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# Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law<sup>1</sup>

Christine Zuni Cruz<sup>2</sup>

... [T]here are few spheres in which social reality so insistently takes precedence over legal dictate as the tenacity with which people adhere to their way of life as forged in the crucible of everyday living; and so, whatever the declared legal situation, cognizance must always be given to the "living law" of the community. This is indeed true of any community, and becomes all the more pertinent when that community, by whatever name known, has some sort of consciousness of its separate identity.<sup>3</sup>

## INTRODUCTION

At some point in my legal career, I recall becoming increasingly uncomfortable with the inconsistencies between the values in the written law of various indigenous nations and the values I knew were embedded in indigenous societies themselves. The two are not entirely in harmony, and in fact, in some instances are absolutely in opposition.<sup>4</sup> I realize that in some circumstances the problem stems from the original source of the written law itself, because many

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<sup>1</sup> The term "tribal law" is used in this article to differentiate the law of United States Indigenous nations from federal Indian Law. Tribal law includes both the traditional law of the People as well as western law, whether imposed or adopted, which has become a part of modern tribal law. The title of this article refers to the incorporation of traditional values and precepts into the written law of tribes, which has come to overwhelmingly reflect western law. Though I prefer the term indigenous law to tribal law, I use the latter term because of its familiarity.

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<sup>3</sup> LEON SHELEFF, *THE FUTURE OF TRADITION, Customary Law, Common Law and Legal Pluralism* 121 (1999).

<sup>4</sup> See generally, Christine Zuni, *Strengthening What Remains*, 7 *KAN. J. L. & PUB. POL'Y* 17, 28 *app. A* (1997) (Appendix A contrasts the Anglo-American adversarial system of justice with indigenous concepts of justice.). This is the follow-up article to *Strengthening What Remains*, an essay that addressed the role of the tribal judiciary in strengthening the place of traditional law in tribal jurisprudence highlighting the difficulty given (1) the colonialistic history of tribal courts in indigenous communities and (2) existing tensions between Anglo-American legal concepts and indigenous approaches to settling disputes. This article expands on the concept of using traditional law as the foundation for enacted, written tribal law. *Id.* at 27.

indigenous nations who organized themselves under the Indian Reorganization Act (IRA)<sup>5</sup> adopted the law drafted by the Department of Interior<sup>6</sup> for the Courts of Indian Offenses or Code of Federal Regulations (CFR) courts.<sup>7</sup> Yet, even recently enacted law continues to look very much like the western law of states.<sup>8</sup> Many reasons for this exist. How indigenous nations create laws, as well as, who creates the law and the type of “law” being created influence what enacted law looks like.

It was my experience as a tribal court judge that made me increasingly aware and uncomfortable with this inconsistency.<sup>9</sup> Perhaps this is because a judge

<sup>5</sup> Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-94 (1983).

<sup>6</sup> The Department of Interior’s Commissioner of Indian Affairs Hiram Price compiled regulations and Secretary H. M. Teller adopted these in 1883 for Courts of Indian Offenses. They were circulated among agents for all Indians except the Five Civilized Tribes, Indians of New York, the Osage, the Pueblos, and the Eastern Cherokees. See WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES EXPERIMENTS \_ in \_ ACCULTURATION AND CONTROL 109-110 (1966). These regulations were aimed specifically at changing undesirable behavior of the indigenous peoples subject to the regulations and included provisions against dances, multiple marriages, medicine men, and destruction of property upon death of its’ owner. Over time these regulations were amended, but in effect they introduced both the western notions of “law”, specific types of “laws” and judicial systems into indigenous communities, initially overtly outlawing certain traditional practices and custom and introducing western legal systems to control behavior and weaken traditional authority. The regulations for C.F.R. courts are presently codified at 25 C.F.R. §§ 11.100, et seq. (2000). See COURTS OF INDIAN OFFENSES, Extract from the Annual Report of the Secretary of the Interior (Nov. 1, 1883), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY, at 160 (Francis Paul Prucha 2nd ed. 1990). See also RULES FOR INDIAN COURTS (Aug. 27, 1892), *supra* at 186.

<sup>7</sup> Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, The Model Code, and the Police Idea in American Indian Policy in AMERICAN INDIANS AND THE LAW* 25 (Lawrence Rosen, ed., 1976)(footnote omitted)(“[Courts of Indian Offenses], originally established under the auspices of the Bureau of Indian Affairs, have been replaced on virtually all reservations by ‘tribal courts,’ which are free from Bureau control. However, tribal courts usually follow procedural codes derived from, if not identical to, those governing Courts of Indian Offenses because the latter are readily available without development costs and are assured of the requisite approval of the Secretary of the Interior.”) *Id.* This still holds true today for some tribal courts, for example, the general ordinances of the Pueblo of Isleta and the Pueblo of Laguna (both with constitutions adopted pursuant to the IRA) are similar to the C.F.R. code. The Isleta code was adopted in 1976, SHARON O’BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 177 (1989) Laguna’s was adopted in 1908. Laguna’s criminal code was recently amended in 1999. See *Kim Coco Iwamoto, Pueblo of Laguna Tribal Government Profile*, 1 TRIBAL L.J. (forthcoming Jan. 2001). There is a difference, however, between C.F.R. codes imposed on indigenous nations and C.F.R. codes adopted by indigenous nations. “A manual of Indian Offenses published by the U.S. Interior Department and enforced by Bureau of Indian Affairs (BIA) police or by federal troops is an element of [federal] Indian law, but probably not of tribal law. It is, however, a fact of tribal life, and wholly or in part, the manual may well become assimilated into tribal law. A code drafted by BIA representatives in consultation with tribal members, ratified by popular plebiscite, enforced by tribal police, and interpreted by judges who are members of the tribe, is presumably an element of tribal law, however inconsistent it may be with other elements. This does not mean that the new code has become the totality of tribal law, or even the preeminent form. Within some communities, undoubtedly, there are laws of which outsiders do not even dream.” Bruce B. MacLachlan, *Indian Law and Puebloan Tribal Law*, in NORTH AMERICAN INDIAN ANTHROPOLOGY, Essays on Society and Culture 340, 343 (Raymond J. DeMallie & Alfonso Ortiz eds., 1994).

<sup>8</sup> Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN’S L. REV. 69, 129, app. B (1995)(examination of the internal law of several U.S. indigenous nations on domestic violence).

<sup>9</sup> My first experience as a tribal trial court judge was as Chief Judge for the Pueblo of Laguna in 1983. I continued as Judge Pro Tempore and as an Associate Judge from 1985 to 1991. I also served as Judge Pro Tempore for the Pueblo of Santa Clara in 1993. From 1989-91, I served as a Judge for the Pueblo of

is required to apply the law to the people appearing before her, an act that is no longer abstract and an act in which “the People”<sup>10</sup> are no longer nameless and faceless. One experience that stands out in my mind involved an elder man who was before the court on a traffic citation. The inverse relationship the situation created was the first thing that struck me. In the courtroom, I (a younger, non-tribal member, female) was the authority figure and the person before me (my elder, a tribal member, male) was subjected to my authority as judge. The situation made such an impression on me because we were both aware of the reversal of our roles under the typical conventions of social norms operating in Pueblo societies. While the ‘role reversal’ itself was separate and apart from the legal system we were participants in, the experience made a lasting impact on my consideration of how the tribal court system affects our tribal societies, including how the law that is actually applied to the people by the courts impacts our societies.

To some extent the gap between the written law and the societal norms of “the People” can be bridged by the judge, something at which tribal court judges who are tribal members and fluent in the tribal language can be particularly effective.<sup>11</sup> Nevertheless, the need for the written law, which judges are charged to apply, to be consistent with and based on underlying norms of the indigenous societies themselves, much of which is embedded in traditional law, is necessary.<sup>12</sup>

Often, it is said in support of the adoption by indigenous nations of law similar to state law, that whatever law an indigenous nation adopts is an act of its sovereignty. Undoubtedly, this is true. Yet, in my estimation, not every sovereign act undertaken by an indigenous nation necessarily promotes sovereignty of the people.<sup>13</sup> Law can be adopted by an indigenous nation which has values

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Taos in the “modern” court, an arm of the traditional Governor’s Court. My tribal court appellate experience includes work with the Southwest Intertribal Court of Appeals, where I served as Administrator for the Court in 1993. I also served as an Appellate Judge for the Southwest Intertribal Court of Appeals from 1991 to 1995. In 1992, I was appointed to the Isleta Court of Tax Appeals and currently serve as an Associate Judge with the Isleta Appellate Court. The Isleta Appellate Court is an appeals court for land and property disputes created in 1999, which determines disputes according to traditional law. The Court is comprised of six judges; three are lawyers, including myself and three elders familiar with traditional law, all members of the Pueblo. The Court conducts itself primarily in Tiwa, the tribal language. Although, I am not fluent, all five judges are fluent Tiwa speakers.

