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**RESTORING INDIGNEOUS LAW AND JUSTICE TRADITIONS**

A thesis

submitted in partial fulfilment

of the requirements for the degree

of

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at the University of Waikato

by

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**ABSTRACT**

Restoring indigenous people's law and their ability to practice their justice traditions is a fundamental aspect of non-discrimination, decolonization, self-governance, self-determination, and social justice. The critical application and interpretation of indigenous people's law has revolutionary potentiality to transform, confront, and heal multiple forms of oppression such as environmental destruction, patriarchy, and the prison/criminal justice system. The sovereign jurisgenerative (law making) power of indigenous peoples is a site of profound hope for the revitalization of indigenous law and justice traditions restores legal principles and values of sacredness, harmony, balance, and interconnectivity within human relationships and with the natural world. Revitalizing indigenous law is a way to re-construct the self and society while also finding and re-connecting to new/old ways of being human. This thesis focuses on both Navajo and Māori practices and visions of law and justice; the challenges and, successes they have faced and the hopes they have of living by their law. Indigenous peoples, their ways of being, their wisdom, laws, and philosophies, must be respected, protected, and preserved not only because they contribute to humanity's richness and cultural diversity but also because they are living examples of a more just, dignified, and ecologically sustainable society, which can serve all humanity.

**This thesis focuses on the critical application of indigenous law and justice and its contemporary potential for healing and challenging multiple forms of oppression.**

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**DEDICATION**

*In honor of*

*Yel Nazbah Betty Clyde*

*Comandanta Ramona (1959-2006)*

*Marcella "Sali" Grace Eiler (1987-2008)*

*and all wahine toa (warrior women)*

**CONTENTS**

<b><u>ABSTRACT</u></b>	<b>I</b>
<b><u>ACKNOWLEDGEMENTS</u></b>	<b>II</b>
<b><u>DEDICATION</u></b>	<b>IV</b>
<b><u>CONTENTS</u></b>	<b>V</b>
<b><u>INTRODUCTION</u></b>	<b>1</b>
<b>RATIONALE AND POSITIONALITY</b>	<b>3</b>
<b>RESEARCH QUESTIONS</b>	<b>6</b>
<b>METHODOLOGY</b>	<b>6</b>
<b><u>PART I: WHO ARE INDIGENOUS PEOPLES?</u></b>	<b>10</b>
<b>MOTHER EARTH AND RELATIONSHIPS</b>	<b>12</b>
<b>THE LAW OF BALANCE</b>	<b>15</b>
<b>THE LAW OF BALANCE AND GENDER</b>	<b>17</b>
<b>THE LAW OF BALANCE: MĀORI GENDER AND SEXUALITY</b>	<b>19</b>
<b>THE LAW OF BALANCE: DINÉ GENDER AND SEXUALITY</b>	<b>21</b>
<b>SUMMARY</b>	<b>25</b>
<b><u>PART II: NAYEE: THE MONSTERS</u></b>	<b>27</b>
<b>COLONIZATION: DISHARMONY, CHAOS, AND IMBALANCE</b>	<b>28</b>
<b>THE STATE, PRISONS, AND THE CRIMINAL “JUSTICE” SYSTEM</b>	<b>31</b>
<b>INTERNALIZED COLONIZATION</b>	<b>38</b>
<b>MALE DOMINATION: VIOLENCE AGAINST WOMEN</b>	<b>51</b>
<b>SUMMARY</b>	<b>55</b>
<b><u>PART III: INDIGENOUS LAW AND HEALING</u></b>	<b>58</b>
<b>LOOKING BEYOND COLONIAL MYTHS</b>	<b>59</b>
<b>LAW AND JUSTICE: INDIGENOUS VS. EUROPEAN FRAMEWORKS</b>	<b>62</b>

*Michelle Cook*

<b>INDIGENOUS LAW AND JUSTICE</b>	<b>65</b>
<b>COMPLEXITY OF NAVAJO AND MĀORI LAW</b>	<b>67</b>
<b>KEY CONCEPTS IN NAVAJO AND MĀORI LAW AND JUSTICE</b>	<b>69</b>
<b>SACREDNESS</b>	<b>70</b>
<b>MANA</b>	<b>71</b>
<b>TAPU AND NOA</b>	<b>71</b>
<b>BALANCE AND IMBALANCE</b>	<b>73</b>
<b>RESTITUTION AND COMPENSATION</b>	<b>75</b>
<b>KINSHIP</b>	<b>76</b>
<b>NATURAL RESOURCES AND THE ENVIRONMENT</b>	<b>78</b>
<b>SUMMARY</b>	<b>80</b>
<b><u>PART IV: INDIGENOUS LAW TODAY: MODERN INCARNATIONS PROS AND CONS</u></b>	<b><u>85</u></b>
<b>BRIEF HISTORY</b>	<b>85</b>
<b>THE FUNDAMENTAL LAWS OF THE DINÉ</b>	<b>89</b>
<b>THE NAVAJO NATION PEACEMAKER DIVISION</b>	<b>92</b>
<b>PROS AND CONS</b>	<b>94</b>
<b>MĀORI TIKANGA AND FAMILY GROUP CONFERENCING</b>	<b>98</b>
<b>SUMMARY</b>	<b>101</b>
<b><u>CONCLUSION: INDIGENOUS LAW OF TOMORROW</u></b>	<b><u>104</u></b>
<b>RESTORING INDIGENOUS LAW BY LIVING INDIGENOUS LAW</b>	<b>107</b>
<b><u>GLOSSARY</u></b>	<b><u>110</u></b>
<b><u>REFERENCES</u></b>	<b><u>113</u></b>

**INTRODUCTION**

For centuries the Diné<sup>1</sup> (Navajo) have used story and oral tradition to help them live the proper, peaceful way, or as the Navajo would say, to “Walk in Beauty.” One such story continues to hold contemporary relevance<sup>2</sup>. According to Navajo legal scholar Ray Austin (2009), at the beginning of time, the “Holy People (deities)” created the Navajo and gave them unwritten fundamental “laws” that would allow them to live in *hozho* (beauty, balance, and harmony) with all “creation” and “all beings.” The law applied to “language,” the “natural environment,” “spirituality,” “kinship,” and “knowledge,” all of which would guide and ensure their harmonious survival as a people. However, the Navajo failed to observe and teach these holy laws to the new generation. As a result of their transgression “nayéé (anything that causes disharmony),” or monsters, were brought forth into the world causing destruction and chaos. The Navajo prayed to the Holy People to re-learn the law they had forgotten. Then one day, a boy and a girl went missing. The people soon found out that they were taken to 'Asdzáá Nádlééhi (Changing Woman), the creator of the Diné, to re-learn and re-connect with the ancient laws and knowledge. The pair returned “12 years later in the spring,” with the sacred law and knowledge that would restore peace and harmony to their people (pp. xvii-xviii).

Law for the Navajo is ancient, sacred, and fundamental. Law is a way of life that provides both social and environmental stability and sustainability. Failing to adhere to and/or practice the fundamental laws of sacredness, harmony, balance, and

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<sup>1</sup> Diné, commonly known as the Navajo are one of the largest groups of indigenous peoples living in the southwestern United States. Their language is of the Athabascan family group. They have a population of around 300,000 and administer a territory of roughly 27,000 square miles.

<sup>2</sup>As Ray Austin noted, “Knowledgeable Navajos rely on the Creation Scripture and Journey Narratives to explain things in the universe, tangible and intangible, past, present, and future, including matters that affect humans and the environment” (Austin, 2007, p.88).

interconnectivity within human relationships and the natural world, according to Navajo, invites disaster. Oral traditions such as these continue to serve an important purpose for human survival and well being. Today it seems that some peoples and societies have once again, like the ancestors, forgotten sacred and fundamental laws of life and, as a result, modern nayéé have been created. According to Yazzie and Zion (1995):

The Navajo word used to describe social problems...is nayéé, which means “anything that gets in the way of a person living his [or her] life”...The literal translation is “monster”. To slay [neutralize and transmute] or weaken a monster you must know its ways and habits. (p.69)

Colonization and oppression in all its forms are nayéé. However, transmuting these monsters is difficult, for many of these monsters are not always clear or easy to identify. The monsters manifest locally and globally, in unjust power structures and dynamics like imperialism, war, poverty, the prison/military industrial complex, racism, male supremacy, state violence, and the relentless consumption of earth’s natural resources to name but a few. Indeed, the monsters live within the psyche, internalized in imbalanced and violently maladaptive behaviours and attitudes. There are many monsters and injustices both, local and global, internal and external, that deny agency and get in the way of people living their lives. These are the neo-colonial monsters that must be confronted, understood, neutralized, and transmuted for harmony and peace to be restored to all peoples and to Mother Earth.

Re-learning indigenous laws, philosophies, and traditions of justice as told in the Navajo story can help humanity transmute the monsters, for they re-connect humanity to ancient wisdom. Similar to Michael Dodson (1994) Aboriginal leader:

I believe that the dignity and perhaps even the survival of the human race hinges on the revival of the voices and cultures of the earth. We [indigenous peoples] are, after all, the peoples who have lived for millennia with the land without bringing it or ourselves to the state of simmering crisis which the

world now faces. Our cultures offer a source of opportunity for a more equal, just, and sustainable future. (p.19)

Reviving and restoring indigenous law and justice is not only important for the well being of indigenous peoples. Restoring justice through indigenous law holds revolutionary potential for humanity in that it can inform and contribute to the development of paradigms, social institutions, and practices that are more just, dignified, and sustainable than the model practiced by the dominant world order. For indigenous people, law and justice traditions are based not on values of exploitation or domination, but on values and principles of sacredness, balance, reciprocity, collectivity, and interconnectivity within human relationships and the natural world.

