of dispute resolution.¹⁰⁰ They are only an "alternative" to the state system of law. It is dangerous to compare A.D.R. with traditional Indian law, because the errors in doing so have destructive impacts.¹⁰¹

American Indians have experience with A.D.R. As the movement developed in the United States:

Nothing, it seemed, propelled enthusiasm for alternative dispute resolution like a few legal victories that unsettled an equilibrium of privilege. Once native Americans litigated to retain tribal lands seized in violation of treaty rights, the federal Bureau of Indian Affairs proclaimed the value of informality. And in Alaska, conciliation proposals were designed to integrate Eskimo tribal justice into the state legal process. There was an especially diabolical quality to prescriptions of informal dispute settlement for native Americans who, for centuries, had practiced their own indigenous tribal

⁹⁹ BOL. CONST. art. 171; *see also supra* note 4 and accompanying text.

¹⁰⁰ The Hon. Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175 (1994).

¹⁰¹ For example, Robert C. Depew prepared a report for the Aboriginal Justice Directorate, Department of Justice Canada, which uses shortcomings in the Canadian-American A.D.R. movement to urge denial or slow implementation of native justice initiatives in Canada. ROBERT C. DEPEW, POPULAR JUSTICE AND ABORIGINAL COMMUNITIES: SOME PRELIMINARY CONSIDERATIONS (Dec. 1994) (on file with authors). He used A.D.R. deficiencies as a straw man, and any resulting position of the Department of Justice Canada to resist native rights is false. *See id.*

forms of dispute settlement—until white intruders imposed the norms of legal adjudication.¹⁰²

The Bureau of Indian Affairs forced Indian nations into A.D.R. to resolve their land and resource claims and “the shifting political currents of legality and informality, applied to native Americans, simultaneously reduced their tribal cohesion and diminished their legal rights.”¹⁰³

There is a difference between informal procedures in a forum where Indian groups must assert their rights against non-Indians and traditional Indian dispute resolution. In Indian-White relationships there are imbalances in bargaining position, with resulting disparities in outcomes. Adjudication was imposed on the Indians of the Americas when European judicial systems were established because the newcomers could not (or would not) understand Indian legal procedure. That must not be done again.

A few years ago, some A.D.R. experts from New Mexico visited the Navajo Nation to get a view of the traditional Navajo procedures utilized in the Navajo Peacemaker Court.¹⁰⁴ They sincerely offered to teach A.D.R. methods to the Navajos they visited, but their hosts politely declined, because they had already had adjudication imposed on them, which was unsuccessful. The Navajo hosts (including Philmer Bluehouse, head of the Peacemaker Division, or *Hozhooji Naat'aanii*) offered to teach Navajo methods to the visitors, and some of them returned to complete the Judicial Branch (of the Navajo Nation) in-house certification training for peacemakers.

There are vast differences between A.D.R. and the traditional methods of many Indian nations, and that must be kept in mind when considering “alternative dispute resolution” for Indians. There are dangers in transplanting the methods of one culture into another.¹⁰⁵ Indian systems may be an alternative to the state system, but they are more often unique in themselves.

¹⁰² JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 128 (1983).

¹⁰³ *Id.* at 129.

¹⁰⁴ See, e.g., James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AMER. INDIAN L. REV. 89 (1983).

¹⁰⁵ However, the American experience with tribal courts shows that if Indian nations are left free to develop their own systems, based on English-American models, they work. The Pueblos of New Mexico and village courts of Mexico use the Spanish model with success.

