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THE NAVAJO PEACEMAKER COURT: DEFERENCE TO THE OLD AND ACCOMMODATION TO THE NEW

James W. Zion*

Introduction

There is a body of Navajo law that has survived the occupation of Spanish, Mexican, and American military forces, the domination of the government of the United States, and the intrusion of the European and American industrial revolution into the life of the Navajo people, the *Diné*. The traditions, customs, and usages of the Navajo, more properly identified as Navajo common law, survived sixty-seven years of attempts by the Bureau of Indian Affairs to "educate" and "civilize" the Navajo through an imposed Navajo Court of Indian Offenses that required Navajo judges to use foreign law. Navajo common law has also remained alive for twenty-five years in a court system controlled by the Navajo government, but it was born of fears of a state takeover and a forced adoption of methods used by American state courts. The Navajo common law has survived through the demands of the Navajo people and their elected leaders.

The Navajo Peacemaker Court is an experiment in blending the procedures of the Navajo common law with Anglo-American methods, and it is an attempt to see whether the means of using Indian customary law is through the development of procedures for its use rather than cataloging its substantive rules.

This article presents the history of the beginning of the Navajo Peacemaker Court and a discussion of why it came into being. The Navajo judges who established the Peacemaker Court hoped to find an alternative to Anglo-American judicial methods by accommodating demands for the use of custom law.

In April of 1982 the judges of the Navajo courts adopted a new kind of court system that blended traditional Navajo

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methods of mediating disputes with regular court operations. The existing Navajo court system is modeled after the state courts of the United States, and in many ways it is as alien to traditional Navajo ways as are the other courts of the United States.¹ The Peacemaker Court was adopted partly because of a desire to soften the impact of an alien system. In forming the new court the judges appealed to the longstanding tradition of the Navajo that provides for headmen or community leaders to mediate and arbitrate local problems. The rules adopted by the judges carefully stated that the old method had been used continually until the present time, particularly in the courts.²

*The Reason for the Court:
The Persistence of Navajo Legal Culture*

Studies of Indian religions show a persistence in traditional religious ways. Some of those practices may have been modified from ancient times, but many are in fact modern and a response to Anglo-American pressures.³

Many modern religious and ceremonial practices are a product of Indian people feeling threatened and trapped by outside institutions, and many reservation Indians respond to the pressures of a materialistic and discriminatory America by attempting to reach back to old values and ways.⁴ Ceremonial and religious practices are not the only aspects of Indian life that are affected by outside pressures. The need to resolve conflicts or disagreements usually addressed by law has also been affected by a desire to use old values and ways of self-protection.

If any division of the Navajo people by acculturation or values

1. See S. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE* 78-91 (1978); Fahey, *Native American Justice: The Courts of the Navajo Nation*, 59 JUDICATURE 10 (1975); Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329 (1978); Keon-Cohen, *Native Justice in Australia, Canada and the U.S.A.: A Comparative Analysis*, 7 MONASH U. L. REV. 250 (1981); R. Barsh, "The Formative Period of Navajo Law; Probate 1940-1972" (unpublished manuscript, 1973) (copy in possession of this author). Though the form of the Navajo courts may be alien to the Navajos, that the judges are Navajo and are responsive to their communities is reassuring.

2. J. ZION, *NAVAJO PEACEMAKER COURT MANUAL* 94 (1982) [hereinafter cited as *PEACEMAKER COURT MANUAL*].

3. D. ABERLE, *THE PEYOTE RELIGION AMONG THE NAVAJO* (2d ed. 1966); V. DUSENBERRY, *THE MONTANA CREE* (1962); J. JORGENSEN, *THE SUN DANCE RELIGION* (1972); C. KLUCKHOHN & D. LEIGHTON, *THE NAVAJO* (rev. ed. 1974); A. HULTKRANTZ, *THE RELIGIONS OF THE AMERICAN INDIANS* (1976).

4. C. KLUCKHOHN, *NAVAJO WITCHCRAFT* 90-91 (1944).

can be made, then there are three groups of Navajos.⁵ The first group, which could be called the "traditionals," generally live in isolated rural areas, and they live simply, using the older ways of the Navajo. The second is a large group of people who are in a transitional status between traditional Navajo ways and the ways of modern America. These "caught-in-the-middles" are the largest and most visible group. Often they were reared in traditional ways and sent to boarding schools at an early age where they acquired Anglo-American educations and values. Now they feel uneasy in both worlds. The third group is the "moderns," made up of young people who speak Navajo poorly or not at all. These people are more attuned to the outside culture because of education, employment, and the ever-increasing presence of television.

Using Navajo common law appeals to all three of these groups, but for different reasons. The traditionals want custom law used in the courts because they feel comfortable with it; they understand it and they have more control when using it. The caught-in-the-middles feel more comfortable with the ideas associated with their upbringing, and they feel the use of custom can provide a tool for protection from the white outsiders who discriminate against them. Often the moderns feel they have an obligation to return to their roots. They know enough about the mechanics of the dominant society (i.e., widespread prejudice and the impact of the capitalist ethic) to desire a legal system they will be able to influence. The problem for the courts is how to accommodate all three groups and serve their needs.

Some Navajos oppose the use of Navajo customary ways. Navajo history has as one of its central themes the conflict between the traditionals and the moderns on the issue of returning to the traditional ways or becoming assimilated. The proposed adoption of a Navajo constitution, livestock control, and the distribution of mineral income have all been political issues in this fight, and the fight continues.⁶

The conflict between the traditionals and the moderns has also reached the Navajo courts, and its judges find themselves "in a dilemma of traditional versus professional authority."⁷ When the Navajo courts were founded, the pressures from outside the tribe

5. K. GILBREATH, *RED CAPITALISM: ANALYSIS OF THE NAVAJO ECONOMY* 98 (1973); Shepardson, *Navajo Ways in Government: A Study in Political Process*, 65 AM. ANTHRO. pt. 2, at 68 (1963). These authors identify two groups, but there are actually three.