### **Rationale and Positionality**

This thesis hopes to develop an indigenous centred paradigm of peace, social justice, and action, that can inform, address, and transmute local, global, social, and environmental injustice and oppression using conceptual tools from the Navajo cultural universe and the wisdom of indigenous laws and philosophies.

This thesis, as Angela Davis has observed elsewhere, makes the “commitment to use knowledge to transform and remake the world for all its inhabitants” (Davis, 2007). Similar to Glen Coulthard (2007) I believe that, “our cultures have much to teach the Western world about the establishment of relationships within and between peoples and the natural world that are profoundly non-imperialist” (p.456). The revitalization of indigenous law is one avenue to remake the world because it restores legal visions and social practices of harmony, balance, non-violence, and consensus. Indigenous visions and practices of law and justice therefore, can be used as a means to theoretically and practically challenge, and transform multiple forms of oppression and hegemony.

For indigenous peoples, the ability to practice their law is not only an act of cultural preservation, self-governance, self-determination, sovereignty, and decolonization, but, on a deeper level, it is about healing and having the power,

agency, and ability to determine and construct a reality that supports a sustainable and peaceful future for the earth, indigenous peoples, humanity, and future generations.

This thesis argues that the critical application and interpretation of indigenous laws, philosophies, and traditional knowledge, can contribute to shifting the paradigm in our understanding and experience of law, justice, peace, social, and ecological harmony. Furthermore, it demonstrates that indigenous laws and philosophies can be used to challenge oppression in all its forms and solve both local and global issues. This process of revitalizing and restoring our law is also a process of indigenous self-affirmation. Robert Young (2001) noted, “in many cases, it was this process of critical self-affirmation that led to the development of a ‘distinctive postcolonial epistemology and ontology’ which enabled the colonized to begin to conceive of and construct radical alternatives to the colonial project itself” (as cited in Coulthard, 2007, p.454). Finding contemporary value and worth, in our law is a process of “critical self-affirmation” allowing indigenous peoples and others to imagine alternatives to unjust colonial power structures, and institutions, such as the prison/criminal justice system, exploitation of the earth, and heteronormative patriarchy.

While this thesis is an act of defence against unjust power structures and the illegitimate legal subjugation of indigenous peoples by colonial law and settler states, it is also an offensive action, in that it offers solutions to help indigenous peoples and humanity overcome and see beyond current colonial paradigms of hierarchy and domination, to see ways of being human that are more just and sustainable. This thesis also aligns with Native feminist liberation theology in the words of Andrea Smith (2006):

Native feminist theologies fundamentally challenge the givenness of the U.S. empire and the nation-state form of governance. They further theologize possibilities of alternative forms of governance for the world. This theologizing also challenges male-dominated sovereignty and struggles for racial justice because they demonstrate that the building block of the nation-state is the heteropatriarchal family....Native feminist interventions call us to

question why we should presume the givenness of the United States in our long-range vision of social justice. (pp.93-94)

I agree with Andrea Smith and hope to fashion a vision of social justice that is not centred or dependent upon the state but rather puts faith in indigenous traditions, laws, and social institutions, to guide us into a just and sustainable future. This thesis argues that the state and its laws are not the only form of law and governance available and provides concrete examples of indigenous social institutions and laws that pre-existed and pre-dated colonial states. I also agree with Smith, for while I am critical of the state, I am equally critical of the internalization of oppression, colonial values, and institutions of modern tribal governments, particularly tribal male supremacy. I do not wish to indulge or create a fantasy of indigenous life. Indigenous peoples have internalized ideologies of oppression and we too must recognize and be responsible for our personal and collective decolonization, and healing. Decolonization, “allows for the interrogations of the present states of tribal governments, so that we may return to traditional philosophies as the foundation of our communities and nation” (Denetdale, 2009, p.135).

Though the revitalization of indigenous legal systems and custom law holds immeasurable hope to alleviate many forms of oppression and injustice within, and perhaps, beyond indigenous communities, there is also an urgent need to be critical of its development. Not only because indigenous justice systems have been co-opted by the state, but also because indigenous peoples are not immune to replicating and perpetuating laws or systems of oppression and values that were, at one time foreign to indigenous cultures. Therefore, it is not only an aim within this paper to advocate for indigenous peoples’ ability to develop their juridical customs and methods of conflict resolutions, it also aims, to highlight complications found within contemporary custom law making, specifically state co-option, and complications relating to gender. The need for indigenous peoples, specifically women, to be critical of who is able to make indigenous law and why, both traditionally and currently, is of great importance. Part of the task of decolonizing law, is decolonizing

indigenous law from state law; the other part is decolonizing indigenous law from heteronormative patriarchal interpretations that create, and entrench, oppressive colonial hierarchies within indigenous communities.

### **Research Questions**

This thesis advocates that the restoration of indigenous law and customs can inform and contribute to the development of a more conscious and just society. Specifically asking, who are indigenous peoples and what are their visions of law and justice? How have these systems been traditionally administered by indigenous peoples? How has colonization impacted indigenous people's law and ability to practice their law? What are some of the challenges and successes indigenous peoples encounter in restoring and practicing their law and legal systems today? How are indigenous peoples using traditional law in modern times to solve problems and what forms have these taken? Finally, what are some of the revolutionary potentialities indigenous people's law and justice traditions offer for challenging multiple forms of oppression?

### **Methodology**

In terms of methodology, I have tried to develop an indigenous analysis that does not come from the world view of the colonist, their ideologies, their logic, their definitions of truth, or their perceptions of reality. However, despite, this attempt to speak outside and/ or turn away from colonial worldviews, I do not discount the problematic fact that there are western influences, for example, that this is written in English and not an indigenous language and that I was raised in the western society. I also do not discount the fact that, "[m]any of the most important stories of tribal resistance and the legal visions and traditions that sustained American Indians in their struggles for survival are simply left unrecounted in the written historical record maintained by the conqueror" (Williams, 1997, pp. 12-13). I have tried to avoid this pitfall by referencing indigenous people's articulations of their oral tradition and law. My methodology is archival, consulting books, journal articles, and law reviews, of which most are authored by indigenous people. I have also tried to strike a balance between female and male writers.

Throughout the analysis, I attempt to focus mainly on the writing and voices of indigenous peoples', particularly Diné and Māori<sup>3</sup> voices, concerning their law, its practice, and their visions and dreams of indigenous law and justice for the future. The process of decolonizing justice by restoring indigenous law has already begun in many indigenous communities, and this thesis takes a critical look at some of these systems, the challenges they have faced, and the successes they have attained in revitalizing and practicing their law and customs.

However, my aim is not to find some kind of indigenous purity. Nor am I attempting to be a voice for all indigenous peoples, women, indigenous youth, or Diné people. Rather this thesis argues that the law of indigenous peoples, if applied critically, has contemporary relevance and revolutionary potential for confronting and transforming multiple forms of oppression. It aims to ask how indigenous laws, philosophies, and justice traditions can serve indigenous peoples today, in challenging oppression, and solving both local and global dilemmas.

The aim is not to study all indigenous law across all time and space, or to create some totalizing universalizing theory as to what is indigenous law; this is an impossible task not only in terms of space, but also for the simple fact that indigenous legal systems are as complex, unique, and heterogeneous as the peoples who make it. Much more research needs to be done to archive indigenous practices of law, as well as their relevance for humanity today. Rather, the goal of this paper is to listen to, privilege, and value the voices of indigenous peoples relating to their knowledge and their visions of law, peace, and justice for their people, the world, and future generations.

This thesis is divided into four parts. Part I presents an intellectual framework with which to discuss indigenous peoples by providing a working definition as to

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<sup>3</sup> The literal translation of “Māori” means normal. Māori is currently used to describe the indigenous peoples of Aotearoa (New Zealand). However it is important to note that Māori are not homogenous as there are at many distinct ‘iwi’ or peoples that make up the Māori collective.

who indigenous people are, both demographically and culturally, as well as supplying an overview of fundamental elements in Navajo and Māori social institutions, laws, philosophies, and traditional knowledge. Particularly, this section discusses worldviews of relationships, the law of balance, and how this world view informed everything from gender dynamics to their relationship with the natural world. This information is provided to give clear concrete examples of how indigenous societies were ecologically sustainable, collective, non-hierarchical, and egalitarian.

Part II identifies how indigenous social institutions and laws were thrown off balance by the introduction and violent imposition of European<sup>4</sup> ideology, institutions, and behaviour. It illustrates how colonization has impacted and continues to negatively impact indigenous peoples' bodies, cultures, and self-determination. Specifically, it discusses the present day impact of the prison/criminal justice system on indigenous peoples, the internalization of colonial values by indigenous peoples, and violence against indigenous women. These issues are provided to demonstrate why the revitalization of indigenous law and philosophies are critical for the wellbeing of indigenous communities and the restoration of social and ecological harmony. Part II concludes with the call to re-establish the balance through re-aligning and re-discovering the wisdom found within traditional indigenous social institutions, law, and philosophies.

Part III attempts to find indigenous law. However, I begin this discussion by first dispelling the racist myth that indigenous peoples were without law. I also address the limitations of the research in that Navajo and Maori law are intricate complex systems and their full examination is outside the scope of this paper. There is much work to be done to fully archive both Navajo and Maori law. This section merely highlights some key legal concepts and principles that could help society re-establish just relationships; primarily highlighting such things as sacredness, balance,

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<sup>4</sup> It is important to note that indigenous peoples live in Europe. The words European and colonization in this thesis refer to an ideology and practice of domination over earth and human bodies.

power, kinship and relationships, the restoration of harmony through restitution, and laws concerning natural resources management.