IV. SUMMARY OVERVIEW OF TRADITIONAL INDIAN JUSTICE

There are hundreds—if not thousands—of Indian groups in the Americas. There are many different language families. There are dialects and customs which may vary greatly, particularly in mountain and jungle areas where peoples are isolated. Therefore, it is impossible to state general principles about Indian law with accuracy. There are some things, however, which are most likely universal or nearly so.¹⁰⁶

There are several important approaches to law. European traditions are most often built on articulations of rules by legislatures, executives or courts. There are alternative views, such as the one that “law” is process, not rules.¹⁰⁷

Think of law as norms which are enforced by institutions.¹⁰⁸ A “norm” “is a rule, more or less overt, which expresses ‘ought’ aspects of relationships between human beings.”¹⁰⁹ It can also be a value or a moral principle. Values are shared feelings about good ways in life or what conduct should be avoided. A “moral principle” is a fundamental value which people follow, depending upon the strength of shared values in a given community. A “custom” is a body of norms which are followed in practice.¹¹⁰ Principles of law are created by agents of society which may be separate and independent of institutions governed by customs.¹¹¹ When a legal institution articulates a norm or validates a custom, that is “law.”¹¹² Force is not necessary to have law; law is “*that which has been reinstitutionalized within the legal institution so that society can continue to function in an orderly manner on the basis of rules so maintained.*”¹¹³

¹⁰⁶ In July, 1983, a group of Indian justice leaders from nations which ranged from the Rio Grande River (between Mexico and the U.S.) of the United States to North Saskatchewan in Canada met at the Blackfeet Nation to discuss Indian customary law. The participants found that many customs and approaches are the same. James W. Zion surveyed Indian customary law in Saskatchewan in 1984, and also found many common bonds.

¹⁰⁷ See, e.g., SALLY F. MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978).

¹⁰⁸ See Paul Bohannan, *The Differing Realms of the Law*, in *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 44–45 (Paul Bohannan ed., 1967) (theory of “double institutionalization”).

¹⁰⁹ *Id.* at 45.

¹¹⁰ *Id.*

¹¹¹ *Id.* This conclusion assumes that those who make the law may be different from those who make up the institutions governed by custom. *Id.* That is, Indians who follow custom are also the lawmakers. Bohannan, *supra* note 108, at 45. Aquinas said law can be made by the “whole people,” and that is true of custom. See AQUINAS, *supra* note 14, at 8.

¹¹² See Bohannan, *supra* note 108, at 46–50.

¹¹³ *Id.* at 48 (emphasis in original).

The element of institutions, which define and apply norms, is important. In most American jurisdictions, there are legislatures, executives, courts or agencies which engage in the process of double institutionalization. They identify the norms they feel are valuable, in the ways that they perceive them, and choose various alternatives to impose and enforce them.¹¹⁴ One key to knowing Indian law is to understand Indian institutions and how they function.

European law is essentially a “vertical” system which is built on hierarchies of power.¹¹⁵ It maintains police, lawyers, courts and prisons. Those institutions are staffed by the elite, for the most part. Depending upon the mobility of the general population to get into the professions which control legal institutions, they will be operated by only the few.¹¹⁶ The state systems most often do not have Indians perform double-institutionalization, i.e. make the laws, because there are few opportunities for them to obtain the education or opportunities to join the elite.¹¹⁷

In contrast, Indian traditional legal systems are “horizontal.”¹¹⁸ Indian clan and kinship groups are legal systems.¹¹⁹ Vertical systems use hierarchies of power and authority, backed by force and coercion, to operate their legal systems. Horizontal systems are essentially egalitarian and function using relationships. Many reject force or coercion.¹²⁰

¹¹⁴The disparity between the legal institution’s perceptions of what is “right” and the perceptions of those subject to the law is obvious. In the United States, there are those who question the method of selecting members of Congress for that very reason. National economic policy also often conflicts with the rights of Indians.

¹¹⁵Yazzie, *supra* note 100, at 177 (citing MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* 16–17 (1968)). Interestingly, Carlos Fuentes frequently uses the term “vertical” to describe Spanish institutions in the Americas. See FUENTES, *supra* note 11, at 129–37.

¹¹⁶See KATHERINE S. NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES* 238–42 (1983) (analysis of legal institutions by social stratification, wealth distinctions and class stratification). The typology or different kinds of legal institutions are: (1) self- or kin-based redress, (2) advisor systems, (3) mediator systems, (4) elders’ and restricted councils, (5) chieftainships, (6) paramount chieftainships, and (7) state-level legal systems. See *id.* at 51–98.