6. R. YOUNG, *A POLITICAL HISTORY OF THE NAVAJO TRIBE* ch. 2 (1978); P. IVERSON, *THE NAVAJO NATION* 19-22, 31 (1981).

7. Barsh, *supra* note 1, at 34.

were to fill the judgeships with Navajos who were highly educated and highly trained in Anglo-American methods. Despite these pressures, both the Navajo Tribal Council and the judges expressed their desires to use traditional Navajo thinking, methods, and customs.⁸

Today the acquired Anglo-American professionalism of the judges, engendered by the climate in which the Navajo courts were founded, has secured their continued functioning on an American state court model. The judges are, however, responding to the dilemma of blending traditional values with their professional authority. They recognize the utility of the American court system, but at the same time they are searching for ways to give lasting legitimacy to the persistence of Navajo common law by bringing it into the court system.

Navajo history is full of illustrations of strong cultural survival complemented by a canny pragmatism. This has led to the adoption of features from the outside that are desirable and the rejection of those that do not fit Navajo values. The use of Spanish weaving and silversmithing techniques and a passion for education show a selective adoption of other ways. The rejection of an imposed constitution and governmental structure shows the tough rejection of methods which do not fit. The persistence of Navajo legal culture and the rejection of harsh rules of law are but another example of that pragmatism.

Events Leading to the Adoption of the Peacemaker Court

On April 2, 1981, Nelson J. McCabe, the Chief Justice of the Navajo courts, gave instructions to begin a study of how Navajo customs could be used in the courts as law. He stated that the chairman of the Navajo Tribal Council, the Judiciary Committee of the Council, and some of the judges had made repeated requests for a study of custom law, and McCabe wanted the study to be made by the courts.⁹ Tribal Chairman Peter MacDonald expressed a great interest in finding a system for using Navajo customs. There was a place for them because the courts are permitted to use Navajo "customs and usages" in civil litigation.¹⁰ Chairman MacDonald asked a noted non-Indian legal expert and

8. Conn, *supra* note 1, at 364, 366 n.209.

9. Conversation with Nelson J. McCabe, Chief Justice of the Navajo Nation (Apr. 2, 1981).

10. 7 Navajo Tribal Code § 204 (1978). This is also permitted in the Courts of Indian Offenses operated by the federal government. 25 C.F.R. § 11.23 (1981).

a tribal attorney to research the possibilities for the use of Navajo custom law.¹¹ The combined insistence of the executive and legislative leaders of Navajo government led to an organized effort within the courts.¹²

The court's efforts had barely begun, having produced only an internal discussion paper of some of the possibilities for research and the outline of a proposal for funding the project, when Chairman MacDonald formed a nine-member Task Force on the Navajo Judiciary to examine the "structure and functioning of the Judiciary System," including "ways in which great emphasis on and utilization of traditional Navajo customs and methods of resolving disputes can be incorporated into the court system as the preferred method and set of values."¹³

The task force began its work, but there were disputes among its members and its demands for funding were ignored. After only a few meetings were held to agree upon the goals of the task force and to hear initial reports from the participant organizations, the work of the task force was brought to an end.¹⁴

During the initial months of the court initiative there was little concrete progress because of an assumption that funds would be needed to conduct a comprehensive study of Navajo substantive law. There were many informal discussions with the judges, the Judiciary Committee, the president of the Navajo Nation Bar Association,¹⁵ and others. These led to an agreement that Navajo customs, traditions, and usages must be legitimized as law and used in the courts. There were, however, few concrete ideas on *how* that would be done. The talks centered on codifying custom law through tribal council action, on preparing a restatement of Navajo common law in the modern American common law man-

11. Conversation with Jean Cahn, Esq. (June 24, 1982). Chairman MacDonald commissioned attorney William Reardon of the Navajo Tribe's Legal Division to research and draft arbitration procedures.

12. Conversation with Councilman Lee BeGaye, Chairman of Judiciary Committee (April, 1982).

13. Letter from Peter MacDonald to Chief Justice Nelson J. McCabe (June 5, 1981).

14. The task force was composed of three members each from the Judiciary Committee, the Navajo courts, and the Supreme Judicial Council. The Supreme Judicial Council was a highly political quasi-judicial body, composed of the Chief Justice, retired judges of the Navajo courts, and tribal council members. The personal and political dynamics of the council's creation led to strong clashes with the legitimate courts and others. Infighting coupled with a failure of the chairman to support funding for the project led to the task force's rapid dissolution. The Supreme Judicial Council expired in September of 1981 when the Navajo Tribal Council did not further fund its operations.

15. The Navajo Nation Bar Association is a lively organization of approximately 250 Navajo and non-Navajo members, most of whom did not attend law school. It is becoming a strong force in the development of the Navajo courts and Navajo law.

ner, or developing a method of using Navajo common law in the same manner as English and American common law. No ideas were implemented, however.

In December of 1981 two simple questions resulted in the idea that became the foundation for the Navajo Peacemaker Court. Tribal Council delegate Albert Ross, Jr., of the Saint Michael's Chapter,¹⁶ near Window Rock, the Navajo capital, came to the office of Chief Justice McCabe to ask a few simple legal questions. The Chief Justice called his attorney to answer them. The main concern was, "If a Navajo judge appoints someone to work with people in the community, can the person be sued?" After some discussion, another question was, "Can the person appointed by the judge force the Navajo police to carry out his orders?"