Part IV looks at indigenous law in practice today in both Māori and Diné societies. For example, how have indigenous law and legal systems been implemented, what forms they have taken, and most importantly, how do they serve the current and future needs of indigenous peoples? This section highlights both the Navajo Nation Peacemaker Court, codification of the Fundamental Laws of the Diné, as well as Family Group Conferencing in New Zealand. Most importantly, it poses the question what do indigenous peoples think about these systems, and how do they serve and/or limit indigenous peoples? Part IV concludes with discussing the potential benefits and challenges of restoring indigenous law.

This thesis contends that the critical application and revitalization, of indigenous laws, wisdom, and justice systems has the potential to challenge oppression, heal, and restore harmony, not only to indigenous peoples and their communities, but to all their relations. Indigenous peoples throughout the world are restoring their practices of law and justice to heal their communities. These processes are constantly evolving and being refined. Restoring indigenous law and justice traditions is not only an act of defense against unjust colonial power structures and institutions, but most importantly, it is an act of hope for the future survival of indigenous people, cultures, and Mother Earth. Indigenous peoples have wisdom to share, visions that see and speak beyond colonial conceptions of law and justice; visions of law and justice that have the will and potential to shift the current paradigm of domination towards one that is more collective, just, humane, and sustainable.

**PART I: WHO ARE INDIGENOUS PEOPLES?**

We are Earth, the people, plants and animals  
Rains and oceans  
Breath of the forest and flow of the sea.  
We honour Earth as the home of all living things.  
We cherish Earth's ability to renew as being the basis of all life.  
We recognize the special place of Earth's Indigenous Peoples,  
Their territories, their customs  
And their unique relationship to Earth.  
We are appalled at the human suffering, poverty and damage to Earth caused by inequality of power.  
We accept a shared responsibility to protect and restore Earth  
And to allow wise and equitable use of resources  
As to achieve an ecological balance  
And new social, economic, and spiritual values.  
In all our diversity we are one.  
*The Earth Charter Preamble 1992 (as cited in Wilmer, 1993, p.230).*

Despite 518 years of contact between indigenous peoples and settler societies, indigenous peoples, their cultures, concerns, and current realities tragically remain a mystery to most. Indigenous peoples are still greatly misunderstood, rendered irrelevant, and/or invisible by dominant sectors of society, including the states that colonized them. It is therefore necessary to first identify and establish some basic facts as to whom indigenous peoples are before discussing their world views, or their visions of law, justice, and peace.

Although there is no universally accepted definition of indigenous peoples, one widely used description of indigenous peoples emerges from United Nations Special Rapporteur, Martinez Cobo's ground-breaking report on the situation of indigenous peoples, reading as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve,

develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.( as cited in Thornberry, 2002, p.49)

In terms of material numbers, “it is estimated that there are some 5,000 indigenous nations and 500,000,000 indigenous peoples in the world” (Graham, 2003, p.241). Despite the lack of definitive numbers it is clear that indigenous peoples make up a significant portion of the world’s population, in fact, “about 5 percent of the total population of the globe” (Maybury-Lewis, 2002, p. 9). Furthermore, although, indigenous peoples make up five percent of the world’s total population, “they represent 90 percent of the earth’s cultural diversity” (First Peoples Worldwide [FPW], 2009). For example, “The people of the world speak between 3,000 and 6,000 languages. Of these, 80 to 90 percent are spoken by indigenous peoples, representing almost all linguistic diversity today” (Bernard, 1992). Therefore, issues of indigenous peoples’ concern more people than just those who identify as indigenous. Indigenous peoples’ issues are humanity’s issues, for they are humanity’s cultural and linguistic diversity.

While indigenous peoples are often falsely portrayed as a vanishing people it is clear that this is not the case<sup>5</sup> for many indigenous peoples. Indigenous peoples continue to live and exist, and though the legal definitions and numerical statistics are useful in providing a conceptual framework with which to discuss indigenous issues; they fall short of really getting to the heart of what it means to indigenous peoples to be indigenous or what it means to be Navajo or Māori.

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<sup>5</sup> This does not include un-contacted indigenous peoples or those living in voluntary isolation in areas including but not limited to the Amazon rainforest. These peoples have and continue to face the real possibility of physical extinction when they are exposed to foreign diseases and/or when their lands and resources are not adequately protected.

### **Mother Earth and Relationships**

Traditionally and currently, many indigenous peoples throughout the world share profound and deep connections to the earth, as Jerry Mander noted:

Indian tribes and aboriginal people's whether they live in the far north or in tropical forest, are more alike than not. The Inuit, the Navajo in the southwestern U.S., and the Aborigines [Aboriginals] in Australia all share very similar attitudes towards nature. (Mander, 1992, p.215)

Often, the very name of indigenous peoples reflects this deep connection to land and Mother Earth. For example the name of the Diné is the *Diyin Nohookáá Diné*, meaning the "Holy Earth Surface People." For both Navajo and Māori the relationship to earth extends to all living and non-living things in nature. For the Diné people:

Humans are "earth surface beings," supernatural and spiritual forces are "Holy Beings," feathered creatures are "winged beings", stars, planets, and moon and other heavenly bodies are "star beings," and so on. The universal relations doctrine (*T'aa 'altsoni alk'ei dah ndlii*), a foundational principle in the Navajo belief system, holds that all beings in the universe are interrelated, interconnected, and interdependent; thus all beings are relatives. (Austin, 2007, p. 115)

The universal relations doctrine, *T'aa 'altsoni alk'ei dah ndlii*, is a corner stone of Navajo reality and consciousness. It illustrates Navajo people's awareness that all living beings and all forms both animate and inanimate are alive and related to one another in a circle of life.

This matrix of relations is also represented in the Navajo concept of *k'e*, "the deep relevance Navajos feel for Mother Earth and its complement, Father Heaven, and the utmost respect they accord animals and plants exemplify adherence to *k'e* norms that prescribe proper conduct towards universal kin or relatives" (Austin, 2007, p.118). *K'e* is a cornerstone of Navajo culture and reflects a distinct worldview

and perception of reality that is conscious of relationships and the interdependencies within and between all forms of life.

Relationships are also fundamental to Māori worldviews and reality as seen in the word *Whanaungatanga*. *Whanaungatanga*, “denotes the fact that in traditional Māori thinking relationships are everything-between people and the physical world; and between people and the atua (spiritual entities)” (Law Commission, 2001, p.30). Furthermore, “A consequence of whanaungatanga is that neat lines cannot be drawn between groups or between kin groups or between humans and the physical world” (Law Commission, 2001, p.32).

Geographic space is more than, “nature,” more than a “natural resource.” To indigenous peoples earth is a relative; it is like a being, a body, alive with a mind and consciousness. The word “natural resource,” fails to convey that many indigenous peoples perceive the sky, celestial bodies, water, rain, air, wind, and fire, as more than just resources, but as relatives and living holy beings. Both whanaungatanga and k’e reflect the awareness that all life is fundamentally interrelated and interdependent. Maintaining balance within and between all living beings is therefore imperative for all life to function harmoniously. Balance and harmonization is both a social practice and cultural aspiration of Navajo and Māori ways of being.

Navajo elder, Betty Clyde, a ceremonial practitioner and wisdom keeper, further elucidated that, “Everywhere you go, the elements are gods, we pray to them, right down to the plants, we pray for them, we do our mineral offerings to Mother Earth. That is how we move forward into the future” (Clyde, personal communication, November 26, 2007). Through her dialogue Betty Clyde demonstrates her reverence and relationship to the earth and its elements. Her relationship with the earth manifests as one of tenderness, respect, and love, not disconnection or domination. Kathryn Manuelito, a Diné woman, explains this deep relationship to earth:

Land is a macro type for our Mother, Changing Woman. Both land and the Hogan [home] are synonymous. Both are “mother” to our people. Land known as Mother Earth is not a metaphor to Diné. Mother Earth is a being who is a source of life, gives birth to all living creatures, and sustains the life of her children by providing them with food and protection. Mother Earth, like our human mothers, is priceless and not a commodity that can be sold or bought as real estate. According to the Diné philosophical teachings, land and the environment exist as sacred space. (Canella & Manuelito, 2008, p.53)

In the Navajo worldview land, earth, physical space, is mother, like a mother she creates, nurtures, and sustains all life. Land is therefore more than a physical space but a sacred space that must be loved, protected, and revered.

For Māori, the earth or “Papatūānuku is regarded as the mother of all living things including birds, fish, animals, herbs, trees, and people” (Barlow, 1994, p.147). Navajo and Māori people relate to the earth as her child. The Diné call the earth and sky, *Nahasdzáán* (Mother Earth), and *Yadilhil* (Father Sky), similar to the Māori who call earth and sky, *Papatūānuku* (Mother Earth) and *Ranginui* (Father Sky) respectively. The Māori also share a deep relationship to earth, exemplified in the saying “tangata (people) whenua (placenta/land)” or “people of the land.” For Māori traditionally, “whenua [placenta] and the pito [umbilical cord] are buried or placed within the land of the whānau [kin group] and that establishes a spiritual link between the land and the child” (Mead, 2003, p. 213). This deep relationship is explained more fully by Eva Rickard (1977), Māori leader:

Firstly whenua is land. Secondly, whenua is the placenta within the mother that feeds the child before birth. And when it is born this whenua is treated with respect, dignity, and taken to a place in the earth dedicated to Papatuanuku...And there it will nurture the child. You know our food and living come from the earth, and there also this whenua of the child stays and says, “this is your little bit of land. No matter where you wander in the world I will be here and at the end of your days you can come back and this is your

papakainga [home] and...I will receive you in death.” (as cited in Mikaere, 2003, p.33)

Burying the dried umbilical cord to establish and affirm the physical and spiritual relationship to earth, land, and home is also a cultural institution practiced by the Diné. Land, for both Navajo and Māori, is a living earth, perceived as a woman, and respected as the Mother of all life. Land for Navajo and Māori is sacred space that cannot be reduced to a commodity. Indigenous worldviews and the identity of indigenous peoples are fundamental and intrinsically tied to the geographic space around them. Navajo and Māori worldviews, laws, and philosophies stem from and reflect the belief in oneness and universality, that all things are sacred, related, and connected on multiple levels both physically, spiritually, socially, and ecologically. The land and the people are one and cannot be separated. The inseparability of the self and space is the basis upon which practices and conditions of non-domination of the earth and the human body can exist and flourish. For if all living and non-living things are related to one another then everything is equally important and has a degree of sacredness. Therefore, all forms including earth, plants, animals, and human beings must be managed and treated with respect, love, and care.