¹¹⁷The Cobo Report contains recommendations on how to involve indigenous populations in legal systems. The report’s approach is limited, and states should recognize or implement self-government, self-determination and sovereignty models in partnership with indigenous peoples, i.e. the Spanish “two republics” concept. See Cobo Report, *supra* note 87, at 21, 44.

¹¹⁸See Yazzie, *supra* note 100, at 180.

¹¹⁹See *id.* at 182–83. Given that kinship groups are legal institutions, policy makers should understand their makeup and functioning. See HAROLD E. DRIVER, *INDIANS OF NORTH AMERICA* 242–68 (1969).

¹²⁰In 1994, a lawyer from Vienna, Austria visited the Courts of the Navajo Nation. He insisted

The European mind has a difficult time understanding Indian legal procedure because the legal institutions of Europe, and those imported to the Americas, are a product of concentrations of royal power, nationalism and central government. "Tyranny is an abuse of hierarchy,"¹²¹ so legal systems which are based on authority tend to become authoritarian. European legal systems need complex human rights and civil rights doctrines and institutions to temper abuses of authority and hierarchy. Traditional Indian legal systems were, in large part (and with notable exceptions), founded on equality and reciprocal relationships. We must understand this distinction because it goes to the heart of legal policy development with indigenous populations and their freedom to do things in their own ways.

Traditional Indian law and modern forms of Indian law in operation today respond to unique relationships. Indian societies have their own legal institutions, both original as well as those developed in response to contact, which utilize mass double-institutionalization in custom, or articulated rules of law by legal bodies. The norms, values and moral principles which are applied as law are derived from the languages, religions, relationships and societies that Indians retain.¹²² They are what make Indian peoples unique.

V. NAVAJO¹²³ LEGAL THINKING AND INSTITUTIONS

The Navajo Nation of Arizona, New Mexico and Utah is the largest Indian nation in North America. As of 1993, it had a total population of 155,276 persons.¹²⁴ There are 17,627,262.80 acres of land in the Navajo Nation,¹²⁵ which makes it larger than Ireland and almost the size of the state of South Carolina, which is the 40th U.S. state in size. *Dine Bikeyah* (Navajoland) is larger than New England and nine U.S. states.

that traditional Navajo law must have employed various exotic punishments, and he refused to accept that most Navajo legal procedures use consensus for outcomes. In 1982, Chief Justice Yazzie made a presentation on Navajo common law to western state judges, and one remarked that Yazzie left out how Navajos staked people to ant hills. That was *not* a Navajo legal procedure.

¹²¹ SAGAN, *supra* note 6, at 277.

¹²² See Yazzie, *supra* note 100, at 1–2.

¹²³ There are several different methods of spelling Navajo; the Spanish spelling is the preferred spelling.

¹²⁴ DUANE ETSITTY, NN [NAVAJO NATION] FAX 93, at 4 (1994) (on file with authors). Of that population, 6923 persons were non-Indian. *Id.*

¹²⁵ *Id.* at 49.

Navajo norms, values and moral principles are stated in the Navajo language and preserved in Navajo creation scripture, origin stories, ceremonies, songs, stories and maxims. The Navajo creation scripture relates the journey narratives which led the people to their current homeland.¹²⁶ Navajo social stories about mythic creatures, particularly Coyote and Horned Toad, are another means to record values as legal principles.¹²⁷ Songs are also used as legal teaching tools.¹²⁸

The Navajo language is very sophisticated. Many Navajo words and phrases express concepts which are difficult to render in another language. They are descriptive and provide vivid word pictures. Navajos do not use religious or sexual swearing, but one phrase which is used, *shash kheyadae*, means “from the bear’s den!”¹²⁹ The Navajo word for a lawyer, *’agha’diit’aahee*, means “someone who pushes out with words.” It describes someone who is bossy, not a very nice person in Navajo thinking.