These questions were asked because of a court custom that had been in existence for a long time. The custom was not found in any Navajo legal writings and it was one little used in modern times. The court custom was that a judge could call in a respected member from the local community to work with litigants on problems for which mediation, rather than the American adversary system, was more appropriate. These disputes were usually over family matters, such as divorce or drinking problems, or other everyday problems. Both Chief Justice McCabe and council delegate Ross confirmed that this custom had existed from the times of the Navajo Court of Indian Offenses, 1892 to 1959. The idea that there was a customary mechanism already in use for resolving disputes was exciting. It quickly became the foundation idea for the court's custom law project.

The first task of the project was to verify the custom as stated by Chief Justice McCabe and council delegate Ross. An important authority was consulted: retired Judge Alfred Hardy, Sr., who had served as a judge in the former Navajo Court of Indian Offenses from 1939 through 1958. Judge Hardy confirmed that there was such a custom. He stated that he often used it successfully in divorce matters and other domestic actions.¹⁷ Judge Hardy's validation of the custom was important because he was a

16. A chapter is a form of local Navajo government. It is conducted much like the town meeting form of local government of New England, and like that form, the people of an area meet to discuss and vote upon matters of local interest. The chapter resolution has a great deal of influence upon the central Navajo government's operations and programs. See S. BINGHAM & J. BINGHAM, *NAVAJO CHAPTER GOVERNMENT HANDBOOK* (Rock Point Community School, Ariz. 1976).

17. Conversation with Judge Alfred Hardy, Sr., retired judge of the Navajo Court of Indian Offenses (March, 1982).

highly respected judge during his years on the bench and he continues to be consulted and acknowledged as a wise man.

Another source for verifying the custom was Judge Homer Bluehouse of the Chinle Judicial District. Judge Bluehouse is the senior Navajo judge and he is a former police officer. He is widely acknowledged as the sitting Navajo judge most knowledgeable in the area of Navajo custom law.¹⁸ Judge Bluehouse also confirmed the use of the mediation method in the Navajo Court of Indian Offenses and in the Navajo-controlled courts from 1959. He stated that he had used the system, but that he preferred to act as the mediator himself. He told of assault cases in which an individual came before the court charged with a crime. On closer examination, the judge discovered that the criminal case was in reality a dispute between neighbors. When the neighbors were brought into court for an informal discussion of the case, the judge sometimes found underlying disputes, for example, over grazing rights or fences, or other problems that had turned neighbors against each other. Judge Bluehouse often persuaded the parties to reach an agreement on the underlying dispute and he had them shake hands and agree to be enemies no longer. He often induced agreement through lectures on the law, particularly through lectures on Navajo traditional values. This process turned a criminal case under American legal principles into a Navajo civil action.¹⁹

Informal discussions with the Navajo judges in private, along with questions asked of those who knew the custom, confirmed that the courts had frequently used people outside the regular court structure on cases. The older judges and practitioners outlined the custom and told of its harmony with the thinking of the Navajo. Navajo judges and practitioners confirmed there was a strong desire for an alternative to the American adversary method of presenting cases. The problem was how to devise a method that would combine the identified custom with normal court operations.²⁰

18. Comments of court officials, Navajo practitioners, and opinion of the author. Judge Harry Brown is another sitting judge known to have an excellent knowledge of custom law; retired Chief Justice Murray Lincoln and retired Judge Tom B. Becenti are also acknowledged as experts in this area. An excellent interview with Judge Becenti which exemplifies Navajo judicial thinking is found at 2 D. VICENTI, et al., *THE LAW OF THE PEOPLE—DINE' BIBEE HAZ'AANNI*, 195-237 (1972) (Ramah High School Press, Ramah, N.M.).

19. Other observers have also seen this. See Barsh, *supra* note 1, at 39, 42; Conn, *supra* note 1, at 337-38 n.45.

20. Discussions with Judge Bluehouse, for example, held in December, 1981 and

Since a method of mediation had been identified, a short search of the literature was made to see if there were any systems of mediation that would be useful. One item of interest was a Pennsylvania colonial experiment, which grew out of the religious practice of the Quakers (Society of Friends), of resolving their disputes within their local communities (the meetings), rather than resorting to the common law courts.²¹ In 1683 the Quaker-dominated Pennsylvania General Assembly "provided an institutional alternative to court action by appointing common peacemakers who would arbitrate disputes. The law stated that 'the judgment of the peacemakers, shall be as Conclusive, as a sentence given by the County Court.'"²² The Quaker idea arose from its practice of localizing authority within small religious communities. This localization was probably the result of the English persecution of dissenters, which produced small, independent, and self-reliant religious bodies that protected themselves through methods of regulating their own members. The Quakers may have taken the name or the practice of their court from the Seneca Indian Nation, which had a Peacemaker Court.²³ Internal disciplinary systems born of persecution by a dominant force are a dynamic that is found in Indian cultures as well.

The contemporary American legal community has been looking to mediation and arbitration as an alternative means of handling disputes and diverting cases from the congested dockets of American courts, and the Navajo courts examined some of the experiments that use those methods.²⁴ The small claims court system was also considered.²⁵

January, 1982. Judge Bluehouse has been a continuing source for finding customary legal procedures and principles. The Navajo judges hold frequent meetings to discuss court operations, and those meetings are a good opportunity to gather information. Albert Hale, president of the Navajo Nation Bar Association, acted as an informant and critic and Benjamin Curley, the Window Rock District prosecutor, served as a sounding board and idea man during this period.

21. Scott, *Fishing in Troubled Waters*, FRIENDS J. (Jan. 1/15, 1982), at 8, 9.

22. *Id.* at 9.

23. *In re Jimerson*, 4 Misc. 2d 1028, 255 N.Y.S.2d 627 (N.Y. Sup. Ct. 1963), *aff'd*, 22 A.D.2d 417, 255 N.Y.S.2d 959 (N.Y. App. Div. 1965); *The Peacemaker Court in New York State*, 14 N.Y.U. INTRAMURAL L. REV. 189 (1959).