<sup>10</sup> “This feeling of oneness and distinctiveness from other groups is illustrated by the widespread custom of Indian tribes naming themselves with a word or words meaning ‘the People.’” O’BRIEN, *supra* note 5, at 14.

<sup>11</sup> Some tribes require that judges serving on the bench are enrolled members of the nation and fluent in the indigenous language. *See* 7 NNC § 354 (a) and (e) (requiring applicant for judicial appointment be an enrolled member and able to speak both Navajo and English).

<sup>12</sup> “[W]illiam Sumner, in his classic work, *Folkways*, explains how law emerges out of the mores; in fact, ‘Legislation, to be strong, must be consistent with the mores.’” SHELEFF, *supra* note 1, at 81 (footnote omitted). *The same principal is recognized by African Law scholars in respect to African customary law. “[I]t is important to keep faith with customary law not as an exclusive body of laws but in terms of its fundamental values and precepts, because: in every society there are basic cultural values; much are of vital importance to the maintenance of social cohesion... Customary law thus becomes important not because of its rules but because of its underlying values.”* *See* Akin Ibidapo-Obe, *The Dilemma of African Criminal Law: Tradition Versus Modernity*, 19 S.U.L. REV. 327, 333 (1992)(footnote omitted).

<sup>13</sup> “First a general comment—sovereignty is no value in itself. It’s only a value insofar as it relates to freedom and rights, either enhancing them or diminishing them. I want to take for granted something that may seem obvious, but it is actually controversial—namely that, in speaking of freedom and rights, we have in mind human beings; that is, persons of flesh and blood, not abstract political and legal

inconsistent with the value system, (i.e. law which would allow anyone, including non-Indian couples, to adopt a tribal child) or which encompasses law unknown to traditional indigenous societies (i.e. law providing for the creation of corporate entities), by which traditional law is changed, as in the former example or by which new law, not covered by traditional law is added, as in the latter example. The change of, or addition to, traditional law is clearly within the sovereign authority of an indigenous nation. However, where the end result of such change and addition is that an indigenous nation's law is no different in substance or language from state law, indigenous nations participate in their own assimilation into the mainstream of American law.<sup>14</sup> Adoption of western law can create a gap between the adopted law and the people to whom it is applied. Such law can be ineffective if the People do not recognize it as emanating from their own value system and resist it-passively and actively. In this respect, an Indian nation's government can participate in the alienation of its own people.

The premise of this article is that ultimately, an indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms. In the development of enacted law, consideration must be given to what the underlying values and norms of tribal society are, how they differ or coincide with the values and norms of enacted law and when they differ, what internal (traditional) law will be displaced by the enacted law and why. Where enacted law is imported law from outside the tribe, even where internal and imported law coincide, those responsible for creating the law should state the foundation of the internal law upon which the imported law is laid. This provides tribal court judges guidance, provides tribal and non-tribal members with notice as to what tribal norms govern their behavior, and how they are different or similar to non-tribal norms. Further, it reinforces the need for a separate system of justice for the separate peoples of indigenous nations.

This article begins, in Part I, with a discussion of traditional law generally and what it means, in an attempt to seek an understanding of the issues that must be addressed as each tribe develops a working definition for themselves. Though a general definition of traditional law can be generally articulated I suggest tribe-specific definitions are more important. Part II then examines the general process

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constructions like corporations, or states, or capital. If these entities have any rights at all, which is questionable, they should be derivative from the rights of people. That's the core classic liberal doctrine. It's also the guiding principle for popular struggles for centuries, but it's very strong opposed." Noam Chomsky Lecture, February 26, 2000 (updated June 5, 2000). *See also* SHELEFF, *supra* note 1, at 56—57 ("There are varying definitions of sovereignty, but the two dominant ones refer, on the one hand, to the source of authority stemming from the state as such, focused on its central organs of government, and, on the other hand, of an attribution of sovereignty to the people who make up the state, who are considered to be the font of whatever power and authority is granted to those in temporary charge of its daily running and its fortunes.")

<sup>14</sup> As nations existing within a nation, the rationale for either adopting or retaining western law by indigenous nations in the United States can be complex. Many Indigenous nation-states who possess independence and authority to create law retain colonial law. Ibidapo-Obe comments: "Despite flag independence for virtually all African states, the reality is that they are still in a stupor of neo-colonialism as reflected in their inability to shake off their colonial mentality. Consequently, many of the colonial criminal laws remain on the statute books wearing the toga of national legislation." Ibidapo-Obe, *supra* note 10, at 328. Colonial mentality, however, is not unique to post-colonial indigenous nation states, it is part of the colonial legacy with which indigenous peoples of the United States struggle as well.

by which tribal law is created and more specifically the incorporation of traditional law into tribal codes, ordinances and resolutions. This requires consideration of the legislative process as it is generally embodied in the law of tribal governance, as well as, the practical considerations and difficulties of incorporating traditional law into written law. Part III looks at an approach used by the Saddle Lake First Nations peoples in Canada. The article concludes with a discussion of the continuing struggle to maintain cultural integrity represented by the promotion of traditional law and the relationship between traditional law and self-determination.

This article explores the idea of enacting law of indigenous nations that reflects traditional legal concepts and values. It considers the current situation that exists in many U.S. indigenous communities in which much of the enacted law is the same as the law of states and suggests that an alternative to the adoption of western law is necessary to make enacted tribal law relevant to the indigenous peoples it serves. More importantly, it begins to question the impact the enacted “western” law of tribal communities plays in shaping the lives of the people, the culture and the future of indigenous communities. In this article, I begin an initial attempt to bring in international, cross-cultural, and multi-disciplinary perspectives and voices to explore both the traditional and the created law of indigenous communities in the United States. Unfortunately, the literature is not replete with the voices of the indigenous peoples themselves, and in fact that voice is often excluded or is silent, which is especially ironic in discussions regarding traditional law. Through the use of footnotes, I allow the voices from different texts to speak directly to the reader and so, in this manner the footnotes operate as voice, text, and subtext and not necessarily solely as silent technical citation and support, as is their function in conventional law scholarship.<sup>15</sup> Lastly, my position in this area is a developing one, but it emerges from the viewpoint that any law a tribe adopts is read and should be read as reflecting its values. In this period of self-determination, the adoption of law or the legislative function of indigenous nations takes on tremendous meaning for indigenous peoples who have long struggled to maintain their separate and distinct identity in the face of assimilationist policies of the federal government. Collective resistance, through the development of our own law, means that indigenous nations must critically assess written law and infuse enacted law with indigenous values as well as strengthen oral law.

### **I. Traditional Law**

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<sup>15</sup> In traditional scholarship, footnotes are used in order to support a proposition in the text. I am using footnotes in a slightly different way. I am using footnotes in order to share the specific voices and texts, to raise tangential issues and to broaden and deepen the discussion as well as to provide specificity. (I also use footnotes in the traditional way.) I seek in my text simply to address the incorporation of custom and tradition into written law or legislation. For the most part, I keep the text in my voice for purposes of maintaining continuity of the theme of the article and to avoid obscuring its purpose. I address the many and significant tangential points which arise in footnotes. I attempt as much as possible to make the text accessible to others not necessarily interested in the scholarly or theoretical details and discourse. However, I see the interdisciplinary complexity of addressing traditional law in any context. In fact, I see the discussion of traditional law as layered; one is practical, another is theoretical. I try as much as possible to leave the text in an accessible form and to leave the theoretical and tangential ideas and issues in the footnotes. I understand this is stretching the purpose of footnotes and that is my intent. I also understand I may have not been entirely successful in this endeavor.

What is traditional law? What do we mean when we say traditional law? This is where we must begin any discussion that addresses the use of traditional law. A critical beginning point is to consider the term in the native language. In Tiwa,<sup>16</sup> for example, there are words for law and custom derived from the Spanish words for both;<sup>17</sup> there is also a word referring to white man's law or the law of the courts,<sup>18</sup> 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"<sup>19</sup> That way of life is elaborated upon in prayer.<sup>20</sup>

Chief Justice 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'aanii*. 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.<sup>21</sup>

In clarifying what we are referring to in the use of the term traditional law, we must also recognize first, the variety of terms utilized by scholars and lay people alike in referring to traditional law and second, the meanings encoded in these English terms.<sup>22</sup> Customary law<sup>23</sup>, common law<sup>24</sup>, indigenous law<sup>25</sup>, tribal law<sup>26</sup>, tradition<sup>27</sup>,

<sup>16</sup> The Tiwa words and translations used here are from a discussion and interview between Isleta Pueblo member and Tiwa language instructor, Doris Lucero, with the author (October 14-15, 2000).