There are several Navajo maxims to urge good action or describe bad acts: in the marriage ceremony, the couple is urged, *hazho’ sokee’*—“stay together nicely.” An elder who speaks to a child will say, *hozhigo*—“do things in a good way.” Of a wrongdoer, Navajos will say, “He acts as if he had no relatives” (showing the importance of social controls).¹³⁰

The word *k’e* is important in Navajo relationships; it is what makes the Navajo legal institutions of the clan and civil leader work.¹³¹ It is very difficult to translate this word into another language because it has deep connotations in order to urge persons to go along with the group.¹³² It is an aggregation of deep feelings which urge respect and solidarity with the group.¹³³ The word speaks to reciprocal relationships

¹²⁶ See, e.g., WASHINGTON MATTHEWS, *NAVAJO LEGENDS* (1994); PAUL G. ZOLBROD, *DINE BAHANE’: THE NAVAJO CREATION STORY* (1984) (examples of collections of the creation scripture in English). Navajos frequently cite the scripture in daily discussions of problems or disputes. The Navajo Nation Navajo Law Project is currently reviewing them for use in the courts.

¹²⁷ See, e.g., FATHER BERARD HAILE, O.F.M., *NAVAJO COYOTE TALES* (1984). Father Haile’s work is superior because it uses facing page Navajo-English translations. For an example of a story of Horned Toad (a law giver), see Philmer Bluehouse & James W. Zion, *Hozhooji Naat’aanii: The Navajo Justice and Harmony Ceremony*, *MEDIATION Q.*, Summer 1993, at 327, 333. Navajo judges insist that children should learn the Coyote stories (told in winter) so they will know the law.

¹²⁸ See, e.g., JOHN R. FARELLA, *THE MAIN STALK: A SYNTHESIS OF NAVAJO PHILOSOPHY* (1984) (analysis of the values conveyed by songs).

¹²⁹ *THE FRANCISCAN FATHERS, AN ETHNOLOGIC DICTIONARY OF THE NAVAHO LANGUAGE* 444 (1910).

¹³⁰ Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, *JUDGES’ J.*, Spring 1993, at 8, 10.

¹³¹ See Yazzie, *supra* note 100, at 182.

¹³² *Id.*

¹³³ *Id.*

where there are duties and obligations to both the individual and the group.¹³⁴ The maxim which expresses Navajo individuality and freedom is, "It's up to him." Navajos believe in a greater degree of freedom than the Western concept of individuality, but individuality is still exercised in the context of the well-being of the group.

There is a special kind of *k'e* called *k'ei* or clanship. Navajos are matrilineal. They are "born of" their mother's clan and "born for" their father's clan. Thus, they trace relationships beyond blood ties or immediate biological family. The clan is the Navajo legal institution.

Navajos had both war leaders and civil leaders. Traditional civil leaders are selected by group consensus and they have authority only for as long as they benefit the group.¹³⁵ The Navajo civil leader's authority is not coercive, but persuasive.¹³⁶ That is, he or she compels others through urging and example, not through power and force. The Navajo leader is not merely an "advisor" or a "mediator," however, nor a "chief" in the sense of someone who can command another.

A traditional civil leader is a planner. The Navajo concept of civil leadership authorizes justice planners for the traditional Navajo legal institution. A justice planner is a *naat'aanii*.¹³⁷ The word itself describes a person who speaks wisely and well.¹³⁸ Wisdom comes from experience and knowledge of the ceremonies, and speech is valued as a virtue. The Navajo language tends to be very precise, so words are important. A traditional story about one *naat'aanii* says that he was "able to talk the goods in." This phrase refers to the talent for planning the leader had, and how his wisdom was used for community success. Navajo planning, *naat'aah*, is very pragmatic and a plan is the product of considering every aspect of a problem through talking it out in a group setting.