24. The experiences of the American Arbitration Association (A.A.A.) and its community mediation and arbitration centers in Philadelphia, Pennsylvania and Hartford, Connecticut were considered. Presentation by A.A.A. to the Hartford County Bar Ass'n (1971). The courts of conciliation of California and Montana, which use mental health professionals, counsellors, and clergy in divorce and child custody cases, were held out as justifications for a mediation system. J. BEER, E. STIEF & C. WALKER, *MEDIATOR'S HANDBOOK* (1982) was also utilized.

25. The experiences considered were those of Connecticut, Montana, and the

The Navajo mediation custom had been identified and it was strong enough on its own to use as a basis for a court system. However, outside examples and authorities were used not only as suggestions for a mechanism to be installed in an adversary system, but as a justification for a formal mediation court operated by members of Navajo communities. In a speech to the annual meeting of the Navajo Nation Bar Association, Chairman Peter MacDonald summed up the feeling of independence and the assertion that the Navajos already had a better answer. MacDonald pointed out that there was a traditional Navajo way of settling disputes using mediation and agreement. He pointed to the fact that under Navajo tradition offenders would be required to undo the harm they did through community service, with the use of gentle coercion and persuasion. MacDonald made two propositions to the Navajo bar. First, in dealing with the law, they should not throw out the old, and second, that "justice" for the Navajo means self-protection against the outside and taking care of matters internally.²⁶

Contemporary recollections of the Navajo mediation system were collected, and a cursory search was made of legal, anthropological, and sociological literature for accounts of Navajo legal practices. Contemporary legal literature gave some suggestions for a mechanism to use and justify the Navajo custom, but there was little to be found of much practical use in either social science works or works on Navajo practices.²⁷ Based upon this information, a draft of some proposed Navajo court rules was prepared.

The Debate on the Rules

The Navajo courts follow the practice of most American jurisdictions of exercising the power to adopt court rules to regulate and define court operations.²⁸ After a great deal of discussion,

Blackfeet Tribal Court small claims courts.

26. Keynote speech of Chairman Peter MacDonald to the annual meeting of the Navajo Nation Bar Association at Gallup, N.M. (April 3, 1982). The speech was made after a draft of the Peacemaker Court rules had been written, but before they were announced for public comment. MacDonald probably did not know of them.

27. There are few materials readily available to the contemporary researcher in the field of Indian custom law. Perhaps this is better because it makes modern tribal experiments in the use of Indian common law more self-reliant.

28. 7 Navajo Tribal Code § 601 (1978) permits a majority of the trial judges to adopt rules of "pleading, practice and procedure." The legislative history of the rule is reviewed in the Navajo Court of Appeals case *In re Practice of Battles*, 3 Navajo Rptr. 92 (Ct. App., Navajo Nation, 1982).

the Chief Justice decided to use the rule-making authority of the courts to create the Peacemaker Court, rather than apply to the Navajo Tribal Council for legislation authorizing it. The reasoning for the decision was that legislation would delay putting a custom court into operation, and that the courts should exercise their authority to structure themselves just as state courts freely create court divisions, departments, and small claims courts by court rule.

The standard practice of the Navajo Tribal Council and its committees, as well as the chapters, is to use the resolution format for making laws and setting policies. The resolutions normally contain a preamble explaining the legal authority and reasons for the enactment, and contain enacting language setting forth the actual laws or policies adopted. This format was used by the Navajo court for the adoption of the Peacemaker Court rules.²⁹

The Navajo judges meet frequently, and when they act to adopt rules of court they meet as the Navajo Judicial Conference. The judges considered the proposed Peacemaker Court Rules on April 23, 1982. On that early spring day the judges felt a spirit of progress because of the dedication of a new multimillion-dollar tribal office building that afternoon, and they considered the proposed rules with enthusiasm. Their enthusiasm was restrained by caution, however.

A report outlining the origin, purpose, and structure of the new court was presented to the judges along with a draft resolution and the actual rules.³⁰ The rules were explained and many questions about their specifics were answered.

Judge Bluehouse led the discussion, opposing adoption of the rules. He stated his support for Navajo tradition, but expressed his strong feeling that the civil rights of individual Navajos would be violated by a sanctioned return to old, abusive ways. He mentioned examples of violence and coercion, and he asked how these could be prevented under the proposed system. His objections and questions were answered and discussed and he finally shifted his stand to one of support.

Judge James Atcitty also opposed the rules.³¹ He felt that the use of a traditional procedure was completely out of step with modern times and contemporary needs. He felt that the existing system was the only way to handle disputes. Judge Atcitty is from

29. PEACEMAKER COURT MANUAL, *supra* note 2, at 94-95.

30. *Id.* at 93-121.

31. Judge Atcitty was one of the first Indians elected to the New Mexico House of Representatives. V. VOGEL, THIS COUNTRY WAS OURS 313 (1974).

Shiprock, and his arguments echoed those raised by earlier Shiprock leaders in the battles over oil revenues, livestock control, and a Navajo constitution.³²

Judge Tom Tso entered the argument, and at first he was mildly critical of the rules.³³ However, his views shifted as the discussion and the arguments progressed. He stressed the reasonableness of the system, the protections built into it and, most of all, the demand for and the need to use Navajo traditional legal processes. He was the strongest proponent of the rules. Judge Harry Brown gave his cautious endorsement to the rules,³⁴ as did Judge Henry Whitehair.³⁵

Judge Marie F. Neswood was hesitant about the rules. She wondered if it was possible to blend a custom that was in little use with regular court operations, but after lengthy exchanges with the other judges she gave her tentative support for the plan.³⁶

Chief Justice McCabe backed the plan and reported the demands he had received for the use of custom law. However, since the tribal code provides that a majority of judges must agree to adopt court rules (approved by the Chief Justice and a tribal attorney), the Chief Justice left most of the argument to the trial judges.³⁷

A majority agreed to back the experiment and the rules were enacted by a vote of five in favor and one opposed. One judge was absent.