<sup>17</sup> *Na-ley* translates to "law." *Ley* is the Spanish word for law. *Na-costumbre* is custom. *Costumbre* is the Spanish word for custom. *Id.*

<sup>18</sup> *Na-shachee* translates to white man's law or laws of the court. *Id.*

<sup>19</sup> *Id.* As Doris Lucero 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." *Id.*

<sup>20</sup> *Id.* *Key-wah-wai-ee* or "This is the way of life" is connected. Detail of that way of life is provided through prayers. *Id.*

<sup>21</sup> Hon. Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994)(footnotes omitted).

<sup>22</sup> This is further complicated by the fact that multiple terms are used interchangeably in reference to traditional law. See Zuni, *supra* note 2, at 22-23.

<sup>23</sup> Customary law is the term used in papers discussing African traditional law. See Derek Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 AM. J. COMP. L. 571 (1989); T.W. Bennett and T. Vermeulen, *Codification of Customary Law*, 24 J.A.L. 206 (1980); David M. Bigge and Amelie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 HAR. HUM. RTS. J. 289 (2000); Akin Ibidapo-Obe, *The Dilemma of African Criminal Law: Tradition Versus Modernity* 19 S.U.L.REV.327 (1992). Canadian and Australian authors also use the term customary law. See Bruce L. Benson, *An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian*

custom<sup>28</sup>, norms<sup>29</sup> and primitive law<sup>30</sup> have all been used to refer to the law of indigenous peoples. Some of these same terms, such as, customary law, common

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*Law*, 5 REV. AUSTL. ECON. 41 (1991); Roger F. McDonnell, *Contextualizing the Investigation of Customary Law in Contemporary Native Communities*, 1992 CAN. J. CRIMINOLOGY 299.

<sup>24</sup> Common law is the term used by the Navajo Nation. It is also used by the Hopi Nation. See Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & POL'Y 761 (2000). Sekaquaptewa restricts the meaning of common law to the written opinion of judges, and does not use the term to apply generally to traditional law outside written opinions. In this restricted sense, "common law" would refer only to that traditional law addressed in written court opinions. See also, Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287 (1998); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509 (1998).

<sup>25</sup> Indigenous law is the term I chose to use because, like the term indigenous peoples, it broadens the frame of reference world-wide, breaking down the divisions among the millions of indigenous peoples and decreasing our sense of isolation. "Indigenous and/or tribal peoples, whom I shall jointly call indigenous and identify for the moment as peoples relatively unassimilated into the global economy who exhibit strong cultural ties to territories now included in states controlled by ethnically alien peoples number more than 250 million persons, or about 4% of the world's population. They constitute some 5,000 distinctive peoples inhabiting approximately 70 different states. Spread across every region of the globe, indigenous cultures survived best when most inaccessible to dominant and alien centers of power." MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: Indigenous Peoples and self-determination XX* (2000)(footnotes omitted). Numbers are tricky. "The numbers of Fourth World peoples are estimated at about 50 million throughout the world—but of course there can be no certainty in this regard, either as to what groups to count, or as to an accurate estimate of their numbers." SHELEFF, *supra* note 1, at 75 n.4.

<sup>26</sup> Tribal law is the term used in Bruce B. MacLachlan's chapter on Indian Law and Puebloan Tribal Law. MacLachlan uses the term to include both "autochthonous elements... and elements of Euro-American law... incorporated through imposition, mechanical diffusion, or stimulus diffusion." MacLachlan, *supra* note 5, at 343.

<sup>27</sup> Tradition is used by Sheleff. See SHELEFF, *supra* note 1.

<sup>28</sup> Custom is used in tribal code provisions to refer to traditional law. See e.g., Pueblo of Isleta Legal Code, § 1-1-17(b) ("Where any doubt arises as to the customs and usages of the Tribe, the Judiciary may request the advice of counsellors familiar with these customs and usages.").

<sup>29</sup> The term "norms" is used in defining custom by Sekaquaptewa. Sekaquaptewa, *supra* note 22.

<sup>30</sup> Karl N. Llewellyn and E. Adamson Hoebel used the term primitive law to contrast Cheyenne law or law-ways with modern law. See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941). Benson also uses the term. Benson, *supra* note 21, at 41-65. Use of the term primitive law is problematic. In the words of Professor Akin Ibadapo-Obe, "Human Society is composed of individuals of disparate disposition, character, needs, whims and caprices. It is the function of law in any given society to attempt to regulate the foibles of its members in a manner that would lead to the achievement of a balance between these diverse tendencies and maintenance of social cohesion and equilibrium... It follows from this premise that no society or community of persons, however 'primitive,' 'undeveloped' or 'backward,' is lacking in such rules or regulations targeted at maintaining order and preventing its destabilization by deviant elements within it. Elementary and basic as this proposition is, spirited attempts have been made by all manner of social, legal, political philosophers and theorists to posit that law... is an exclusive preserve of certain cultures, geographical areas, or, (to adopt their hackneyed phraseology) 'civilizations' of the world." Ibadapo-Obe, *supra* note 10, at 327. Likewise, MacLachlan states, "[a] number of significantly different interpretations of law are productively used in anthropology. Some imply that law 'in the strict sense' is an institution of developed societies that has evolved from human situations in which at best there existed only prelaw, protolaw, or primitive law. This definition implies that the law of developed societies, of nation-states, is the culmination of a series of developments of lesser values. It begs a multitude of questions that are worth raising. My interest is in the conception of law that is characteristic of all human societies. Law is a brooding omnipresence in human relations." MacLachlan, *supra* note 5, at 342. But see SHELEFF, *supra* note 1, at 39—40 (footnotes omitted) ("[T]he truth of the matter is that there is a vigorous, ongoing debate in the social sciences, particularly in anthropology, as to the essential nature and meaning of primitivity. Stanley Diamond has argued very forcefully that the very idea of primitive should be seen in positive terms, and that the characteristics associated with it have significance both for

law, tradition, norms and custom are also used generally by religions, in commerce, and are recognized terms in the western legal system and the international community.<sup>31</sup> As such, these terms have established legal meanings, some of which are utilized by indigenous peoples in the adoption of these English terms and some of which are expanded or borrowed or changed completely.<sup>32</sup> Clarity in what a particular indigenous nation seeks to recognize as traditional law accompanied with adapted definitions of recognized terminology can help indigenous peoples control the particular meanings in English legal terms like custom, tradition, customary law, norms and common law.<sup>33</sup>

The traditional law of any given tribal community is not entirely and unequivocally accessible in the same manner as is written law. 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. “For new rules to be accepted by the members of an affected group, they generally must build upon, and indeed, extend existing rules. That is, the fundamental principles of customary law... do not change. They are simply extended to cover new situations.”<sup>34</sup> For many of these reasons, the use of traditional law has caused and continues to raise various issues regarding its use by

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understanding social reality and for clarification in the social sciences... Diamond concludes that in certain ‘basic and essential respects... primitive societies illuminate, by contrast, the dark side of a world civilization which is in chronic crisis’... Ashley Montagu pinpoints the key issue with direct relevance to the term tribe. He writes: There is perfectly sound sense in which the term ‘primitive’ and the concept for which it stands may be used, but not until we have disembarassed ourselves of the unsound ways in which the word is employed shall we usefully be able to employ it at all.”)

<sup>31</sup> See for example, Alan Watson, *An Approach to Customary Law*, 1984 U. ILL. L. REV. 561(1984) discussing the dominant theory of how custom in Western private law is transformed into law- *opinio necessitatis*, the thrust of which is that individuals purposely follow a certain rule because they believe it to be law, and analysis of an alternative theory that custom becomes law only when it is the subject of statute or judicial decision. The author notes the “areas” of custom his paper does not address, and the different theories of custom illustrates how “custom” is approached differently in each “area.” See also *Id.* at 561 n.1 (“In view of the theoretical difficulties encountered in determining when a society has law, the nature of custom in modern ‘tribal societies’ is not discussed here. For the development of a theory of custom in Roman law, insofar as there is one, see Nörr, *Zur Entstehung der Gewohnheits-rechtlichen Theorie*, in Festschrift für W. Felgentraeger 353 (1969). For a very different view of the formation of customary rules, particularly in international law, see J. Finnis, *NATURAL LAW and NATURAL RIGHTS* 238 (1980). This paper also does not discuss custom as a source of international law.”).