What happens when there is a dispute? The person who claims injury demands *nalyeeh*. The word is translated as "restitution" or "reparation," but it is an action word which demands compensation for an injury and an adjustment of relationships between an "offender" and a "victim."¹³⁹ Who is the judge? It is not a *naat'aanii*, but the persons who are involved in the dispute.¹⁴⁰ The persons who have

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Yazzie, *supra* note 100, at 182.

¹³⁷ *See id.* at 186.

¹³⁸ *Id.*

¹³⁹ *See* Austin, *supra* note 130, at 10.

¹⁴⁰ Yazzie, *supra* note 100, at 186–87.

“standing” by being within the “zone of dispute” in Navajo common law include relatives and clan members of the parties. The procedure used to resolve the dispute is “talking things out,” and the Navajo word for “trial,” *ahwiniti*, means “where they talk about you.”¹⁴¹

How does the “trial” work? The person who demands *nalyeeh* seeks the assistance of a relative to get a *naat’aanii* to summon the participants to talk things out. The particular *naat’aanii* will often be a blood or clan relative because horizontal legal institutions operate within relationship groups. The session always opens with a prayer, and it is often held after a meal. Prayer is a means of summoning supernatural assistance. It focuses the minds of the participants on the purposes of the gathering. Prayer is a powerful and compulsive word.¹⁴² It brings in the supernaturals, not simply as witnesses (as with the European oath) but as participants and agents for action.

Following the prayer, each person in the group has an opportunity to speak. The opinions and feelings of both the “victim” and the “perpetrator” are important, as are those of their relatives. For example, in a talking out session held to discuss the paternity of a child, the child’s grandparents resolved the putative father’s denial of paternity by pointing out that they (as the parents of the couple) knew about the sexual relationship all along and there was no doubt the child was theirs.

After such discussions take place, the *naat’aanii* expresses an opinion about the dispute in “the lecture.” This translation in English is unfortunate because what the *naat’aanii* says is not simply a lecture on abstract moral principles. It often relates to Navajo creation scripture through its many examples and maxims of the right way to do things.¹⁴³ A Navajo *naat’aanii* is not a “neutral,” as with American A.D.R. mediation, because he or she is summoned to guide the parties, not as a decision-maker, but as a guide or teacher. The *naat’aanii*’s opinion about the right way of doing things is important to the parties. The “lecture” or opinion is also important for the process of *naat’aah* or planning.

¹⁴¹ Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15, 17 (1992) (describing the utilization of Navajo legal principles in an ethics code for judges and court personnel). Tom Tso is a former Chief Justice of the Navajo Nation Supreme Court.

¹⁴² See generally GLADYS A. REICHARD, PRAYER: THE COMPULSIVE WORD (1944).

¹⁴³ Co-author James W. Zion, a non-Indian, was divorced from his Navajo wife in a “talking out” session where a *naat’aanii* gave the lecture about harmonious relationships and ending the marriage “in the good way,” using the creation scripture on marriage.

The first step of making a plan is to carefully identify the problem. The Navajo word for it is *nayee*, which literally translated means “monster.” A “monster” is something which gets in the way of life, a barrier, an impediment, or an obstacle to be overcome.¹⁴⁴ In Navajo creation, there were monsters who walked the earth, and the Hero Twins who slayed them went through a long process of learning, preparation, trial and seeking assistance to be able to slay them. The *naat'aanii* helps the parties identify the causes of trouble and uses Navajo wisdom and experience in the lecture to guide them. The parties then develop a plan of action to end the dispute through consensus and agreement. That plan describes the duties of each participant to mend relationships.

The end goal and the result is *hozho nahasdlíi*, which is the new relationship and attitude of the parties. It is the product of the process. It means, “now that we have done this, we are again in a state of *hozho*.” The term *hozho nahasdlíi* is used to conclude a prayer. Unlike the European prayer-termination word, *amen*, it does not mean “may it be so.” It means “It is so.” Although *hozho* is very difficult to translate, it refers to the wholeness of all reality and the connections of everyone and everything.¹⁴⁵ It involves the supernaturals, who are actually present to be a part of the process. It uses values of *k'e* solidarity and respect to reach a conclusion or state of being among everyone where each one interrelates in a proper way with the others.