### **The Law of Balance**

Concepts of harmony and balance are also critical in understanding Navajo and Māori worldviews, laws, and philosophies. Balance can be observed everywhere in nature, in negative and positive attraction, in the four cardinal directions, between the earth and the sky, lightness and darkness, man and woman, body and spirit. Without balance between these forces, light and dark, day and night, man and woman, life as human beings know it cannot exist. Navajo and Māori worldviews, laws, and philosophies mirror the balance found in nature and are practices that harmonize aspects of the human body with the external universe to ensure holistic well being. For Diné this is exemplified in the word *hozho* (harmony, balance, peace, and beauty) which:

[D]escribes a state (in the sense of condition) where every tangible and intangible thing is in its proper place and functioning well with everything else, such a condition can be described as peace, harmony, and balance (for lack of better English terms). (Austin, 2007, p.83)

Diné life and culture is a journey and a science to attain and maintain hozho at all levels of existence. Diné people call this practice hozho, or “Walking In Beauty.” This way of life is illustrated in the Navajo Night Chant, as recorded by Matthews (1879), “In beauty I walk/With beauty before me, I walk/With beauty behind me, I walk/With beauty below me, I walk/With beauty above me, I walk/With beauty all around me I walk/It is finished in beauty” (as cited in Hughes, 1996, p.137). It is both a way of being as much as it is a practice: “The beauty referred to is both spiritual beauty and the pervading beauty of the natural world. And appreciation for it is expressed not only in words, but in ‘walking’, that is, a way of living” (Hughes, 1996, p.13). These concepts speak to who we are as a people, how we perceive reality, and our place in the universe. Māori share similar understandings and beliefs as reflected in this statement of the significance of balance:

The overriding principle was that of maintaining balance; balance between communities and their environment, balance between people and their atua [spiritual being, deity, god], balance between iwi [people], hapū [extended kin group, consisting of many whānau] and whānau [kin group], balance between the members of communities, and internal balance between each and every person. (Mikaere, 2003, p.66)

The essence of Māori and Diné worldviews and ways of being human fundamentally concern the harmonization between would be opposing forces. Harmonization between men and women, between the human body and the spiritual body, between humanity and nature all represent a distinctly indigenous worldview that has both practical and spiritual implications. It is through the practice of harmonization or the maintenance of balance that life, well being, and peace are sustained socially, spiritually, and ecologically.

### **The Law of Balance and Gender**

The law of balance and harmony for Diné and Māori governed not only their relationships with the earth and the natural world but also governed the balance of power between genders. In terms of Māori social institutions and gender, Ani Mikaere observed:

Both men and women were essential parts in the collective whole, both formed part of the whakapapa [genealogy] that linked Maori people back to the beginning of the world, and women in particular played a key role in linking the past with the present and the future. (Mikaere, 1994, p.1)

Women, like the earth itself, played a central role in the perpetuation of whakapapa, life, and the continuation of bloodlines and were therefore revered and empowered in Māori society. Moreover, “[a]s Māori law recognised ambilateral and ambilineal descent, it is equally as important to whakapapa through tupuna [ancestors] who were women and through those who were men” (Law Commission, 2001, p.35). Furthermore, “Māori cosmogony explicitly acknowledges women and the first female Papatūānuku, as essential to human survival. Honouring women and maintaining gender balance is [therefore] basic to tikanga Māori [Māori law and philosophies]” (McBreen, 2009). It should therefore be of no surprise that women traditionally held positions of power, respect, and authority in both oral traditions and Māori society. As Ngahuia Te Awekotuku (1991) Māori activist and scholar noted:

[H]istory, legend, and cosmology all abound with the mysteries and adventures of Maori women: Hinenui i te Po, the Great Lady of the Night, in whose massive vulva Maui, the insolent demigod, was crushed in his quest for ‘man’s immortality’, Wairaka, whose legendary strength dragged the voyaging canoe Mataatua up on to the safety of the Whakatane shore; Materoa, of Ngati Porou, who led victorious armies into battle on the coast; Rihi Puhiwahine whose poetry celebrating the domains of the Waikato and Tuwhareoa is chanted today. (p.60)

Further, in terms of land and ownership Rei (1993) asserted that traditionally, “Māori women were acknowledged as owners of Māori land under Māori law and custom” (as cited in Law Commission, 1999, p.16). Traditionally, “Māori women as individuals owned ‘use rights’ over land and resources. Those could be passed to a woman by either parent and would remain that woman’s property and not become that of her husband if she married” (Law Commission, 1999, p.15).

Navajo women’s positions of power and respect, similar to those of Māori, are present in oral traditions, cultural institutions, and practices associated with the deity 'Asdzáá Nádlééhi, or Changing Woman. As Austin (2009) elucidated, “Changing Woman, who is also called White Shell Woman, is the principal actor and creator of the carriers of the four basic clans....so she is the ‘mother’ of the Diné” (p.157). Navajo people use a matrilineal clan system that stems from the oral traditions of Changing Women. Navajo women like Changing Woman and earth, are essential to the continuance of clans, bloodlines, and life and for these reasons they were revered and respected. The balancing of power between men and women is clearly demonstrated in the oral tradition of 'Asdzáá Nádlééhi and Johonah-éh (Sun). As the story goes, the Sun asked Changing Women to stay with him, however Changing Women would only agree to this arrangement if the Sun built her a beautiful house with sacred stones and animals all around her. Page and Page (1995) illustrated this as follows:

When the sun asked why she made such demands, she said, “You are of the sky and I am of the earth. You are constant in your brightness, but I must change with the seasons”. And she said, “Remember, as different as we are, you and I, we are of one spirit. As dissimilar as we are, you and I, we are of equal worth. As unlike as you and I are there must always be solidarity between the two of us. Unlike each other as you and I are, there can be no harmony in the universe as long as there is no harmony between us. If there is to be such harmony, my requests must matter to you.”(as cited in Leeming & Page, 1998, p.158)

The oral tradition teaches that men and women are equal and must therefore support and respect one another and this reflects the law of balance. It teaches that in order for the very fabric of the universe to function properly there must be solidarity and harmony between Changing Women and the Sun, between male and female bodies and energies. As Young (2001) emphasized:

Total harmony cannot be realized, however, until Changing Woman and the Sun reach a fully equitable relationship. Only then does the actual creation of Navajo people occur. Everything that happens throughout the creation story relates directly or indirectly to the notion of the delicate balance between male and female. This complementarity of the genders is a recurrent emphasis in the Navajo way of life. (p. 226)

These stories not only reflect women's power and agency, they also reflect the deep reverence for life, harmony, and balance between men and women. It demonstrates that Navajo traditions and societal aspirations are not patriarchal. For Navajo and Māori, equality and harmony between genders was also an essential part of their cultural identity and philosophy.

### **The Law of Balance: Māori Gender and Sexuality**

Traditional Māori society was egalitarian. The Māori worldview and reality recognized the fundamental importance of maintaining balance and applied this to all things including, but not limited to, gender and sexuality. This can be observed in oral traditions and cultural artifacts that recognize and celebrate sexual power, agency, and diversity. In terms of Māori women, Ani Mikaere (2003) illustrated:

Female strength formed part of the core Māori existence, and was sourced in the power of female sexual and reproductive functions....Women were also, by virtue of their sexuality, regarded as possessing special powers in the mediation of the boundaries of tapu [practices of restriction; sacred]and noa [practices to free from restriction]. The recognised centrality of female

sexuality to survival meant that women celebrated their femaleness with confidence, both expecting and exercising sexual autonomy. (pp. 66-67)

Further evidence that traditional Māori society was not organized along heteronormative patriarchal lines can be found in the word *takatāpui* and the oral tradition of Hinemoa and Tūtānekai. The first reference to *takatāpui* can be found in the:

*Dictionary of the Māori Language*, which was first compiled in 1832 by the missionary Herbert Williams. The entry in the dictionary refers to *takatāpui* as an ‘intimate companion of the same sex’ and cites the example of Tiki, who we learn, is the *takatāpui* of Tūtānekai. (Hutchings & Aspin, 2007, p.15)

The story of Tiki and Tūtānekai is further explained by Ngahuia Te Awekotuku (1991):

The word [*takatāpui*] is associated with one of the most romantic glamorised, man-woman love stories of the Māori world, the legend of Hinemoa and Tūtānekai. Tūtānekai, with his flute and his favourite intimate friend, his *hoa takatāpui*, Tiki, and Hinemoa the determined, valorous, superbly athletic woman...who took the initiative herself, swam the midnight water of the lake to reach him, and interestingly, consciously and deliberately masqueraded as a man, as a warrior, to lure him to her arms. (as cited in Hutchings & Aspin, 2007, p.15)

The story of Hinemoa and Tūtānekai illustrates the agency of this Māori woman to determine and go after the man she desired. Indeed the lengths she goes to fulfil this desire is heroic in and of itself. It is not only a sign of her sheer physical strength and endurance; it also shows her great determination to get what she wants. Furthermore, she disguises herself as a man to claim her love Tūtānekai. Tiki was Tūtānekai’s “*hoa takatāpui*,” his “intimate friend.” Why would Hinemoa disguise herself as a man, if Tiki and Tūtānekai were just “intimate friends of the same sex?” The story suggests that Tiki and Tūtānekai were sexual partners. What can be gathered from this story is that women were not submissive, but demonstrated the

agency and ability to choose and determine their partner's and their own sexuality. Furthermore, the story indicates that homosexuality and/or same sex partners were an acceptable manifesting of relationships, including sexual relationships.