<sup>32</sup> “Legal elements can belong to more than one distinct system, but diffusion of an element from one legal system to another must be analyzed carefully.” MacLachlan *supra* note 5, at 343.

<sup>33</sup> Because legal elements related to the development of traditional law, such as tradition, custom, customary law, and common law are used by both American and indigenous legal systems, it is important for tribes to provide their own definitions of such terms because American legal definitions may not in fact contain the sense, in scope or in meaning, which indigenous societies understand such words to convey in their use of the words.

<sup>34</sup> See Benson, *supra* note 21, at 46-47 (footnote omitted). Benson examines the social contract underlying customary law systems based on economic theory to develop generalized characterizations of such systems. He then examines these characterizations by looking specifically at the Yurok and Cheyenne customary law systems. He looks both at property right formation and the legal institutions formed for enforcement. Interestingly, he argues private property rights and the rights of individuals “are likely to constitute the most important primary rules of conduct in such legal systems” *Id.* at 44. He also examines customary law as unwritten constitution. See *id.* at 45-50.

both those within the tribe and without the tribe.<sup>35</sup> Some tribal members may feel traditional law is subject to manipulation or has fallen into disuse and is no longer in existence or applicable; outsiders are uncomfortable with its lack of accessibility related to its internal and oral nature.<sup>36</sup>

In addition, it is important to recognize the passage of time and the impact of external forces that can give rise to changes in traditional law or which may obscure traditional law. For example, what was traditional at one point may have changed in the shift from a settled agricultural society to a mobile society brought about by the encroachment of tribal lands by the advancing settler population.<sup>37</sup> This can mean that what some consider traditional today can be the result of what colonialism has wrought.

If today's Indian political leaders mean maintaining the traditions and culture inherited from the very brief period of Indian history during which external forces led to centralization and increasing emphasis on communal rights, then for the most part, they are really speaking of a culture which was already tremendously influenced by the coming of the white man.<sup>38</sup>

The unique history of each indigenous nation is important to consider because of the impact that history has on tradition.<sup>39</sup> A very general sketch of the history of Pueblo government in New Mexico demonstrates the impact the Spanish and Americans had on the "original" traditional law of governance. In the words of

<sup>35</sup> Consider, for example, the language in *Duro v. Reina*, 110 S.Ct. 2053 (1990), in which Justice Kennedy states: "While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of tribes they serve. Tribal courts are often 'subordinate of the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.'" *Id.* at 2064 (citation omitted). The Court in *Duro* held that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership. *See also* Paul Spruhan, *Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, 1 TRIBAL L.J. (forthcoming Jan. 2001) (analyzing this and other language in *Duro* in relation to the application of Navajo traditional law to find criminal jurisdiction in the Navajo Nation to prosecute a non-member Indian in *Means v. District Court*, 26 ILR 6083 (1999)).

<sup>36</sup> "Even if Acoma law appropriately does apply to this case, it should apply only to the extent it is preexisting, articulated, and accessible... Additionally, law that is not preexisting, articulated, and accessible does not comport with the plain meaning of 'law' under the FTCA's 'law of the place' language. In the absence of preexisting, articulated, and accessible Acoma law, it is incumbent upon the Court to look to the law of New Mexico." Trial Brief On The Issue Of Applying Acoma Law To This Case at 2, *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999) (Civ. No. 97-1418 MV/RLP). *See Cheromiah*, 55 F. Supp. 2d 1295 (D.N.M. 1999) (holding that under the Federal Tort Claims Act (FTCA), the "law of the place" to be applied to a medical malpractice claim occurring on tribal lands, was tribal law). *See* Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law under the Federal Tort Claims Act*, 32 ARIZ. ST. L. J. 695 (2000) for an analysis of the *Cheromiah* decision.

<sup>37</sup> Benson, *supra* note 21, at 61 ("Resulting changes [from European settlement] set the stage for amendments to implicit social contracts within some tribes, even before the American government subjugated them, suppressed their law, and put them on reservations. For example, some tribes began to organize and centralize authority, primarily for warfare, and this centralization frequently had legal ramifications."). Benson considers the Yurok, Comanche and Cheyenne in this paper.

<sup>38</sup> *See id.* at 63.

<sup>39</sup> *See Robert B. Porter, Building a New Longhouse: The Case for Government Reform Within The Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805 (1998) (examining the impact of colonialism on the traditional government institution of the Haudenosaunee.).

Pueblo historian Joe S. Sando, “[t]radition was history, history was tradition.”<sup>40</sup> Originally,

[t]he Spirit warned the people to respect and obey the laws of nature, and the orders of their leaders: the chief, the war captains, and the cacique.<sup>41</sup> The cacique was to guide them spiritually. In him was vested the power of authority to legislate laws. The Spirit cautioned that this was the only way for them to live together in peace and to be protected. The Pueblo people had confidence that the cacique and the other leaders had power and wisdom because they were guided by the One above. Under this government the people made religion a part of their daily lives.<sup>42</sup>

Beginning in 1539, the Pueblos of New Mexico were impacted by three successive waves of colonial governments: the Spanish, the Mexican and the American. As a result of Spanish colonialism, the Pueblos were required to introduce Spanish-type civil officials into their government structure in 1620.<sup>43</sup> The office of pueblo governor was designed for Spanish domination, but “was converted by the Pueblos into an effective bulwark against intrusion by foreigners. The governor, in effect, protected the spiritual leaders. Thus were their human values preserved. The governor is responsible, under the cacique, for all tribal business of the modern world.”<sup>44</sup> In the majority of Pueblos, these officials are selected annually by the cacique and his staff.<sup>45</sup> Under American domination, a few of the Pueblos introduced another element to the structure of government by “reorganizing” under the Indian Reorganization Act of 1934<sup>46</sup>, which provided for the institution of constitutional elective governments<sup>47</sup>, whereby leaders are elected rather than selected by the cacique.<sup>48</sup> While the Spanish imposition of offices introduced new authority, the Pueblos responded by tying appointment to these positions to the traditional authorities, thus minimizing disruption of traditional authority.<sup>49</sup> The American introduction of constitutional elective governments removed the appointment authority of the traditional leadership over the introduced offices, separating the religious leadership from the secular government.<sup>50</sup>

<sup>40</sup> JOE S. SANDO, PUEBLO NATIONS: Eight Centuries of Pueblo Indian History 21 (1992).

<sup>41</sup> “Traditionally, each Pueblo was governed by one or more priests (if two, then each ruled for half the year)... Among the Hopi Pueblos the leader was called the *kikmongwi*; at Jemez, the *whivela*; and at Isleta the *taikabede*. The Spanish referred to Pueblo leaders as the ‘cacique’ (Taken from a Caribbean Indian world meaning ‘leader’, *cacique* is the term used by outsiders today when speaking of a Pueblo religious leader.)” O’BRIEN, *supra* note 5, at 29.

<sup>42</sup> SANDO, *supra* note 38, at 24.

<sup>43</sup> *Id.* at 249.

<sup>44</sup> *Id.* at 14.

<sup>45</sup> *Id.* at 15.

<sup>46</sup> *Id.*

<sup>47</sup> These include the Pueblo of Santa Clara, Pueblo of Zuni, Pueblo of Isleta and the Pueblo of Laguna.

<sup>48</sup> SANDO, *supra* note 38, at 14. *Two other Pueblos elect rather than appoint leaders: Pojoaque and San Ildefonso.* *Id.* at 15.

<sup>49</sup> MacLachlan, *supra* note 5, at 344.

<sup>50</sup> For a brief discussion of the events giving rise to introduction of constitutions and the separation of religious and secular affairs in two Pueblos. *See id.* at 345-6 (discussion on Santa Clara Pueblo). *See also* O’BRIEN, *supra* note 5, at 173—174 (discussion on Isleta Pueblo).