The judges left their conference feeling optimistic about this experiment in Navajo custom law. Now it had to be acceptable to the Navajo government and to their people.

The Structure of the Navajo Peacemaker Court

The informal agreement within the court was that the Navajo customary method should be protected, preserved, and encouraged, but it should not be regulated. The Navajo courts did not have the funds to hire individuals to conduct mediation in local

32. See *supra* text accompanying note 6.

33. Judge Tso is a product of the Navajo Nation Bar Association. Prior to becoming a judge he was an attorney (i.e., a member of the Navajo bar but not a law school graduate) with DNA-Peoples' Legal Services and a president of the bar association. He is considered to be a brilliant judge and a well-known Navajo leader.

34. See *supra* note 18.

35. Like Judge Tso, Judge Whitehair is a former practitioner.

36. Judge Neswood, who is the highest-ranking woman Navajo official, is a senior judge. She is a former clerk of court and a former acting chief justice.

37. 7 Navajo Tribal Code § 601 (1978).

communities nor to conduct training programs in modern methods of mediation and arbitration. More important, there was a feeling that the chapters were so independent that they would not respond well to instruction and Anglicized methods for using their traditional mediation mechanism. Navajo traditional mediation involves respect for the mediator, lectures on religious and traditional values, and an awareness of the dynamics of the local community. The judges and staff developing an outline for the new court recognized this and decided that the Navajo tradition should not be influenced in its actual operation.³⁸ Navajo pragmatism and independence were recognized as forces to be accommodated.

The theoretical basis of the court consisted of four elements.³⁹ At the core of the court the Navajo mediation tradition was to be left untouched. It would be surrounded by a formal court system that would act as a clearinghouse and referral mechanism. The formal court system would be based on the elements of structure, protection, choice, and enforcement.⁴⁰

The element of structure gave authority to the tradition. The tradition would now have existence as a formal court with a name, and it would have status as an official body of Navajo government as a division of the Navajo courts. The courts would provide clerical and record-keeping assistance because these resources are not readily available on the chapter level. An important part of the element of structure was that the regularly constituted courts would enforce decisions produced through mediation or arbitration.

The element of protection was necessary in order to bring the new method into existence because of problems and abuses that had occurred in the past. Judge Bluehouse and Councilman Ross told of instances in which community members, sometimes with the assistance of Navajo police officers, would take an offender or troublemaker to the local chapter house, lock the doors, and then mentally and physically abuse the person. The suggestion

38. Consensus of Chief Justice McCabe, Judges Tso and Bluehouse, Councilman Ross, and others (by knowledge of author).

39. Navajo tradition gives great weight to the concept of four elements. There are four sacred directions with four sacred mountains. The coincidence of this tradition with the four elements comprising the theoretical structure of the court was later found helpful in taking the Peacemaker Court idea to local leaders.

40. The system has been diagrammed as a circle (representing tradition) surrounded by a square formed by the four elements of the court. The diagram is used as an instructional device in explaining the Peacemaker Court.

that the system would not work because of such abuses led to the decision that the appointed judges must be given overall supervisory powers over the Peacemaker Court. They would be able to issue speedy protective orders to guard against abusive conduct.

When informed of the plan, some persons asked what would happen if someone did not want to be bound by the decision of a person who was not an appointed judge. There was often the misunderstanding that those in the community appointed to serve in the new court would be judges in the same sense as the Navajo judges who made decisions in the adversary setting. This issue was addressed in the third element of the court, expressed as choice. The normal method used would be mediation, in which the appointed official would only be authorized to encourage individuals to talk out their dispute. If an individual did not recognize the legitimacy of the process or the mediator, then he or she could not be forced to agree to a particular resolution to the dispute. Quasi-judicial decision making in the form of arbitration was provided, but the protection of requiring a written agreement to arbitration was required.

The choice element was made available to the judges by providing for the transfer of pending civil and criminal cases to the Peacemaker Court for mediation. This was what the judges had been doing all along. Individuals then had the right to refuse to cooperate with mediation and return to adversary litigation in the trial court.

There was no reason to provide a formal structure in the Navajo courts if the goal was simply to recognize what had been taking place for a long time. The idea, however, was to support and encourage the tradition by giving it legitimacy in a structured setting, through encouraging its operation and enforcing its decisions. The element of enforcement provided for a judgment to be entered in the local district court representing the results of a mediated agreement or an arbitrated decision. Thus entered, the judgment carried all the authority of any judgment of the Navajo court and could be similarly enforced. Since any judgment on a mediated settlement or an arbitrated decision would be one of the district court, the Navajo police could be required to enforce the community decision. Such a judgment could also be appealed to the Navajo Court of Appeals and be given full faith and credit in other jurisdictions. Questions about enforcement powers were resolved by making it mandatory that individuals participate in mediation sessions, once this method was chosen, and requiring participants to come to those sessions under formal court sub-

poenas. Once the theoretical outline was made, the procedures to be used fell into place.

The rules are intended to be simple, and they are only ten pages long. The general rules state the authority of the Peacemaker Court and indicate the kinds of matters that can be addressed by it.⁴¹ They also provide for compulsory participation in mediation and the voluntary participation of non-Indians as parties. Non-Indians are compelled to cooperate as witnesses or participants but not as parties.⁴² Given the independence and pragmatism of the Navajo, the general provisions allow for an informal application and a liberal construction of the rules, and state that the "rules will be used and applied in as close an accordance with Navajo tradition and custom as is possible."⁴³ This is intended to be an escape clause in the event the formal rules are not compatible with traditional practices or with what the parties want. Members of the Navajo bar are forbidden to participate in Peacemaker Court proceedings (with the exception of some matters to be handled in the district court).⁴⁴ Judges are eliminated from the heart of the court's operations.