Historical evidence which demonstrates the diversity of Māori sexuality can also be found in a number of different locations that include artworks, written documents, and oral accounts:

A fine example of the celebration of same sex sexuality resides today in the Museum of Anthropology....one particular exhibit which portrays two male figures....are conveniently joined at the penis....“Why were same sex couples depicted on items such as this if homosexuality were not accepted, indeed celebrated within pre-European Māori society?” Based on the evidence before us, there can be only one answer to such a question. Same sex relationships within Māori status did have special significance which, I believe was based on the fact that such relationships were in fact accepted, nurtured, and celebrated. (Aspin, 2005)

Additionally, “A significant indicator that there was no hierarchy of sexes in traditional Māori society is the language. Nouns and pronouns are gender neutral: for example, *ia* applies to both he and she” (Law Commission, 1999, p. 15). Traditional Māori society therefore applied non-dualistic concepts of gender and sexuality. Women were powerful and sacred and individuals who were not hetero-normative were accepted and celebrated. Traditional Māori society was neither solely hetero-normative nor patriarchal but strongly egalitarian. Expressions of gender variance and women's power not only existed in traditional Māori society but were woven into the fabric of both the oral tradition and material culture of the people.

### **The Law of Balance: Diné Gender and Sexuality**

Stories of gender and sexuality are also found within the oral traditions of the Diné. One is the creation of sexuality by First Woman and another is the River of Separation story. As Paul Zolbrod noted:

Altsé asdzáá, the First Woman-prototype of mortal females-invents....sex. She creates genitals and inspires in them a special sensitivity. She wants men and women to bond tightly when they conceive and raise offspring. So she fashions the male penis out of turquoise, and into it inserts a mixture of loose cuticle from a woman's breast and yucca fruit. She then makes a vagina out of white shell and into it inserts a clitoris of red shell. Into that she inserts a mixture of cuticle from a man's breast and another piece of yucca fruit. Then she places both organs on the ground side by side, blows medicine upon both of them, and issues instructions. (Zolbrod, 2004, pp. 691-692)

According to Navajo oral tradition First Woman invents and creates sex, sexual organs, and sexual pleasure so men and women will stay together. Sexuality is not just for procreation but something to be enjoyed by both partners. Paul Zolbrod (1984) exemplifies First Woman's instructions:

"Now think," she first tells penis. "Think about the one to your left." Penis, of course, obeys and extends a great distance. "You think, too," she then tells vagina. "Think about the one to your right." Vagina, in turn, obeys as well, but she cannot extend nearly as far as penis has. And she quickly recedes. ....Continuing her instructions, First Woman tells both to shout. "Penis, shout so that your partner can feel the might of your voice. Vagina, shout so that your partner can feel the touch of your voice." Penis shouts very loud, but vagina's voice is puny and weak. So she tells them to repeat. "Touch one another and shout once more," she tells them; "Penis, shout again so that your partner can feel it. Vagina, shout again so that your partner can feel it." So they try again, and this time penis could not shout as loudly as he had the first time, while vagina has a good voice. (as cited in Zolbrod, 2004, p.692)

Not only does the oral tradition demonstrate Navajo people's sense of humour but most importantly it illustrates their sophisticated knowledge regarding sexuality and sexual anatomy. Firstly, the oral tradition provides a description of human anatomy through describing both the purpose and functions of genitalia. Secondly, the story describes differences between the male and female orgasm. The shouting in

the story is a metaphor for orgasm. The first time around the male orgasm is stronger than the female orgasm. However the second time around the male orgasm is weaker than the first while the female orgasm remained constant. This oral tradition is a form of Navajo gender and sexual education.

Another oral tradition from the Navajo universe that explains the critical importance of maintaining hozho, between genders can be found in the “River of Separation” story between First Man and First Woman. As Zolbrod (2004) noted, “First Man and First Woman quarrel bitterly when she accuses him in effect of treating her as a sex object: He wouldn't bother to hunt and bring her food if it weren't for her vagina, she grumbles, which enrages him” ( p.692). First Man and First Woman continue to argue and deciding that they no longer need one another they separate taking each gender to opposite sides of the river (Zolbrod, 2004, p.694). Furthermore, “the *nádleehí* [inter-sexed or gender variant people] went with the men, taking his dishes and weaving implements” (Denetdale, 2009, p.143). The men and the women for a short time were able to live separately, however, as time passed, there longing for each other grew. The women’s crops failed and they were hungry, the men also hungered for companionship, some tried to cross the river to meet one another, but the river was too swift and many drowned. They realized that children were no longer being born and they feared the people would become extinct. They soon came to realize that they must make peace and live harmoniously with one another for life and happiness to continue. The men and the women eventually reunite and they promise to always live in harmony with one another.

Navajo society and worldview was based on balance and egalitarian relationships and not a heteronormative patriarchy. This is indicated by the critical role played by the *nádleeh* in restoring peace between the sexes. As Wesley Thomas noted, *nádleeh*, or “multiple genders were part of the norm in the Navajo culture before the 1890's” (Thomas, 1997, p. 156). According to the Navajo oral tradition “when there is chaos or confusion, the *nádleeh* (as cultural entities) come into the community to bring order and clarity” (House, 1997, p. 227). The oral tradition of the

nádleeh demonstrates traditional Navajo attitudes for inter-sexed people went beyond mere tolerance, but that these individuals served an important function for group survival and social harmony. This oral tradition illustrates the overall importance within Navajo thought in maintaining hozho in all levels of existence including harmony between genders.

The oral tradition of First Woman creating sex and sexuality and Changing Woman and the Sun illustrates the agency and power of Navajo women to determine their partner, their, lives, and their sexuality and provide clear examples of how power was distributed and shared between genders in domestic relationships and sexual unions. The River of Separation story teaches that without harmony between genders, the world falls into chaos and disharmony. Furthermore, it teaches that women and men, and those who are inter-sex, can not live separately from each other or dominate each other but are dependent on one another for survival. The oral traditions do not force men or women into narrow gender categories but allows for a degree of gender flexibility. It is clear from both Māori and Navajo oral traditions that respect for sexual autonomy and balance between genders were fundamental to keeping the over all balance and harmony within their society and within their world. The practices of gender equality and harmony stemmed from worldviews, that recognized the sacredness of all living beings, the importance of relationships, as well as the overarching aim of maintaining balance and harmony within all aspects of life. Indigenous women in these societies were powerful economic, cultural, and political forces embedded in the social fabric of their culture and community.

In conclusion, it is clear that traditional Māori and Navajo society were not organized solely along heteronormative patriarchal lines but were fundamentally egalitarian<sup>6</sup>. Within both Navajo and Māori societies, hetero-normative patriarchal structures are not normative. For both Māori and Navajo, the observance and

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<sup>6</sup> While it is arguable that forms of hierarchy did exist in traditional Māori and Navajo society, this thesis argues that the hierarchy was distinctly indigenous, not European. Controlled and balanced by values of sacredness, relationships, community, and accountability.

maintenance of harmony and balance, between man and woman, earth and humans are central laws of life and indeed demonstrate how Navajo and Māori people related to each other and the universe around them. This is the indigenous way of seeing and embodying the universe. Therefore, it should come as no surprise, as Andrea Smith noted, that, “Native communities prior to colonization were not structured on the basis of hierarchy, oppression, or patriarchy” (Smith, 2006, p.97).

### **Summary**

In Part I, material numbers as well as an intellectual framework of indigenous peoples was provided to create a general conceptual framework with which to discuss indigenous peoples and the importance of indigenous issues. Diné and Māori worldviews and ontology was discussed in order to provide a general understanding of who they are and how they perceive and embody the universe around them.

Indigenous peoples are earth people. The earth, in indigenous world views, is a living mother and indigenous peoples have a reciprocal relationship with her, one of dialogue, tenderness, even love. This view enabled indigenous peoples to identify and relate to the earth as its child and allowed them to form intricate webs of relationships between themselves and geographic space. It has been suggested that Diné and Māori world views and ways of being human were based on the recognition of the inseparability of the human body with the material and spiritual universe. Navajo and Diné, worldview is also based on balance and harmonization of the human body with the external universe.

Maintaining balance and harmony were essential to maintaining the delicate webs of relationships both in the social human world, natural world, and the spiritual world. The indigenous ontological worldview of balance and harmony was applied to social institutions which distributed and balanced power and agency between men and women politically, socially, and sexually. Indigenous social institutions were thus overall non-hierarchical since all humans within this paradigm possessed some degree of sacredness. Furthermore, the concepts of balance and harmony between genders

*Michelle Cook*

were practical and, essential to both the physical survival and spiritual health of their communities. According to Diné and Māori, all living things and non-living things are interconnected, interrelated, and interdependent upon one another. Harmonizing with and balancing these various forces, elements, and relationships are the essence to both Diné and Māori knowledge, wisdom, and social practices. Indeed it was these laws and norms that governed and sustained harmonious relations in their societies.