In defining traditional law, fundamental questions arise. Have the introduction and incorporation of external influences resulted in a “new” or “evolved” tradition? Or is the tradition as it was prior to external influence? It depends on one’s definition of traditional law. What is considered and accepted as traditional is, of course, very much in the hearts and minds of today’s indigenous peoples, but also very much in the hands of both traditional and non-traditional “Indian political leaders” including elected tribal council members and members of the judiciary. From my experience in working with other tribes and with my own tribe, seeking to utilize traditional law is hard work that takes perseverance and patience. The requisite knowledge and skill to do this work do not come from without the tribe; they come from within. The [re]incorporation of traditional law into “tribal” law is an undertaking that must be approached with great thought. First, what does reincorporating traditional law into tribal law mean? Second, what is the traditional law of a tribe? How do traditional law and custom transcend into the present day lives of Indian peoples living in a vastly different time and, in some cases “place”, than the ancestors from whom traditional law is drawn? Traditional law and custom do transcend, because traditional law and custom contain the values, beliefs and worldview of a peoples<sup>51</sup>, though it must be recognized native peoples’ conception of law is different from the western idea of law.<sup>52</sup> It must also be recognized that all tribes are in different places in relation to one another both in terms of articulating traditional law and incorporating it into tribal law.

Indigenous groups must define for themselves what traditional law is, because others cannot adequately define it for them<sup>53</sup> and because it is unique to

<sup>51</sup> “Custom, then, far from being a problematic aspect of tribal life in the context of the modern world, becomes an integral aspect of a legal system, not an artificial addition reluctantly conceded, but an essential component of a meaningful law that is willingly accepted by the citizenry, because it is deeply embedded in their consciousness as a living part of their culture.” SHELEFF, *supra*note 1, at 87.

<sup>52</sup> RENNARD STRICKLAND, *FIRE AND THE SPIRITS*, Cherokee Law from Clan to Court 10-11 (1975). “In truth, the Cherokee conception of law was simply different from the more traditional Western idea of law. To the Cherokees law was the earthly representation of a divine spirit order. They did not think of law as a set of civil or secular rules limiting or requiring actions on their part. Public consensus and harmony rather than confrontation and dispute, as essential elements of the Cherokee world view, were reflected in the ancient concepts of the law. The ongoing social process could not, in the Cherokee way, be manipulated by law to achieve policy goals. There was no question of man being able to create law because to the Cherokee the norms of behavior were a sovereign command from the Spirit World. Man might apply the divinely ordained rules, but no earthly authority was empowered to formulate rules of tribal conduct.” *Id.* “[I]t would be a waste of time and a misdirection of intellectual effort to seek to establish a single, universally applicable connotation for [law]... ” See P.H. Gulliver, *Case Studies in Non-Western Societies in LAW IN CULTURE AND SOCIETY* 11, 12 (Laura Nader, ed. 1969).

<sup>53</sup> Take, for example, the following excerpt which illustrates to me the difficulty outsiders have in trying to understand themselves, let alone articulate, what customary law is: “Colin Bourke and Helen Cox, among others, have observed that Indigenous customary law is ‘difficult to define in non-Indigenous terms because it covers the rules for living and is backed by religious sanctions. It also prescribes daily behaviour.’ Kenneth Maddock observes that ‘Actions as diverse as the making of fire... the mating of bandicoots... and the avoiding of mothers-in-law are subsumed under *djugarura* [an established and morally-right order of behaviour].’ As with all systems of culture and law, it has evolved with circumstances and continues to do so; and in many ways is comparable to Talmudic Law or Koranic Law, in this it relies on both religious and temporal sanctions for its force, and purports to organize daily existence in compliance with divine guidance. Robert Tonkinson’s anthropological definition, for example, is specific to the Mardudjara he has studied, but his suggestion that customary law ‘connotes a body of jural rules and moral evaluations of customary and socially sanctioned behaviour patterns’ is

each group. I suggest that it is this very act that will take indigenous peoples in an entirely different direction with their law than is possible when law is first approached from the western legal perspective.

## II. Incorporating Traditional Law

Addressing the re-incorporation of traditional law into tribal law — codes, and ordinances — implies that codes and ordinances do not contain traditional law. In the majority of tribes, this is true for at least a couple of reasons. One, traditional law is transmitted orally in the native language. Secondly, written “tribal law” adopted under the Indian Reorganization Act was not intended to reflect traditional law and in fact, supplanted it with Anglo-American legal concepts. In the end, however, the way to determine the extent to which traditional law is incorporated in tribal written law is to first examine a particular tribe’s written law. Traditional law, for the most part, will not leap out of these documents.

Reference to traditional law can also be found in tribal constitutions, where its use and application can be provided for. An example is the Constitution of the Pueblo of Laguna. The Laguna Constitution provides for the application of traditional law to members, persons residing on the lands of the Pueblo, and all persons entering the lands of the Pueblo.<sup>54</sup> The Constitution also refers to the traditional governing authority vested in officers of the Pueblo<sup>55</sup> and provides the “sovereign powers of the Pueblo of Laguna shall be vested in the Pueblo Council<sup>56</sup>” and exercised in accordance with the “Constitution, the ordinances, customs and traditions of the Pueblo, and the laws of the United States applicable to the Pueblo of Laguna.”<sup>57</sup> In addition, the Constitution states that disputes “which cannot be settled by the parties affected may first be brought before the Village Officers who shall try to have the parties settle the matter by giving their advice”<sup>58</sup>, a traditional method of resolving disputes. If the parties cannot settle the matter with the advice of the Village Officers, the matter can be submitted to the Pueblo Courts.<sup>59</sup>

Similarly, the Hopi Constitution makes reference to traditional law or “custom” without specifying what is the custom. Pursuant to constitutional authority, “[v]illages are to decide... matters according to the established village custom, according to the procedures that a traditional village determines under the leadership of the village chief or “Kikmongwi”, or pursuant to a village’s

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*of wider application. Perhaps the best definition, however, is one as to content rather than description, and to this end Ronald Berndt offers an acceptable amalgam. Indigenous customary law, he writes, is the sum of three sets of relationships—people and land, people and deities, and people and people—and of three highly interdependent factors which act upon these relationships—religion, natural environment, and social organization/kinship.” Rob McLaughlin, *Some Problems and Issues in the Recognition of Indigenous Customary Law* (visited Dec. 30, 2000).*

<sup>54</sup> CONSTITUTION of the PUEBLO of LAGUNA, art. I, §§ 2, 3 (1984).

<sup>55</sup> *Id.*, art. III, §2.

<sup>56</sup> *Id.*, art. IV, §1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, art.V, §5.

<sup>59</sup> *Id.*

constitution.”<sup>60</sup> This reserve of power under the Hopi Constitution “often requir[es] the finding and application of village law (often customary law) in both the tribal and village forums.”<sup>61</sup>

Likewise, some tribal legal codes provide for the application of traditional law without specifically incorporating the law into the document itself, therefore leaving the application of traditional law to the tribal judiciary.<sup>62</sup> An example is the Pueblo of Isleta’s Legal Code, Section 1-1-17(a) which states: “In all civil cases, the Pueblo of Isleta Judiciary shall apply applicable Pueblo of Isleta Ordinances or *customs*, unless prohibited by the laws of the United States, in which case such laws shall apply.”<sup>63</sup> The civil law contained in the Isleta Legal Code is very limited, in theory leaving civil law entirely within customary law.<sup>64</sup>

Nevertheless, it is important to assess the formal and informal use of traditional law in an existing tribal system, if one is working toward greater incorporation of traditional law into the tribal legal system. It is important to determine if traditional law is given place, and if so, the extent to which its use is actually employed by those responsible for applying it. An assessment that finds an unacceptable displacement of or insufficient accommodation, reinforcement or use of traditional law in the tribal justice system presumably drives a decision to “incorporate” more traditional law into codes and ordinances and can also inform what this incorporation should look like.

What do we mean when we speak of incorporating “traditional law” into written law? Do we envision incorporating the traditional law itself, or do we envision making place for it as in the above examples of Pueblo law? If we are speaking of incorporating the law itself, we must consider the difficulties of incorporating “traditional law” into written law (code, ordinances and resolutions). Do we mean to take traditional law, write it down in English for western style tribal courts to enforce? Does traditional law lend itself to this? Do we change its character in the very process of doing this? Of course, tribes can do whatever they think is right to incorporate their traditional law. But, what’s practical? The very idea of “writing” the traditional law down was recently rejected by a conservative traditional Pueblo community. Indeed, it is important to consider that when a tribe works its Indian tradition into any non-traditional system, the outcome represents a mixture, not pure tradition.

The history of the creation of existing tribal law as well as the present practice regarding the creation of tribal law informs the character of the law of tribes. Generally speaking, the responsibility for creating law or legislating lies in

<sup>60</sup> Pat Sekaquaptewa, *Evolving the Hopi Common Law\_ (1999) (pre-publication draft on file with the Tribal Law Journal)*[hereinafter, Sekaquaptewa Pre-Publication Draft](footnote omitted). The Hopi Constitution, Article III, Section 2 provides:

<sup>61</sup> Sekaquaptewa, Pre-Publication Draft, *supra* note 58, at 1.