The persons who actually conduct mediation and arbitration are to be called peacemakers. They are selected because of their "ability to work with chapter members, . . . reputation for integrity, honesty, humanity and . . . ability to resolve local problems. . . ."⁴⁵ This rule is an enshrinement of the Navajo tradition of selecting peace leaders. The peacemakers are to be chosen by the Navajo judges in the absence of community action. The chapters are, however, encouraged to make their own selections of peacemakers at chapter meetings.⁴⁶ In response to commentary that the peacemakers chosen by the chapters or judges might not

41. The Peacemaker Court's ultimate authority is the ability to use Navajo customs and traditions, as authorized by 7 Navajo Tribal Code § 204(a) (1978), and almost any kind of community or personal dispute can be addressed. Peacemaker Court Rules 1.2 and 1.4 as found in PEACEMAKER COURT MANUAL, *supra* note 2, at 101. Although the intent was to provide only for simple community disputes, Navajo practitioners and government workers quickly thought of using the court for divorces and child welfare cases.

42. Peacemaker Court Rule 1.5 as found in PEACEMAKER COURT MANUAL, *supra* note 2, at 102. The policy choice of not requiring non-Indians to participate as parties was made because of the state of the law of jurisdiction over non-Indians at the time the rules were adopted.

43. Peacemaker Court Rule 1.7, *id.* at 102.

44. Peacemaker Court Rule 1.6, *id.*

45. Peacemaker Court Rule 2.1, *id.* at 102-03.

46. Peacemaker Court Rule 2.1(b), *id.* at 102.

have the respect of the community, or might be closely related to a party, or might favor one side of a dispute, the judges included a provision in the rules that the parties to a dispute can agree to any individual as a peacemaker.⁴⁷ This is also designed to accommodate the three levels of Navajo society (the traditionals, the caught-in-the-middles, and the moderns), because they should have the ability to choose their own respected mediators. These mediators can be traditional medicine men, non-Indian clergy or counsellors, traders, lawyers, Native American Church leaders, or other trusted figures of authority.

The peacemaker is given the authority to mediate disputes, but there are few requirements on the form the mediation is to take.⁴⁸ They clearly are not to act as judges, but they must have the specific authority to arbitrate if the parties agree to that process.⁴⁹ The duties of the peacemaker are to assemble the disputants and participants (anyone who has a role in the dispute) for mediation (peace making) and to coordinate activities with the district court.⁵⁰

The clerical and referral system places the burden for paperwork and referrals upon the district court staff, particularly the Clerk of Court. The clerks prepare written requests for use of the Peacemaker Court, make reports to a centralized records office, notify the peacemakers of their appointment, receive and transmit user fees, assist in preparing necessary paperwork, and generally act as an information and assistance resource.⁵¹ Because many Navajos have problems dealing with bureaucratic systems and paperwork, Navajo clerks of court act as public scribes and information resources in order to serve people who must travel many miles to attend to their business.⁵²

The hope is to provide a simple system where an individual Navajo need only to see a Clerk of Court for a referral to a peacemaker. After the rules were adopted, a manual was written for the judges, the chapters, the peacemakers, and the clerks of court, with instructions for each of these officials. The manual

47. Peacemaker Court Rule 2.1(d), *id.* at 103.

48. Peacemaker Court Rule 2.2(e), *id.* at 103.

49. Peacemaker Court Rule 2.3, *id.* at 103-04.

50. Peacemaker Court Rules 2.4 and 2.5, *id.* at 104.

51. Peacemaker Court Rules 3.1 and 3.4-3.8, *id.* at 104-06.

52. The use of thumbprint signatures by elders on checks and documents is still common, and many people have to hitchhike long distances to get to Navajo governmental offices.

also contains forms that can be photocopied. The clerks are instructed that they may fill out the forms in their own handwriting and can keep the papers for requests in simple ring binders,⁵³ thus dispensing with most of the formal record-keeping of regular court systems.

The sitting judges appoint peacemakers in individual cases, issue simple protective orders when abuses are brought to their attention, and issue formal written judgments on mediated or arbitrated decisions.⁵⁴ The judges are also given the authority to halt formal litigation before them and transfer civil cases and some kinds of criminal prosecutions to a peacemaker for community action.⁵⁵ This procedure acknowledges that the adversary system does not adequately serve the participants in many kinds of civil and criminal litigation. Family cases are often aggravated by the emotions and personalities of the parties, and the rules provide a cooling-off process in those situations. The historical practice of Navajo judges turning criminal prosecutions under American court procedures into Navajo civil matters is now followed by the referral system. The judges (particularly Chief Justice McCabe and Judges Bluehouse and Tso) stated that parents or spouses had often requested that the judge give a lecture to an erring family member, and that these requests had to be denied because of the adversarial practices of the court system. The judges also received requests from the families of criminal defendants that a prosecution be stopped in favor of a stern lecture from the bench, but the criminal processes of the courts were not designed for this.⁵⁶ The referral and transfer provisions were designed especially to serve these needs. Judge Bluehouse particularly stressed the effectiveness of lectures based upon legal standards, moral guidelines, and traditional religious principles.

A controversial problem was how the peacemakers would be paid for their services. The judges had the option of presenting legislation to the Navajo Tribal Council to fund Peacemaker Court operations or to make the system rely upon user payment. The option of going to the council was rejected because of the experimental nature of the Peacemaker Court and the small likelihood that funds could be obtained to pay the peacemakers. The

53. PEACEMAKER COURT MANUAL, *supra* note 2, at 82. The rules were adopted in April of 1982, and the manual was prepared in May of 1982.