A final decision often involves a transfer of goods to the injured person, to compensate for actual injury and to serve as a symbol of a good relationship. The amount or value of the compensation can include “a little extra” to show the seriousness of the act or injury. An agreement to deliver goods (such as jewelry, sheep, horses or money) also has the effect of showing the innocence of the victim, as with the open and visible delivery of horses to compensate for a rape, or a husband's act of giving *nalyeeh* to a wife to make up for an assault.¹⁴⁶

Relatives are an important part of the final agreement or “judgment.” The relatives of someone who has injured another are responsible to help pay *nalyeeh* or help the parties with the immediate dispute. They are “traditional probation officers” in the sense that if they pay

¹⁴⁴ Austin, *supra* note 130, at 10.

¹⁴⁵ *Id.*

¹⁴⁶ See James W. Zion & Elsie B. Zion, *Hazho' Sokee': Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 413–22 (1993).

valuable goods to a victim and that person's family, they will "keep an eye on" the offender to prevent future misconduct.

These are only a few of the legal principles and procedures used in traditional Navajo dispute resolution. They work, because Navajos value relationships and respect the traditions which are expressed in the Navajo language and religion. Navajo justice is egalitarian, consensual and builds on the interdependence of people in clans and families.¹⁴⁷ Traditional Navajo law had no need for civil rights or constitutional protections, because the Navajos did not need protection from authority figures in vertical institutions. There are those who protest that this is all very fine in a traditional society where people spoke the same language and lived in homogeneous communities, but it cannot work in a modern industrialized state where there are people from different backgrounds. Is that so?

In 1992, the Navajo Nation judges decided to consciously reinstitutionalize the traditional Navajo legal procedure in the formal court system.¹⁴⁸ They called it the "Navajo Peacemaker Court."¹⁴⁹ It operates on two levels: the rules of the court division essentially provide for court-annexed "mediation" and "arbitration,"¹⁵⁰ but the traditional processes described above are generally used. At present, there are over 250 peacemakers in the 110 chapters or local governmental units of the Navajo Nation. How does the modern version of traditional justice work in practice? Given that modern Navajos live in towns, watch television and function in a wage and consumer economy, is traditional justice a dead letter? Are peacemaking methods limited to the remaining pockets of rural, Navajo-speaking peoples or do they work in a modern society?

Navajo thought is very practical and pragmatic. Navajo legal procedure in peacemaking is not only a process to achieve a group decision, but also to solve problems. It gets at the heart of the matter and educates people to guide them to adjust their relationships.

We can describe Navajo justice methods in light of modern psychology. Most Navajo Nation crime involves alcohol-related misconduct directed against family members and relatives. Many civil actions in-

¹⁴⁷ See generally, Yazzie, *supra* note 100.

¹⁴⁸ *Id.* at 186.

¹⁴⁹ See Zion, *supra* note 104, at 89-90.

¹⁵⁰ Peacemaking is not really "mediation," because a *naat'aanii* peacemaker is not a "neutral" as in American A.D.R. It is not "arbitration," because a *naat'aanii* does not make a decision for others. In the Navajo system, the parties can agree to have a peacemaker make the decision.

volve injuries or failed promises within relationships.¹⁵¹ In Western legal systems, where punishment or property-shifting is central, there is great emphasis on accusations. The individual human response to an accusation often is a state of *denial*, *minimalization*, or *externalization*. Denial is where someone refuses to admit he or she has a problem or caused harm to another. On any given Monday morning in courts around the United States, persons accused of drunk-driving refuse to admit they have a problem. Minimalization is a situation where someone excuses an action by saying it is not a big deal. We hear that it is “okay” for a man to beat his wife, or that it is “traditional” for a Navajo husband to beat his wife (although it is against Navajo traditions to do so).¹⁵² Externalization is blaming. Men often blame the woman in domestic violence situations to excuse motivation. They also claim that they were drunk. That is an excuse, and too often courts have allowed “time out” for drunken behavior.