**PART II: NAYEE: THE MONSTERS**

...From small holes in the ground  
the indigenous fight the monsters  
From small holes in the ground  
the indigenous cannot be seen, and yet can see and feel  
the rumblings of the enemies from far away....  
Margo Tamez, *Nde' Voices against the Wall*,

(Tamez, personal communication, June, 13, 2007)

In order to understand why the restoration of indigenous law and philosophies is so critically important, there must first be an accounting of how colonization and colonial ways of being, law, and institutions have and continue to imbalance, impact, and oppress indigenous peoples. According to the Navajo, the “nayée [or monsters] represent any threat to individual or group harmony” (Winfrey, 2002, p. 296). Colonization and colonial ways of being are nayée that continue to threaten both the individual and collective harmony of indigenous peoples and the planet

Part II highlights colonization and current colonial nayée that indigenous peoples are facing specifically in unjust power structures like the prison /criminal system, the internalization of colonial values by indigenous peoples, and violence against indigenous women. These injustices are highlighted in order to demonstrate how colonization is still working in the lives of indigenous peoples. For, “[i]n our time, direct colonialism has largely ended; imperialism, as we shall see, lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic, and social practices” (Said, 1993, p. 9). As mentioned by Said, colonization is not just about taking land. It is equally a process of possessing indigenous peoples’ minds and bodies with foreign ideologies, social practices, and behaviors. Most importantly, these injustices are highlighted to illustrate why indigenous peoples’ law and philosophies can help indigenous communities and humanity restore peace, justice, and balance to the world, because unlike their European counterparts they are not based on domination, oppression, separation, or hierarchy. These forms of oppression are not natural or normal for they were not part

*Michelle Cook*

of the social fabric or power structures of indigenous societies like Navajo and Māori prior to colonization. These forms of oppression were created, they were made, and they can be unmade. This section on colonial monsters sets the stage for Part III, which will highlight some key concepts in indigenous law that can help indigenous communities, and humanity re-establish and restore both social and ecological balance and stability.

### **Colonization: Disharmony, Chaos, and Imbalance**

Colonization by settler societies dramatically impacted Navajo and Māori peoples' ability to maintain the balance both in their communities and the world around them. The United Nations Special Rapporteur, S. James Anaya (1996), observed that:

In the contemporary world, indigenous peoples characteristically exist under conditions of severe disadvantage relative to others within the states constructed around them. Historical phenomena grounded on racially discriminatory attitudes are not just blemishes of the past but rather translate into current inequities. Indigenous peoples have been deprived of vast landholdings and access to life-sustaining resources, and they have suffered historical forces that have actively suppressed their political and cultural institutions. (p.3)

As a result of both historic and contemporary discrimination indigenous peoples today continue to struggle against a multitude of issues, concerning their lands, resources, health, languages, cultures, political, and social institutions. Both Navajo and Māori people are no exception.

Both the Maori and the Navajo came under forced external rule during the middle of the nineteenth century. The British Empire was experiencing worldwide expansion, and in New Zealand this came at the expense of the Maori. At the same time, in North America, there was continuing westward movement by the United States under the rubric of "Manifest Destiny" as the nation outgrew the confines of the eastern part of the continent. In each case,

expansion came at the expense of the indigenous cultures because the dominating powers would not allow them to coexist as sovereign entities. (Frantz, 1998, pp.490-491)

In their quest for dominance, land, and resources indigenous peoples' bodies and cultures were violently subjugated. European colonizers forced indigenous peoples through both psychological and physical violence, to adopt and practice foreign ideologies and values based on hierarchy, domination, and disconnection. European power structures and domination rests on severing indigenous peoples from their ways of being, their land, and each other. As Moana Jackson noted:

Colonisation has always been a complex process. The assumptions it has made and the way it has taken power from indigenous peoples have varied over time and circumstance. The idea that power comes from the barrel of a gun has been a handy colonising truism, and every act of dispossession has, at some stage, required the colonisers to wage wars, commit horrendous massacres and perpetrate an often unrelenting physical violence.

However, power can also be exercised in less overtly violent ways, through attacks on the souls and minds of people to be dispossessed. Destroying the world-view and culture of indigenous peoples has always been as important as taking their lives, because the actual process of disempowerment, the key purpose of any colonisation, has to function at the spiritual and psychic level as well as the physical and political. (Jackson, 2007, pp.177-178)

Colonization has impacted indigenous communities and the world in a multitude of ways and in numerous combinations. Not only does colonization violently attempt to destroy the physical bodies of indigenous peoples but it violently attempts to destroy their psychic space and worldview as well. Indigenous peoples therefore, struggle to maintain their ways of being human and, their connection to land. As a result, of colonization indigenous peoples currently:

Are not only the most economically, politically, and socially marginalized groups in the world, but they are besieged precisely because the values underlying the moral foundation of their cultures are regarded as antithetical to the values pursued in accordance with the dominant world order. (Wilmer, 1993, p.6)

Not only have indigenous peoples been forced into poverty, excluded politically from power and decision-making processes which impact their lives and futures, but their very reality and worldview is constantly under siege from a dominant world order that attempts to make their bodies and their values disappear. The underlying values of indigenous society, such as non-hierarchical egalitarian social relationships, non-domination over people, earth, are antithetical to values pursued in European thought, behavior, social practice, and culture.

Indigenous worldviews previously mentioned in the Navajo *k'e* and Māori *whanaungatanga* doctrine represents a relational consciousness. A consciousness grounded in relationships to other things, and in an understanding that human beings are not separate from each other, the earth, or the spiritual universe but are intimately connected and fundamentally related to each other and all life in an interdependent and interrelated web.

In relation to earth and nature, the ideology of disconnection is precisely where the worldview of western thought and indigenous thought diverge. Indigenous reality and western reality are strikingly diametrical in relation to the earth where according to western thought “living beyond nature’s limits [is] encouraged, conquest of nature [is] a celebrated value, resources [are exploited], humans [are viewed as [a] superior life form; [and] the earth is viewed as ‘dead’ ” (Mander, 1992, p.218). Western reality is innately constructed as dualistic and based on a separation and is therefore “fraught with the dichotomy or duality between man and woman, and person and nature” (Shiva, 1996, 383). More over, “The ontology of dichotomization generates ontology of domination, over nature and people. Epistemologically, it leads to reductionism and fragmentation, thus violating women as subjects and nature as an object of knowledge” (Shiva, 1996, p.384).

Earth in European thought and behavior is not conceptualized as mother. It is not loved or respected as mother but seen as hostile and separate from the human body. This disconnection allows the earth and even some people to be conquered and dominated. The disconnection from both the earth and fellow human beings ignores the spiritual and biological fact that all things in the universe are interdependent. A belief and cosmology that is central to both Navajo and Māori cultural thought and behavior exemplified in k'e and whanaungatanga. The colonial ideology of domination must be challenged, transmuted, and abolished if there is to be social peace and environmental sustainability.

Colonization however, continues to negatively impact indigenous people's bodies and culture, and can be observed in the subjugation of indigenous laws through the imposition of the colonial prison/justice system, the internalization of colonial values by indigenous peoples, and violence against indigenous women. The next section argues that these forms of colonial oppression can be challenged and restored through re-discovering, re-learning, and re-connecting with the ancient law, values, principles, and justice traditions that governed and sustained indigenous societies for centuries.

### **The State, Prisons, and the Criminal “Justice” System**

The nayée of the criminal justice system and the prison industrial complex is a critical site of analysis and resistance because large numbers of indigenous peoples are prisoners of, and suffer within, this colonial institution. Colonization replaced and subordinated indigenous peoples' law and justice systems with their own laws and legal systems and this continues to impact indigenous peoples today. Critical legal studies can provide a theoretical framework with which to decode the criminal justice system. Critical legal scholars, “challenge the notion of law as neutral, objective, and determinate. [Furthermore] We may also use the deconstruction methodology to expose how law has served to perpetuate unjust class, race, and gender hierarchies” (Wing, 2000, p.4). For indigenous people, colonial law, and the criminal justice system that enforces it, are not neutral but rather continue to be instrumental in the

oppression, subjugation, and destruction of indigenous peoples, cultures, bodies, and spirits.

Indigenous peoples, as a result of poverty, social inequality, and historic racism, are vulnerable to the criminal justice system and the prison industrial complex. Indigenous peoples have a very important story to tell in terms of their experience of the criminal “justice” system and whether or not this is a system worth keeping. Despite indigenous peoples being minorities in many nation states, they are disproportionately represented in the prison system; making indigenous, men, women, and youth, some of the most incarcerated and policed peoples in the world.

For example in Australia, indigenous peoples are estimated to make up 2.4% of the overall population. (Australian Human Rights Commission [AHRC], 2006). However:

*The Royal Commission into Aboriginal Deaths in Custody (RCIADIC)* reported in 1991. At that time, Aboriginal people make up 14% of the total prison population and were up to 15 times more likely to be in prison than non-Aboriginal people. (AHRC, 2006)

Moreover, The Australian Bureau of Statistics (2004) also found, “that it is estimated that in 2002-03 Indigenous young people (that is 10 to 17 years of age) were detained at ten times the rate of all young people in Australia” (as cited in AHRC, 2006). The case is similar for Aboriginal women who were incarcerated “nationally” at rate “20.8 times higher” than non-aboriginal women, making them the “fastest growing prison population” (AHRC, 2006).

Not only are Aboriginal peoples over-represented in the prison system but as a result of racism and historic colonization many indigenous peoples are severely mistreated and/or die in custody, by either suicide or an act or omission by agents of the state. Williams (2001) found that in Australia in the span of, “1990-1999, 115 Indigenous people died in custody” (as cited in AHRC, 2006). Moreover, Collins and Mouzos (2001) concluded that, “Indigenous deaths in custody throughout the 1990’s represent a disproportionately high 18% of all deaths in custody” (as cited in AHRC,

2006). While many of the deaths were self-inflicted and some were a result of negligence on the part of the state, it is clear that through either lack of hope or lack of action indigenous peoples' experience of the prison system is a place of violence and despair not a place of healing, rehabilitation, or justice.