54. Peacemaker Court Rules 4.1-4.6, *id.* at 107-08.

55. Peacemaker Court Rules 6.1-6.5, *id.* at 109-10.

56. Both Conn, *supra* at note 1, and Barsh, *supra* at note 1, give excellent explanations of the dynamics of traditional Navajo ways of taking care of "criminal" matters.

thinking was that people would be able to pay a fee to the peacemaker because they would not have to pay a court filing fee or the attorney's fees required in regular court litigation. There was also a feeling that the users of the Peacemaker Court system would respect the court more if they had to pay for it. This view acknowledged a practical "you don't get something for nothing" attitude.⁵⁷

Because the new court is experimental, it is believed wise to put a system in place that has as many options as possible and then see what modifications will have to be made after mistakes occur or suggestions are received. The predictions for the future were that the system would be accepted with modifications, or totally rejected, but in either event, it would be influenced by the forces of Navajo pragmatism and the persistence of Navajo tradition.

Since the system is experimental, the Peacemaker Court rules were written in formal legal language for use by the judges and the lawyers, as well as in "plain language" (or what is hoped will be seen as plain language) for local leaders.⁵⁸

The Justification for the Peacemaker Court Under Navajo Common Law

The Navajo courts have inherent and statutory authority to adopt rules of court pleading, practice, and procedure,⁵⁹ and they must use Navajo customs and usages where they are not preempted by United States law.⁶⁰ In creating the Peacemaker Court, the judges exercised their powers to create a new division of the trial court, and they also followed established Navajo custom and usage in creating it.

The twentieth-century Navajo judicial custom was well-established and it was reinforced by available oral tradition and established literature. As it is with most Indian nations, there are few published works on the legal customs of the Navajo,⁶¹ al-

57. The views of Benjamin Curley, the Window Rock District prosecutor, were particularly helpful and persuasive on the fee issue.

58. Peacemaker Court Rule 7.2., as found in PEACEMAKER COURT MANUAL, *supra* note 2, at 110. See also *id.* at 111-21. Previously the Chief Justice issued an order forbidding the use of legalese and requiring the use of understandable English in the courts. Administrative Order, May 4, 1981.

59. *Id.*

60. 7 Navajo Tribal Code § 204 (1978).

61. The NAVAJO BIBLIOGRAPHY WITH SUBJECT INDEX (J. Correll, E. Watson, & D. Brugge eds. 1969, 1973 Supp.) is illustrative; of the 28 entries under the topic of law, only a few relate to Navajo custom law.

though some materials can be found that, though brief, are excellent.⁶²

There were sufficient published materials available to justify the custom and trace its origins to pre-Hispanic and Anglo-American times. From the earliest times to the modern period, the Navajo have had headmen or *Naat'aanii*. These are local leaders who function without the coercive authority found in other governmental structures, and they are individuals of prestige who govern by persuasion.⁶³ The Navajo leaders were (and are) chosen in a democratic fashion, because of their ability,⁶⁴ and by canvassing community opinion.⁶⁵ Men and women had an equal voice in the selection of these leaders, and the ideal was to make a unanimous selection.⁶⁶

Leadership was required for the purpose of conducting war and for supervising a peacetime economy based upon agriculture, livestock, and hunting. War chiefs or leaders were chosen for their military abilities and peace chiefs or leaders were chosen for their eloquence and discrimination.⁶⁷ Most important for the Peacemaker Court's authority, the *Naat'aanii* (headman), who was also a peace chief (*Hozhoodi Naat'aah*), only held power because of eloquence and achievement,⁶⁸ and his or her role was nonauthoritarian, noncoercive, and used only in the interests of the group.⁶⁹ The *Naat'aanii* arbitrated disputes, mediated quarrels, resolved family problems, and tried to correct wrongdoers.⁷⁰ If this leader overstepped the bounds of authority, the basis for his or her legitimacy was destroyed. Obedience to the *Naat'aanii* was lost then due to a lack of community respect and confidence.⁷¹

This democratic form of leadership, which had a built-in kind of recall mechanism, was carried over into the period of relations with the United States. The same tradition flowed into the operations of the Navajo legislative and judicial bodies.⁷² While judges are not selected in the same manner as the *Naat'aanii* and have

62. The only comprehensive work is the multivolume *The Law of the People—Dine' Bibee Haz'Aanii*, *supra* note 18.

63. YOUNG, *supra* note 6, at 25.

64. Van Valkenburgh, *Navajo Common Law I*, 9 MUSEUM NOTES No. 4, 17 (Museum of N. Ariz., Oct., 1936).

65. Shepardson, *supra* note 5, at 51.

66. *Id.*

67. Van Valkenburgh, *supra* note 64. See also YOUNG, *supra* note 6, at 15-32.

68. Van Valkenburgh, *supra* note 64.

69. Shepardson, *supra* note 5, at 47.

70. *Id.* at 51; YOUNG, *supra* note 6, at 25.

71. Shepardson, *supra* note 5, at 47.

72. *Id.* at 78. See also YOUNG, *supra* note 6.

more than simple persuasive powers, the important fact for the Peacemaker Court is that those chosen to mediate and arbitrate disputes must have the respect of the people and can only exercise persuasive and not coercive powers.

Although the Navajo common law supporting the new procedure was firmly established, the judges looked to other precedent in order to command recognition of the new court by the United States and the states.