Navajo peacemaking addresses denial, minimalization and externalization in ways that state systems cannot do. In a given state system, proving the facts of a case is difficult and burdensome. In criminal systems with the privilege against self-incrimination, defendants cannot be compelled to discuss motives, attitudes, addictions or causes of misconduct. In Navajo peacemaking, which does not utilize punishment, people are free to “talk out” the problem fully and get at the psychological barriers which impede a practical solution. How does it do that?

The Navajo Nation courts received funding through the U.S. Department of Justice to implement the Male Minority Project. It is a diversion program whereby persons accused of drunk driving are sent into peacemaking. They have “use immunity” for anything they say,¹⁵³ and thus they are free to talk. If the defendant claims not to have a drinking problem, he or she says it to a spouse, parents, children and others who know the person well. If the defendant claims about wife-beating that it is not a big deal or that the wife is at fault, he must say it to his spouse or her family members. An individual’s values are clarified and corrected by those who know him well and know the true facts, rein-

¹⁵¹ Traditional Navajo law, or Navajo common law, did not distinguish between criminal and civil actions.

¹⁵² Navajo judges also hear it is “traditional” to have sexual relations with a step-child or a child who has barely reached the age of puberty. These are stereotypes which are picked up from outsider’s assumptions about Indians.

¹⁵³ “Use immunity” means that nothing which is said in peacemaking can be used against a defendant if the case returns to court for adjudication and punishment.

forced by a *naat'aanii* who is also there to correct unrealistic attitudes. In one domestic violence case, a wife-beater attempted to deny and excuse his actions, and his sister immediately corrected him. She told him that he was an abuser with an alcohol problem, and she offered her assistance to help him and his wife lead a new life to avoid abuse.

Navajo peacemaking addresses other psychological problems. It is a form of counseling. The Honorable Irene Toledo, judge of the Navajo Nation Ramah Judicial District, wondered about the existence of "post-traumatic stress disorder" among defendants accused of assault. Navajos enlist in the U.S. military forces at rates far higher than the general population and fought in both Vietnam and Operation Desert Storm. On closer examination, Judge Toledo found there was a correlation between the disorder and violence, including violence by the children of veterans.¹⁵⁴ Navajos are well aware of this disorder, and for centuries have conducted a special healing ceremony for returning war veterans which deals with the horrors of war and the traumatic memories wars cause. Judge Toledo used peacemaking counseling to urge offenders to get their healing ceremony, and the process worked. Peacemaking is also used to prepare defendants to voluntarily enter Western-styled treatment programs.

Navajo justice methods are practical. They use methods which are not mysterious or unique to Navajos, but which address recognized human emotions. They build on human processes which are universal. Indian justice recognizes human relationships and reinforces them to reach practical conclusions.

In 1994, visitors from the Parliament of Namibia visited the Navajo Nation. As Chief Justice Yazzie explained Navajo justice concepts, the group's tour guide protested that what Yazzie said was all very fine for a traditional society which was homogeneous and where everyone spoke the same language, but it wouldn't work for people with cultural or language differences. The chief justice smiled and related a story. A young Navajo child was pushed into a clothes dryer and was scorched to death. The child's parents brought a wrongful death suit against the laundromat and a products liability action against the manufacturing company for negligence in manufacturing the dryer. The defense attorney examined a likely jury verdict in court adjudication and saw that it was impossible to predict an outcome. The potential cost of both

¹⁵⁴ Violence is learned behavior. See Jeffrey A. Roth, *Psychoactive Substances and Violence*, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF (U.S. Dept. of Justice, Washington, D.C.), Feb. 1994; Cathy S. Widom, *The Cycle of Violence*, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF (U.S. Dept. of Justice, Washington, D.C.), Oct. 1992.

litigation and a judgment could have been prohibitive. The defense attorney asked for peacemaking. In a session involving the child's parents and representatives of the laundromat and the manufacturer, the parties "talked out" the child's death. The parents related that they were not motivated by money, but simply wanted a means of dealing with the loss of their child. The lawyers waited in the hallway. At the end of the peacemaking session, the parties agreed to a settlement sum. The amount was about what the defendants could have expected from a rural jury in the Arizona court system.