Despite The Royal Commission's investigations and recommendations to stop Aboriginal deaths in custody, the deaths continue. As recently as January 27, 2008, Ian Ward, an Aboriginal elder, facing charges of drunk driving, died of heat stroke while being transported in an ill-equipped police van" (Deaths In Custody Watch Committee Western Australia [DICWCWA], 2009, p.4). The death of Ian Ward demonstrates the brutal reality that indigenous peoples face when encountering the colonial justice system. David McDonald observed that:

It is easy to conclude from these depressing statistics that the operation of the criminal-justice system in Australia the criminal-justice system in Australia, with regard to Aboriginal people, continues the pattern of colonial domination and control seen in this nation since European settlement. The criminalising of Aboriginal people as a whole and their massive levels of incarceration are accurately characterised as processes of ethnocide. (McDonald, 1999, p.298)

Prisons are a form of ethnocide for they continue colonial domination over indigenous bodies because it is a foreign system based on a foreign law, administered through a foreign power structure that only gains its legitimacy and authority through the imposition of colonial law on the bodies and lands of indigenous peoples. Prisons are a form of state violence that is normalized and acceptable. However, the prison system is anything but a place of peace, justice, or rehabilitation.

In Aotearoa (New Zealand) similar trends of indigenous imprisonment are prevalent. For Māori communities, a recent study found that although Māori make up only 12.5% of the total population they make up 50% of the prison population. Māori women make up 60% of the female prison population (Department of Corrections New Zealand, 2007). Indigenous overrepresentation in prison is the same

in North America, for example in 1998 although making up “less than 1% of the total population” they made up “7.6 percent of federal prison population” and “1.4 percent of the state prison population.” Therefore “on a per capita basis” indigenous peoples were imprisoned at a rate “38 percent higher than the national average” (Levison, 2002, p. 31).

These statistics and material numbers have been provided in order to illustrate a pattern of indigenous incarceration. The systematic over-representation of indigenous peoples in the criminal justice and prison systems indicate severe discrepancies between indigenous peoples and non-indigenous populations. Despite being minorities in New Zealand, America, and Australia, a systematic pattern of indigenous over-representation in the prison system emerges; this overrepresentation demonstrates, as critical legal scholars argue, that the western criminal justice system and its laws are not neutral but impact indigenous peoples disproportionately, which arguably is a form of colonial structural violence against indigenous peoples. As Brand-Jacobsen (2002) explains:

Structural violence can often be far more difficult to recognize and understand. This is the violence built into the very social, political, and economic systems that govern societies, states, and the world. It is the different allocation of goods, resources, opportunities, between different groups, classes, genders, nationalities, etc., because of the structure governing their relationship. (p.17)

The structure that governs the relationship between indigenous peoples, and the crown or state, is and has always been inherently violent; for it is a system that is based on a white racial hierarchy, genocide, and the dispossession of indigenous peoples from their lands. The odds of an indigenous person being imprisoned are frightening and so are the long term consequences of imprisonment on the social fabric and futures of their communities. Indigenous prisoners are severed from their families, land, languages, and their cultures and this has incredible consequences for the survival of indigenous cultures and their well being. The imprisonment of

indigenous peoples is another form and method of dispossessing indigenous peoples from their power, land, culture, and community.

Prisons are a form of institutionalized structural violence because they deny the basic freedoms to indigenous peoples. The criminal justice system is violent because it applies one law, and one form of justice, both of which are based on European ideology on indigenous peoples, who prior to colonization practiced their own forms of law and justice. Why should indigenous peoples or anyone for that matter submit to or accept that the western criminal justice system is the only form of justice available?

For indigenous people, the “justice” system is a source of injustice. The abuse of indigenous peoples by the state as seen in the deaths of indigenous peoples in custody proves that the colonial institution that masquerades as “justice” victimizes indigenous people. Furthermore, the police who enforce colonial law must also be criticised for they have also been a source of injustice and oppression for indigenous peoples and many others. As noted by the social justice organization INCITE!:

Since the arrival of European colonists on this continent and the creation of slave patrols — the first state-sponsored law enforcement agencies in the U.S. — Native, Black, Latina, Asian, and Arab women and girls have been and continue to be harassed, profiled, strip searched, body cavity searched, raped, beaten, and murdered by agents of the state on a systematic basis. Such abuses remain widespread and entrenched across the country, in the context of the “war on drugs,” policing of sex and sex work, the “war of terror,” “quality of life,” “zero tolerance” and “broken windows” policing. (INCITE!, 2009)

As mentioned by INCITE, violence inflicted by the state, police, and overall criminal justice system are not considered violent but part of the every day activity of enforcing “justice.” This violence is a form of institutionalized social injustice and state sponsored oppression. Particularly for indigenous peoples, “the existing criminal justice system is not only alien and damaging to us but also the ultimate enforcer of

colonial oppression, rethinking justice from the ground up is what Indigenous peoples- and arguably all peoples-must do” (McCaslin & Breton, 2008, p.512). Indigenous peoples and all people must rethink what justice means and what it looks like. The criminal justice system is based on punishment and control. It is a violent system which disproportionately targets indigenous people, and should be challenged and changed. As stated by McCaslin and Breton (2008) “The very essence of colonialism and its criminal justice system is rule by force, which leads us back to what the colonial project against Indigenous peoples has always been about” (p.512). The justice system in its current incarnation is better understood as an extension of colonial violence and the enforcer of colonial ways of being and practices.

It is questionable, perhaps even impossible, that justice will come from colonial institutions and law given the deep entrenchment of racism and domination. The current western justice system is embedded in, and has been constructed by, colonial institutions that have been instrumental in the genocide and current ethnocide of indigenous peoples’ bodies and cultures.

The criminal justice system and its institutions has been and continues to be an obstacle in providing justice to indigenous peoples rather than a source of empowerment or healing. The solution to over-incarceration of indigenous peoples is not just a matter of reducing numbers, ultimately the solution calls for a redistribution of power and resources. As John Pratt (1999) noted in regards to the Māori prison population:

The issue is no longer one of how to equalise opportunities for Māori within New Zealand society so that these disproportionalities may be reduced. Instead, the issue has become one concerning the extent to which Māori are to be given control over their own destinies, thereby allowing them to resolve such matters in ways they think appropriate. (p.326)

Pratt’s statement calls for a re-distribution of power and control giving Māori the power and jurisdiction to resolve issues and crimes in their communities according to their own laws and customs. This is a matter of sovereignty, self-

governance, and self-determination and a call to shift power dynamics between the Crown and Māori people. While Pratt's statement in terms of sovereignty and control is true, without addressing the overall socio-economic, political, and educational, inequality between indigenous peoples and their non-indigenous compatriots, the over-representation of indigenous peoples in the criminal justice system and prison industrial complex will be difficult if not impossible to remedy. As result of unjust power structures, class inequality, and historical racism, indigenous peoples are prisoners of colonial states and institutions, criminalized and tried on foreign laws that have no origin in their lands and worldviews they are prisoners in a system that wants to destroy and control their bodies, in order to take their power, lands, and resources.

The core issue of over-representation of indigenous peoples in the prison/criminal justice system one of power, control, and equity; returning power to indigenous people to control their own people on their own terms, as well as equity; that is, resolving the overall socio-economic discrepancies and power imbalances between indigenous and non-indigenous peoples. Indigenous people's subjugation to colonial law and their lack of jurisdiction over their people is a form of racial discrimination. The lack of control in practicing their law and justice it is yet another manifestation of colonial structural violence and white racial rule over indigenous peoples. The over-representation of indigenous peoples in the colonial prison system is but one manifestation of the imbalance of power between indigenous peoples and colonial states and another example of modern colonial oppression.

The subordination of indigenous peoples' law and the inability to administer meaningful justice is a form of racial discrimination and colonial violence. Indigenous peoples and their inability to receive culturally competent models of justice must be understood as another colonial assault on the indigenous body and spirit. Indigenous over-representation and abuse in prison is yet another reason why the revitalization of indigenous law is so critical and necessary for the liberation, well being, and long-term health of indigenous communities. The power equation between

*Michelle Cook*

the state and indigenous peoples needs to be changed and corrected. Power and jurisdiction must be shared and managed between indigenous peoples and the colonial states. Indigenous communities are in need of healing and meaningful justice, which can occur when indigenous peoples are resourced and empowered to use the cultural tools available to them, to become agents in creating laws and justice systems that reflect, and are responsive to their specific needs, histories, cultural values, and perspectives.

### **Internalized Colonization**

#### *The Young Warrior*

The young warrior  
Seeing the world through brand new eyes,  
Brought up thinking she was special and good.

Lakota people can be proud again.

When an injustice is done to one of “the people”  
The warriors gather.

The women warrior is among them,  
Proud and strong,  
Because she is a fighter.

The words flow off the tongues of the new orators,  
Telling of the old ways,  
And why being Indian is worth fighting for,  
Mesmerized by the sense of strength and duty,  
To become a warrior and keep the Lakota way alive.

Tradition as told by men,  
Written in history books by white men  
Religion didn’t escape their influence.

Despite being told the women’s squad is assigned the kitchen,  
She guards the rooms and buildings from passing racists.

While the Lakota people make their stand,  
Quiet defiance to the men who say, “respect your brother’s vision,”  
She mutters, “respect your sister’s vision too”.

She supported you at Wounded Knee,  
She was with you at Sioux Falls,  
Custer,  
And Sturgis,

And always remembered you,  
Her Indian people  
In her prayers.

She has listened to women who were beaten by the men they love,  
Or their husbands,  
And gave strength to women who were raped,  
As has the Sacred Mother Earth.

At some point asking where Tradition for women was being decided.

As a Traditional Lakota woman you are asked to approach a relative  
or your spouse to speak your thoughts and feelings at a public meeting,  
Not to touch a feather, or not to handle food at what the white culture  
Once referred to as the “sick time”

Woman warriors once told to break the stereotypes of the white people,  
She is also told to walk ten steps behind a man.