Outside Recognition of Navajo Common Law

When the Navajo judicial code containing the authority to use custom law in civil cases was enacted by the Navajo Tribal Council, the code was approved by the Secretary of the Interior. This made the recognition of custom law obligatory upon the Bureau of Indian Affairs.⁷³ This policy follows the general legal policy of the United States that Indian customs are to be accorded respect by the United States government as law.⁷⁴

Legal recognition of Navajo custom by federal and state authorities is important because the Peacemaker Court rules make it possible for the individual Navajo to obtain a judgment under a customary procedure and turn it into a judgment of the Navajo courts of record. That means that the traditional court judgment will be recognized by the states. The state of New Mexico recognizes Navajo law under the full faith and credit doctrine,⁷⁵ and Arizona will recognize it (unless it is found to be contrary to Arizona public policy) under the doctrine of comity.⁷⁶

The Navajo judges also looked to other American legal principles for support in rejecting the adversary system of resolving disputes. The Navajo courts looked to an 1829 United States Supreme Court ruling rejecting unacceptable rules of English law. In that case the Supreme Court noted that: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and

73. *Oliver v. Udall*, 306 F.2d 819, 822 (D.C. Cir. 1962); *In re Tsosie*, 3 Navajo Rptr. 182, 186-87 (D. Chinle, 1981); *Estate of Descheeny*, No. WR-CV-565-82 (D. Window Rock, Navajo Tribal Court, Feb. 7, 1983).

74. See *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Frank v. State*, 604 P.2d 1068 (Alaska 1979); *In re Sah Quah*, 31 F. 327 (D. Alaska 1886); *People v. Woody*, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* (1978); Resolution on American Indian Religious Freedom, Pub. L. 95-341 (1978).

75. *Jim v. CIT Fin. Serv. Corp.* 87 N.M. 362, 533 P.2d 751 (1975).

76. *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689, 695 (1977); *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950).

adopted only that portion which was applicable to their situation."⁷⁷ Indian attorneys have concluded that the law used for Indian peoples must be private, inexpensive, and accessible, and it must fit the ends of compensation and reconciliation.⁷⁸ The noted Indian writer and attorney, Vine Deloria, Jr., has reminded the United States Congress of the American political doctrine that the states are to be left alone to become laboratories for political change, and he claimed the same role for Indian nations, saying, "tribes are not vestiges of the past, but laboratories for the future."⁷⁹ The general American philosophy that local governments are to be left alone to develop systems based upon local needs was claimed by the Navajo judges for their own government, and they pointed to basic American legal and political doctrines for support.

Validation and Acceptance of the Court

The success or failure of the Peacemaker Court will be recorded or forgotten some time in the future, and its full history to date cannot be recited in a short article. After the Peacemaker Court rules were adopted, however, there were attempts to inform Navajo leaders and the chapters of the new system. Contacts were also made with individuals and organizations outside the Navajo Nation to find more ideas.

A public informational conference was held for tribal council delegates and chapter leaders in June of 1982, and visits were made by judges and court personnel to local chapter meetings and Navajo conferences to educate the public on the new idea.⁸⁰ The Navajo Nation has the largest land base of all the Indian tribes (it is the size of the state of West Virginia), and communications with the rural chapters are very difficult. Financial shortcomings have made educational visits to the chapters in the various areas impossible, but efforts to gain acceptance of the Peacemaker Court continue to be made.

77. *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829). This case is cited and quoted in PEACEMAKER COURT MANUAL, *supra* note 2, at 5.

78. Barsh & Henderson, *Tribal Courts, The Model Code and the Police Idea in American Indian Policy*, in AMERICAN INDIANS AND THE LAW 31 (L. Rosen ed. 1978).

79. *Id.* at 59.

80. These visits have included presentations to a conference on Indian child welfare sponsored by the Navajo Division of Social Services, a chapter leader program of the Navajo Community College, and presentations of the Kinlichee, Hogback, Shiprock, Houck and Ramah chapters. The Navajo judges presented the Peacemaker Court concept to the advisory board of DNA-Peoples' Legal Services, and the court carried out a program of informational news releases and interviews with the press and radio.

Representatives of other Indian governments have been contacted in order to share information and exchange ideas. The Navajo have been in contact with representatives of the Chipewewa-Cree, the White River Apache, the Salt River Pima-Maricopa, the Blackfeet, and the Salish-Kootenai tribal governments in the United States in an effort to develop rational systems of custom law more fully. The contacts have extended to Canada, with visits to the Federation of Saskatchewan Indians and the Native Law Centre of Saskatoon, Saskatchewan. In December of 1981 the Navajo court hosted a conference of the National American Indian Court Judges Association and made a presentation to the tribal court representatives gathered at Gallup, New Mexico, in order to obtain comment on the Peacemaker Court. In the international arena, visiting African judges and representatives of the Australian Laws Commission have discussed procedural mechanisms for the use of custom law.

These contacts between Navajo leaders and people from the outside have led to the conclusion that the process chosen to use Navajo custom law is valid and acceptable. The courts find that the biggest problem they have in utilizing the Peacemaker Court is in educating local Navajo leaders about it, and that will be difficult without obtaining the resources to reach out to the chapter level of Navajo government.

Conclusion

The Navajo judges are as pragmatic as the communities they represent. They know the Peacemaker Court will work only if it is accepted by the people who are to make it work, and the judges expect changes in the Peacemaker Court as the experiment progresses. The important result thus far is that the Navajos who have heard of the Peacemaker Court praise it.⁸¹

The Navajos accept what they find useful to them and reject what they do not. The Peacemaker Court was founded upon demands that are a product of the persistence of the Navajo culture, and the Navajo judges believe they have chosen the correct method of blending Navajo common law into an American-style court system.

81. Participants in the June, 1982 public presentation commented that they liked the idea and that they did not realize custom law could be used in such a fashion. There has been enthusiastic commentary from various chapter leaders. A citizens' advisory group to the new executive administration under Chairman Peterson Zah fully supported the Peacemaker Court idea when they were briefed on it at a January 4, 1983 meeting.