<sup>62</sup> Therefore, in addition to looking at the law contained in the legal documents of the tribe, one must also look at the practice of the judiciary, in order to determine the extent to which customary law is applied under existing law, or to what many refer to as tribal “common law,” but the focus of this paper is on the incorporation of traditional law into tribal codes, ordinances and resolutions, the legislated law of the tribe.

<sup>63</sup> See Pueblo of Isleta Legal Code, §1-1-17(emphasis added). The provision reads in its entirety:

<sup>64</sup> The only substantive provisions of the Isleta Legal Code governing civil actions are those governing determination of paternity and support (ILC § 1-1-20), determination of heirs (ILC § 1-1-21) and approval of wills (ILC § 1-1-22).

the Tribal Council of most tribes. Yet the process for creating law undoubtedly differs greatly from tribe to tribe. In my experience, I am aware of the following range of actors responsible for the actual language in the recently legislated law of tribes — council members, attorneys (including non-Indian attorneys, non-member Indian attorneys and member attorneys, generally in that order), council-appointed committees comprised entirely of members, council-appointed committees composed of a mixture of member and non-members, and “citizen” committees comprised of both members and non-members. Undoubtedly these actors, their goals and any “models” they consult have great influence on the structure and content of the law. Generally, the tribal council has final authority to adopt law, but this authority may be subject to Department of Interior approval.<sup>65</sup> In the end, however, it is the legislating body which has responsibility for the law adopted for the tribe. Therefore, it is appropriate to focus attention on the tribal council’s attitude and position on traditional law.

How councils create law and how they accommodate traditional law has a tremendous impact on the development of the written law of a tribe. It is not unusual for tribes, through whatever method they use to draft law, to consult outside law when developing law. Many “model”<sup>66</sup> and “uniform”<sup>67</sup> laws exist, as do “model codes” drafted specifically with tribes in mind.<sup>68</sup> In addition, tribes look at and adopt in entirety the law of states.<sup>69</sup> The reasons for this vary and are largely practical and understandable. Why should tribes create from scratch law regarding such things as traffic, taxation, environment, when perfectly acceptable law on such matters already exist? Shouldn’t tribes be concerned about the recognition factor of their laws by external actors, such as states, and outside business entities? Nevertheless, the impact of this practice on the creation of a unique body of law reflective of internal tribal values and beliefs is obvious. The extent to which tribes adopt external law as their own law directly impacts the influence of the norms and values contained in external law on tribal members and tribal society, in general. Obviously, this phenomenon has been in existence since at least 1934, the year the Indian Reorganization Act was enacted, for many tribes, and earlier for other tribes, such as the Pueblos of New Mexico [<sup>70</sup>] and the Cherokee Nation of Oklahoma<sup>71</sup>. It must be recognized that “[p]resumably . . . values are embodied in the law, in substantive rules as well as in the guiding procedural principles<sup>72</sup>” and that as a result of adopting external law we import these values as well. To the extent we

<sup>65</sup> PUEBLO OF ISLETA TRIBAL CONSTITUTION, art. V, section 2(e) (Revised 1991).

<sup>66</sup> See e.g., MODEL PENAL CODE (1985).

<sup>67</sup> See e.g., UNIF. COM. CODE (1999).

<sup>68</sup> See e.g., MODEL CHILDRENS CODE (2nd ed.) AND CHILDREN’S COURT RULES (American Indian Law Ctr. 1981).

<sup>69</sup> See e.g., Pueblo of Acoma Res. No. TC-DEC-1-99-2, Adoption of Title 2, Chapters 1 and 2, General Civil Matters (Resolution adopting by reference the New Mexico Medical Malpractice Act); Pueblo of Isleta Res. No. 87-35, Adoption of the New Mexico Motor Vehicle Laws (Sept. 14, 1987).

<sup>70</sup> *Supra* text accompanying note 39.

<sup>71</sup> Professor Strickland refers to the post-contact period of 1786 to 1828 as “White Ascendancy,” the “period the Cherokees addressed themselves to the question of how the white legal system could be adapted to Cherokee needs and which elements would best serve Cherokee tribal goals.” STRICKLAND, *supra* note 50, at 5.

<sup>72</sup> Vilhelm Aubert, *Case Studies of Law in Western Societies*, in LAW IN CULTURE AND SOCIETY 273, 277 (Laura Nader ed. 1969).

mix or blend traditional and western law, or even if we introduce external law and keep it separate from traditional law we are either creating new law, that is not entirely traditional or maintaining two separate but co-existing (and inevitably competing) value systems.

The assumption that is made throughout this article is that a tribe desires to incorporate traditional law into its existing law, that the membership is supportive, that the traditional law is accessible and that the governing body of the tribe is in agreement. Of course, this may all depend on the traditional law that is being incorporated. Not all segments of tribal society may be in agreement with all or certain aspects of traditional law. For instance, in the area of governance, elected tribal councils may be the antithesis of traditional governance, and the issue may or may not have been resolved within a tribe.<sup>73</sup> The tribal council may also serve the function of an appellate court, as in some Pueblos. In this capacity, the council as appellate court is in a position to solidify principles of traditional law or set overarching rules regarding traditional law in the courts below, if it chooses not to do so in its legislative capacity. Other tribal appellate courts have taken an active role in this regard.<sup>74</sup>

To the extent that tribal councils have legislative authority, they are largely responsible for the presence of traditional law, whatever the form, in tribal enacted law. The next section of this article discusses an approach to promote traditional law that differs from the existing approaches presently found in tribal law discussed above.

### III. The Saddle Lake Approach

The Saddle Lake<sup>75</sup> approach is an approach that requires an understanding and articulation of a tribe's traditional law.<sup>76</sup> The approach suggests the reduction of the traditional law itself to codification.<sup>77</sup> This part of the approach is not for every tribe; in fact, I do not agree that traditional law itself should be codified. The critical part of the approach, for purposes of this article, is its concept of using

<sup>73</sup> "The first major change the United States brought about in Indian tribal governments came during the treaty-making era. Through its efforts to simplify and speed treaty negotiations, the United States often pressured tribes to centralize their governments. Traditional tribal governments incorporated guards against concentration of power to preserve values of freedom, respect, and harmony. Decisions generally required the approval of leaders of several bands, each of whom needed the consensus of all band members. This democratic nature inconvenienced and exasperated the U.S. government, which urged tribes to select a principal chief with authority to make decisions on behalf of the tribe.

<sup>74</sup> See generally, *Daniel L. Lowery, Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969- 1992*, 18 AM. IND. L. REV. 379 (1993); Sakaquaptewa, *supra* note 22.

<sup>75</sup> Saddle Lake First Nation is located approximately 120 miles northeast of Edmonton, Alberta in Canada. It covers 70,500 acres. By 1985 figures, its population of approximately 3,000 citizens lived on the territory of Saddle Lake and nearly 1000 lived off of the territory. See SADDLE LAKE TRIBAL JUSTICE MANUAL 2 (1985).

<sup>76</sup> *Id.* In 1983, Saddle Lake prepared a funding proposal to the Alberta Law Foundation to research and develop a model or plan for a tribal justice system. Funding was approved and the Tribal Justice Centre was created and mandated to develop a proposed model justice system. *Id.* at 21.

<sup>77</sup> "All Tribal customs and laws applicable in the Tribal Justice System and upon the territory of the Tribe should be made evident and codified (written) where possible in order to give notice to all persons subject to them and all institutions of government whose authority and power flow from them... 2. Customs and traditional laws of the Tribe should be collected or codified for use in the justice system and by non-Indian courts which apply them in proper cases." *Id.* at 42.

traditional law as the foundation for law.<sup>78</sup> It is using traditional precepts, principles and values as the basis for the enacted law of the tribe, upon which I focus. *See Appendix B.* It is important to stress that it is an approach - it is not a model code or uniform law. In fact, the approach insures that the tribal law developed is uniquely tribal because it is based on the values of a particular tribe derived from its own traditional law. Although the approach is documented, it was not implemented by the Saddle Lake First Nation and thus remains an “approach” and not an existing example of the approach.<sup>79</sup> Its promise, however, remains. The approach is not as easy as adopting a model code or uniform law. Yet, if we learn anything from United States government policy, it is that no singular legal model exists for five hundred plus different tribes. In fact, the very promise of the Saddle Lake approach is that it is premised on traditional law — which is unique to each tribe.