VI. "BACK TO THE FUTURE"

Associate Justice Raymond D. Austin of the Navajo Nation Supreme Court describes well how many Indian nations are applying their traditional law—they are going "back to the future."¹⁵⁵ Austin concludes that the Indians did well until Columbus arrived, but everything went down hill after that. Now that Indians are consciously reviving their traditional justice methods and ways of doing things, they will recover. He adds that the Western world has much to learn from traditional Indian justice methods.¹⁵⁶

Indian customary justice works. Navajo justice is a corrective, restorative and distributive justice. It is "corrective" in that it seeks the source of problems and develops practical plans to deal with both the cause and the act which create a dispute. It is "restorative" in that it deals with and adjusts the relationships of parties. It is "distributive" in that a great deal of Navajo legal thought revolves around group responsibilities to people in need, and giving people the material or emotional support they need to resolve an injury or deal with a personal problem. It is practical and the ends of justice are geared to the needs and relationships of people.

What is the present situation in North America? In the United States, the tribal court system prevails. Tribal courts are justice bodies created by the inherent powers of Indian nations. They are most often based on the American justice court model, but when outsiders observe them, they think that the Indians are getting it wrong. This is because the outsiders do not know what they are looking at, and still believe the "Indians have no law" myth. In Canada, Indians are deprived of the right to have and use their own law, but the Canadian Government now knows this does not work. In Canada, there are many discussions

¹⁵⁵ Austin, *supra* note 130, at 48.

¹⁵⁶ *See id.* at 8.

of integrating Indian methods into the state system or, better yet, recognizing indigenous justice bodies. In Mexico, there may be adaptations in village courts or assemblies which could be a beginning for the revival of traditional Indian law.

What do Navajos have that they can teach to American lawyers? In a word, *trust*. In the United States, non-Indians who do not understand Indian justice attempt to assert control in “model codes,” imposed laws and judicial review. They cannot understand that most traditional Indian justice does not revolve around punishment, but focuses on problem-solving and relationships. In the Navajo system, the judges (who are law-trained Navajos but not necessarily law school graduates) are learning that peacemaking works very well when they leave community-based peacemakers alone. The Navajo rules for the process do not mention or regulate traditional methods but leave them free to operate on their own.

Indians are fully capable of resolving their own problems, in their own ways and in their own communities. They do not fare well in state systems, and it is likely that a state system will never fully and fairly accommodate Indian perceptions of justice. “Do you handle murder in peacemaking?” is a question we often hear. Yes, peacemaking does address claims for *nalyeeh* in murder cases, but the Navajo Nation wants a better partnership with the United States Government to deal with it in the federal system. Navajos want the resources to deal with murder cases through the option of prisons, where needed.

Indian justice is “justice” for Indians when the state cannot or will not respond in its systems of adjudication. Indian peoples have a right to make their own law and apply it in their own institutions in a way which suits them. They have had that right since Roman times; it is a fundamental human right. Indians have a choice. They can use state-model adjudication, an adapted method (such as tribal courts or the Spanish institutions found in New Mexico and elsewhere), or traditional methods. They can develop or adapt others.

The action word is “trust,” and the method is partnership. Never again should a legal system be imposed on Indian nations, such as was done with adjudication in tribal courts. A.D.R. methods should be developed in communities, not in universities, or departments of justice or Indian affairs. “Legal pluralism” means different methods of justice which work side-by-side and function well because they have a good relationship. In other words, they will work well if they have *k’è* and *hozho*. That is what Navajos continue to do in the wake of conquest, so they will never really be conquered.