The core of the Saddle Lake approach that lends itself to use by others is its premise of developing tribal law on the precepts and values of traditional law, essentially using traditional law as the foundation for the development of all other law. The Saddle Lake Justice Manual cites the Minister of Indian Affairs, as stating:

Justice is a basic need in the life of every person. It has confronted, challenged and concerned every society which ever joined together for mutual benefit... The law belongs not to governments, not to bureaucrats, not to lawyers, but to the people... The many alternative means of resolving disputes suggested now-mediation, arbitration, restitution, reconciliation, to name a few-are the very methods which are part of customary law... Native peoples have been deprived of their own traditional laws, concepts of justice and legal procedures. We realize that the native peoples of Canada expect a system of justice that reflects their own cultural heritage...<sup>80</sup>

The expectation that justice reflect our own cultural heritage is what drives the discussion on “reincorporating” traditional law. The Saddle Lake approach was used by the Saddle Lake First Nation to devise their entire justice system. It is an approach with various components, any of which can be adapted by those utilizing the approach.<sup>81</sup> The following components are those utilized by the Saddle Lake First Nation and relevant to the re-incorporation of traditional law into tribal codes: 1.) Meetings

<sup>78</sup> “1. Customs and traditional laws shall be recognized and entrenched in tribal codes and justice procedures to the full extent possible and where appropriate as determined by the Tribe.” *Id.* at 42. It is this first point that influences the notion of basing written law on fundamental principles and precepts of traditional law.

<sup>79</sup> Interview with James Zion, Solicitor, Navajo Nation Supreme Court, in Albuquerque, N.M. (September 1, 2000)(Former Mentor to the Tribal Justice Centre).

<sup>80</sup> SADDLE LAKE TRIBAL JUSTICE MANUAL, *supra* note 73, at 21.

<sup>81</sup> Because of the autonomy of each indigenous nation, I do not seek to set forth this approach as “the” approach to follow. Rather, it is the idea and the process of assessing traditional law, extracting principles or precepts from that law, then basing the written law an indigenous nation finds necessary to adopt on these principles and precepts that is important. Therefore, I describe in the text of this paper only the most general approach used, and footnote the specifics.

and interviews with elders;<sup>82</sup> 2.) Development of (a.) basic principles of traditional law derived from the elders;<sup>83</sup> and (b.) jurisprudential statement;<sup>84</sup> and 3.) Development of law<sup>85</sup> or legal system.<sup>86</sup> The approach envisions the incorporation of traditional law into the development of ethics<sup>87</sup>, and both substantive and procedural law<sup>88</sup>.

What I draw from the approach and advocate is the process of utilizing meetings and interviews with elders to determine traditional law, the use of the information to then articulate basic, foundational principles and precepts of traditional law and the use of these foundational precepts to build the law and, for the more ambitious, the legal system. The foundational precepts of traditional law are what lawmakers should keep in mind as they create the laws regarding everything from domestic relations to child protection to criminal law. This does not necessarily mean that the traditional law itself is written down, though some nations, such as the Saddle Lake Nation, might choose to do so, but that the law is based on fundamental principles of traditional law. The very process of developing

<sup>82</sup> These included involvement and participation in various Elders meetings, band meetings, general discussion with band members and personal interviews with Elders of the community, either by appointment or Elders coming forward requesting an interview. See SADDLE LAKE TRIBAL JUSTICE MANUAL, *supra* note 73, at 29.

<sup>83</sup> Tribal customs for Band elections, customary law for Chief and Council, childcare, domestic relations, property, disputes/resolution of conflicts, land, and “reservation living” were set forth in statements. *Id.* at 29-36.

<sup>84</sup> Saddle Lake’s “Jurisprudential Considerations” were set out in five propositions. These propositions generally addressed justice, common values, and institutional requirements. *Id.* at 23-27. The most significant, for purposes of addressing traditional law, is the final proposition: PROPOSITION: The realms of custom and law may be differently defined and each plays different roles in a community/society, yet one must be based upon and complementary to the other. Customs are norms or rules about the ways in which people must behave if social institutions are to perform their task and society is to endure. Law, on the other hand, is defined as a body of binding obligations regarded as right by one party and acknowledged as the duty to the other. Seen in this light, some customs are re-institutionalized for the more precise purposes of legal institutions. Law, therefore, may be regarded as a custom that is restated in order to make it amendable to the activities of the legal institutions. In this sense, it is one of the most characteristic attributes of legal institutions that some of the laws are about the legal institutions themselves, although most are about the other institutions of a community/society such as the family, political, economic, ritual or whatever. Thus, law is a body of binding obligations regarded as right by one party and acknowledged as the duty to the other which has been re-institutionalized within the legal institution so that a community or society can continue to function in a orderly manner on the basis of the rules (customs) so maintained.” *Id.* at 26-27.

<sup>85</sup> The Recommendation following the Proposition for Tribal Law and Customs provides: “That tribal customs and traditional laws of the Tribe be applied in the justice system where applicable and appropriate and that where no customs or laws exist, that Chief and Council pass and have codified, where appropriate laws, statutes and regulations applicable before the tribal justice system and further, that all customs, traditional laws and statutes and by-laws be published to the extent possible for the information and notice of all persons on or off reserve where and to who such laws apply.” *Id.* at 43.

<sup>86</sup> The Tribal Mechanisms of Justice Proposition recommended a two level system for the administration of justice. *Id.* at 46. The first was a Peacemaker system and the second, a Tribal Tribunal of Jurors. *Id.* “The Tribunal shall be of the administrative model, non-adversarial, but carrying the powers to mediate, conciliate, negotiate and arbitrate disputes filed and brought before it.” *Id.* at 45. It also recommended passage of a statute creating the system and appropriate rules and regulations for the system. *Id.* at 46.

<sup>87</sup> “Ethical standards should reflect the traditions, laws, and customs of the Tribe.” *Id.* at 48.

<sup>88</sup> See SADDLE LAKE TRIBAL JUSTICE MANUAL, *supra* note 73, at 42-44 (Proposition 4 states procedures should reflect tribal traditional laws and customs. Proposition 5 states traditional methods of resolving disputes should be incorporated in the tribal justice system where applicable).

law on the basic value and belief system of a particular group's foundational principles of relationship, social values and beliefs would not allow for the wholesale adoption of external law without consideration of how or whether that law is in accord with the underlying norms of the society. This instills culture and tradition in the public law of the nation.

In practice, the approach is harder than it sounds. At each step, there are considerations to be taken into account and decisions to be made. For instance, what traditional law are we talking about? The traditional law that has survived and is alive today? The tradition of the tribe before first contact? How is traditional law organized?<sup>89</sup> Are there some aspects of traditional law that are inappropriate for discussion?<sup>90</sup> How should elders be selected? Who is an elder? In what manner should meetings and interviews be conducted? Who should be involved in the work and who should make decisions regarding the interpretation of the materials gathered? Can the meaning of the law survive the translation from the native language to written English? Should it be translated or kept in the native language? Should traditional law be kept entirely separate and apart from any blend with non-traditional law or process? How should the information gathered then be distilled to arrive at basic precepts? How is this "foundational" law then used to develop larger bodies of law? Who holds the law? Who is to say what traditional law applies or translates to this modern time? What custom no longer applies due to disuse or due to conflict with federal or other internal and external overrides? Some of these questions can have general answers, but the majority are questions that can only be answered in context of a particular indigenous community. Furthermore, depending on the size of the community, the questions may become more difficult to answer or other questions or factors may arise. Implementing the approach, however, is not easy and, in fact, is difficult. It requires hard work, dedication and perseverance.

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<sup>89</sup> For example, the Saddle Lake materials indicate that the Higher Indian (Cree) law can be divided as follows:

Affirmation of the Whole-Continuity  
 Affirmation of the Creator-World  
 Affirmation of the Community-Nationhood  
 Law of Harmony  
 Law of Relationships  
 Law of Discourse-Oral tradition and "Good Talk"  
 Law of Truth  
 Law of Personal Responsibility  
 Law of Pity (civil)  
 Law of Consequences  
 Law of Consensus  
 Law of Fairness and Equity  
 Law of Duty  
 Law of History

TRIBAL JUSTICE CENTRE, PROPOSED DRAFT LEARNING MANUAL AND SYLLABUS FOR THE TRIBAL JUSTICE SYSTEM 1 (November 1985).

<sup>90</sup> "It should be made clear, however, that the Hopi have persisting traditional institutions and authorities that decide matters within their subject matter or personal jurisdiction sphere according to village and clan customary law. These mechanisms include religious societies and the presiding priests of a kiva at a given time of year. This also includes clans and clan leaders, and the Kikmongwi and other village leaders who are undertaking their traditional village responsibilities. The details of what these authorities do and how they do it comprises the body of Hopi religious law, much of which cannot be shared with the uninitiated." Sekaquaptewa, *supra* note 22, at 776-77.

The type of work required by the approach must be undertaken by those internal to the tribe; in fact, it cannot succeed without the support of those internal to the tribe.<sup>91</sup> What makes it difficult is what makes traditional law difficult. Tribes have different histories, not only do their experiences in interacting with colonizing forces differ but which colonizing force they dealt with at what point in time differs. Tribes differ in the extent to which their members have intermarried, and retained their languages, their traditional lands and their traditional ways. All of these factors impact traditional law. First, it is important to know and understand ourselves as well as recognize that our histories are crucial.<sup>92</sup> Secondly, we must know and truthfully analyze our own law. A series of questions can be helpful in examining tribal law, both the formal and written law and the formal and informal unwritten law. What part of the law is governed by tradition? Does our written law address areas covered by traditional law? If so, do they reflect that law? If not, do they conflict with that law or only partially reflect it? What is the relationship between codified law and traditional law, i.e. does one override the other? In short, an assessment of the law is essential.

The approach contained in the Saddle Lake Tribal Justice Manual is innovative. It contains the seed for incorporating traditional law into the justice system. It is an approach that is variable, in that tribes using the approach will not necessarily arrive at the same place in the end. More importantly, the Saddle Lake approach represents a serious respect for traditional law and its place not only in resolving specific disputes on a case-by-case basis, but in serving as a foundation for all law of the tribe, including law of governance, ethics, and substantive and procedural law.

#### IV. Of Cultural Integrity and Self-Determination

It is important to consider the warnings of the “dangers”<sup>93</sup> of codifying traditional law, which I take to mean writing down the specific traditions and customs of the tribe as laws. If the concern is in the direct codifying of traditions and customs as law, though I believe the concern is broader than that<sup>94</sup>, this is not

<sup>91</sup> The Saddle Lake First Nation did not implement the system. Band Leadership changed and the proposed justice system was shelved. See *Interview with James Zion*, *supra* note 77.

<sup>92</sup> “[T]o put it in the language of cultural adaptation theory, the survival of any society depends on its ability to creatively interact, out of its received store of experience or culture, with the unique vicissitudes of its particular geography and history, and not someone else’s. Geography remaining diverse still, and history having not quite ended, either the creative diversifying process continues or survival itself ends.” L&Acirc;M, *supra* note 23, at 210.

<sup>93</sup> See James W. Zion, *Don’t Magic Power Out Of The Hands Of The People!: An Essay on Indian Common Law Statutory Process*, *(unpublished manuscript, on file with the Tribal Law Journal)*. See also Hon. Robert Yazzie, *Navajo Common Law Development*, in NAVAJO COMMON LAW SYMPOSIUM 2000, *Diné Bi Beehaz’áanii Symposium Materials* 1,3 (2000) (“I think we are all agreed that we must use the process of making law to protect, promote, and preserve Navajo values in the Navajo common law. One of the biggest dangers in doing that is that we will distort or ‘get it wrong,’ or we will freeze it. It is very dangerous to put certain customs in writing.”).

<sup>94</sup> See Bennett & Vermeulen, *supra* note 20, for a critique of both codification and common law development of customary law based on the difference between western law and customary law. I submit that there are differences, however, between a nation-state seeking to codify customary law for diverse indigenous populations, and a single indigenous group seeking to develop written law grounded in its own oral traditional law. There is also a difference between indigenous groups that operate entirely

the aspect of the Saddle Lake approach that I advocate for creating law. The apparent fear, or danger, of freezing traditional law or of getting it wrong assumes written law will never be amended, not be drafted by those knowledgeable of the living nature of law, or that it will be impossible to create written law that accurately reflects tribal values and beliefs. I acknowledge that it will take tremendous creative ability but expect that it will not be done without principled study of the traditional law and careful deliberation about the drafting of law based on traditional legal precepts. I also do not anticipate that such work will be done by outsiders to indigenous communities, nor be done exclusively by lawyers, without the necessary input of the traditional authorities of law. What it does require is an understanding and, perhaps more difficult, an agreement, of what values and principles are contained in traditional law and basing enacted law on those principles. It requires that those responsible for enacting tribal law understand these values. It also requires that legislators be responsible for articulating the rationale and assuming full responsibility when enacting law that differs from those values. Despite such challenges, I fail to see how adopting western written law is preferable.

Law is a dynamic force. Western written law contains western values, beliefs, and precepts that dictate thinking, behavior and approach to justice. Once law is adopted, it begins its work.<sup>95</sup> If any law must be written, and applied to us, why shouldn't it 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 as well as based on what we know motivates and influences our social structure, that is — 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 internalized and have affected tribal institutions and thought. The challenge lies in negotiating that clash between values and principles imbedded in traditional law and those imbedded in western law. De-colonization 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

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within an oral and traditional law system and most U.S. indigenous groups that operate with the trappings of the western legal system, including western-style courts, legislatures, written laws and judicial opinions. The existence of these western trappings in indigenous communities raises challenges in terms of their relationship to oral traditional law.

<sup>95</sup> “Law is an adjunct of society. When the latter changes, the former must also adjust.” L&Acirc;M, *supra* note 23, at 202.

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 have themselves facilitated this encroachment, both through their own actions and failure to act.<sup>96</sup> 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.

### V. Conclusion

We have a history of colonization and oppression. That is why I address “re” incorporating traditional law and custom into our “tribal” law. But colonization and oppression have also left a legacy, in many forms, for example, alcohol and substance abuse, violence and suicide in our communities which affect our men, our women and our children. Do western legal approaches help in these areas of self-destruction and people on people violence? Do our written laws even make room to help our people resolve the underlying problems in a way that restores their self-dignity and self-worth so that the individual is reminded of their connection to the greater community? I am not suggesting that traditional law or customary law is a magical wand that once applied will take away these problems. What I do know is that relying on our own ways, our own philosophies, our own law restores our own method of supporting individuals for the strengthening of the larger community, thereby tearing away at the legacies of colonialism and oppression and reaffirming our wisdom which has helped us to continue on as “the People.” Western law is based on the values and norms of western society. Traditional law embodies the values and norms of our own indigenous societies. If we can adopt any law we choose, including western law, why not choose the law that reinforces our own values and norms?

The link between traditional law, self-determination and sovereignty is clear. The creation of laws by us based on our philosophies and approaches is fundamental self-determination. Self-determination demands that we articulate our own law. For me, self-determination means Indigenous peoples have to do everything for themselves, according to what is right for them. It means Indigenous peoples have to be in control of the development of their law. To give our written law over entirely to western influence is a mistake. Our traditional law sets forth who we are as “the People.” Those who say that it is an act of self-determination to adopt any law we please are wrong, if that law undermines who we are as “the People.” The issue of how we incorporate traditional law into existing structures altered by colonialism is an issue worldwide. Nation-states in Africa and in the western hemisphere, such as Papua New Guinea are grappling with this very issue. It is important for tribal peoples to communicate on this and other issues

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<sup>96</sup> As UNM Legal Writing Professor and Pueblo of Isleta Tribal Court Associate Judge Raquel Montoya-Lewis points out, the basis of this facilitation can be internalized oppression. It can also arise from the lack of vision regarding traditional law that legal advisors to indigenous communities bring. In this respect, many legal institutions who teach “Indian” law are implicated in their failure to treat the traditional law of indigenous peoples with the respect it deserves, with their focus on federal Indian law to the exclusion of tribal law. That said, it is also important to point out that the primary sources of traditional law are in indigenous communities, not in the legal institutions.

concerning traditional law or internal law.<sup>97</sup> It is through the sharing of experiences and ideas concerning traditional law, its use, and its strengths that many will benefit.

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<sup>97</sup> In recognition of this, the Tribal Law Journal (TLJ) dedicated to the internal law of indigenous peoples was launched at the University of New Mexico School of Law. The TLJ is intended to be used as a vehicle to promote the development of tribal law based on indigenous concepts. The web address for the Journal is <http://tlj.unm.edu>. The email address for the Journal is [tlj@law.unm.edu](mailto:tlj@law.unm.edu)