The new eyes that once were in awe at what the world had to offer,  
Looks down at this new girl child,  
The Lakota woman warrior knows her daughter also has a vision.

(Two Eagles, 1988, pp. 119-120).

Gayle Two Eagles, the Lakota poet, echoes the pain that many indigenous women have felt regarding the internalization of colonial worldviews, practices, values, and social structures which exclude them from both political and social positions of power within their communities. What is most painful, is that the source of their oppression is not only an outsider, but also their own men, deny their power to them on the grounds of indigenous “tradition.” She is told her place is in the kitchen, or as Two Eagles states, “ten steps behind a man.” Though indigenous women have fought colonial forces alongside their men at battles like Wounded Knee<sup>7</sup>, and countless others indigenous women’s positions and power and their contributions to the survival and perpetuation of the people is all too often forgotten and/or minimized.

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<sup>7</sup> The Battle of Wounded Knee was a tragic massacre of Lakota people by the United States army.

Colonization as stated earlier is a “complex process.” This section will highlight some of the ways in which internalized colonization is present in the lives of contemporary indigenous peoples particularly through the adoption of male-domination, European constructions of gender and sexuality, and capitalist aspirations. These examples are provided to illustrate the oppression that is occurring within indigenous communities and why the critical restoration of indigenous law and philosophies is fundamentally important to the current well being and future well being of indigenous communities.

Internalized colonization is an important site of engagement for it demonstrates the deep dimensions of colonial conditioning in the lives of indigenous peoples. Indigenous peoples are caught in a matrix of layered oppression, sourced from both the outside and inside. Internal colonization is therefore another *nayéé* that the modern warrior must transmute for harmony to be restored. For internal colonization impacts, oppresses, and restricts indigenous communities in a number of ways. What is most painful and difficult to heal is the fact that the colonial ideologies of hierarchy, disconnection, and domination previously mentioned have been internalized by indigenous peoples, making those who were once the oppressed the oppressor.

Though this is understandable given the colonial situation that colonial values are internalized, it must be challenged, for it causes suffering and oppression within the minds, bodies, and communities of indigenous peoples. As Dr. Brendan Hokowhitu observed, “Many indigenous peoples are yet to detach themselves from colonial legacies, still embodied in the world and their person” (Hokowhitu, 2008, p.116). Taiaiake Alfred (1999) has called this the “adoption of colonial mentality” which is, “recognizable in the gradual assumption of the values, goals, and perspectives that make up the [colonial] status quo” (p.70).

As demonstrated in previous sections, traditional Navajo society was not hierarchal but was matriarchal and based on oral traditions that stressed the importance of maintaining balance and harmony at all levels of human existence, including balance between genders. Colonial conditioning has imposed ways of being

and perceiving the world that are not based on indigenous values and principles of harmony, balance, and relationships, but are based on European ideologies and practices of domination, oppression, and hierarchy; particularly Eurocentric heteronormative patriarchal Christian ideologies, and capitalist aspirations. As a result of colonization, many indigenous peoples have interpreted their law and 'tradition' through a distorted state-centred hetero-normative patriarchal lens, as seen in Two Eagles' poem, "tradition as told by men." Law and tradition then function to serve and protect not the communities interests but male tribal member's power and authority to dominate tribal politics and decision making processes while denying that power and ability to indigenous women. These power dynamics can be observed in how tribal 'sovereignty,' 'governance,' and 'nation building' have been implemented contemporarily. As noted by Barker (2006):

Indian sovereignty was [ and continues to be] defined likewise in troubling and troubled ways- as an absolute, as wholly unchallengeable, as sacred, as hyper-masculinist, with Indian men representing themselves as final authorities over Indian politics, both politically and culturally. The effect of such representation was that existing, exploitative relations of power between Indian women and Indian men were perpetuated as culturally authentic and integral, even traditional and certainly necessary to Indian sovereignty. (Barker, 2006, p.148)

This so called "traditional" hetero-normative patriarchal model of indigenous governance and sovereignty has been used to uphold male supremacy, disenfranchise, and oppress indigenous women, non-hetero-sexual peoples, and the earth. This colonial conditioning must be challenged, confronted, and transformed if peace and balance is to be restored to indigenous communities and future generations. While the "painful, confusing, and uneven adoption of these practices and attitudes by Indians is incredibly disconnected from their cultural histories, oral traditions, beliefs, and practices" (Barker, 2006, p.132), colonial mentality and unjust power dynamics

remains a reality and an obstacle in liberating and healing indigenous women and communities.

Historically the establishment of patriarchy has roots in the Treaty of 1868 signed between Navajo and the United States of America and the formation of modern tribal governments. Only men signed the Treaty of 1868. While Ruth Roessel (1981) argued that although, “no Navajo woman signed... their thoughts and feelings were evident in the treaty” (as cited in Denetdale, 2006, p.12). Wilkins (2002) noted the Treaty required, “the consent of three-fourths of all adult Navajo *males* [emphasis added] to make any “cession” involving Navajo trust lands” (as cited by Austin, 2009, p.13). Though a Navajo women’s “thoughts” and “feelings” may be evident in the Treaty, their right to land is not. Navajo women’s consent and or consultation in the Treaty were not legally required in the transfer of Navajo land and property. Thus Navajo women from the on set of colonization were largely disenfranchised from their traditional positions of land ownership, political power, and authority. This is not to say however that Navajo women were passive. Chief Manuelito, one of the original signers of the Treaty as observed by Denetdale (2004), “relied upon” his wife “Juanita or Asdzáá Tł’ógi”, “for counsel” (as cited in Denetdale, 2006, p.11). Nonetheless, Navajo women’s political participation was not formal but informal and in the background.

The establishment of patriarchy can be observed in the formation of the modern Navajo governments and councils:

The model for Indian government was a simplified version of a federal organization for, as in the United States politics, Navajo governmental activity was considered a masculine prerogative. This was made clear by Navajo women being denied the vote until 1928. The BIA [Bureau of Indian Affairs] continued, as it had begun, to emphasize male orientation in its “civilizing” efforts; its census ignored matrilineal clan designations; assigned the patronym of the father to the child; and grouped household members under a male head in its registration procedures. Sheep permits were issued to a male

household head, regardless of who owned the individual sheep. Important BIA jobs went to men, preferably Anglo men. (Shepardson, 1982, p. 160)

The adoption of colonial mentalities has real consequences in the contemporary lives and futures of indigenous peoples and this dynamic can be observed within contemporary Navajo politics and leadership. For example, the internalization of male domination can be observed in the exclusion of Navajo women from positions of power, specifically that of political leadership. Colonization impacted Navajo men and women differently; Navajo women's positions of power and authority were subjugated in the making of the modern tribal government. Male-domination was normalized and entrenched within the workings of Navajo Nation government and the manifestations of these unjust power dynamics continues in the contemporary lives of Navajo women. Navajo historian, Jennifer Nez Denetdale, (2006) observed:

In 1998, when LeNora Fulton announced her candidacy for the president of the Navajo Nation, she faced criticism from Navajo/Diné men and women who argued that Navajo women should not be leaders because it would lead to chaos in society, as a traditional narrative stipulated. Navajo women have been discouraged from full political participation in the Navajo Nation government even as they exert considerable influence within their families and in local community politics. (p.9)

Though Navajo women exert incredible influence in the *domestic* realm, they are not encouraged to hold *public* positions of politic power and leadership in the Navajo Nation tribal government, all of which is based not on Navajo tradition but internalized colonial constructions of gender, sexuality. As mentioned previously in Part II, the Navajo are a matrilineal people, indeed many of the core oral traditions of the Navajo stress that when there is not balance between genders there is chaos. Furthermore:

[A]lthough many Navajo men, and even women, declare that Navajo women should not hold the highest office in Navajo land, both men and women draw upon traditional narratives to challenge ideas about appropriate gender roles modeled on Western ideals. With the imposition of Western democratic principles, Navajo women find themselves confronted with new oppressions in the name of ‘custom and tradition.’ (Denetdale, 2006, p. 10)

Oppression which occurs in the name of custom and tradition must be confronted and transmuted. Oral traditions through colonization have been stolen from indigenous peoples and used as a means to destroy their egalitarian systems and ways of being. Colonization has impacted how indigenous peoples interpret and apply their oral tradition, custom, and law. This is one way that colonization is continuing to manifest and oppress indigenous peoples today. To heal and bring harmony, these false interpretations must be confronted so that indigenous women and men can reclaim the oral tradition so that they serve the well being of the people, not just the interests of male supremacy and male domination. As a result of colonization and policies of assimilation, some indigenous peoples have assumed western constructions of nation-hood, gender, and sexuality as their own. This colonial conditioning has re-cast custom and oral tradition through state-centred hetero-normative lenses all of which defends and promotes male supremacy, and male dominated tribal nations.

Māori writers have also observed the internalization of colonial values by Māori men and women. For Māori:

Colonisation of this land by a misogynist culture has contributed to shifts in our tikanga that diminish the mana of women and limit the behavior of both men and women to gender roles that fit a Western model. At a more fundamental level, colonisation of our creation stories now provides the justification for these shifts in behavior and attitude. (McBreen, 2009)

McBreen similarly observes how the colonization and re-telling of Māori creation stories has justified and entrenched western models of gender and sexuality

restricting both men and women's agency to determine their gender and sexuality. However, indigenous women, like Kim McBreen, have not been silent in the face of this kind of oppression:

They [indigenous women] have been saying that the normalization of their disenfranchisement is not okay-not okay because it does not reflect Indian cultural beliefs about gender and not okay because it does not reflect Indian women's agenda to (re) assume their public, participatory roles within the governance and social life of their communities. (Barker, 2006, pp.150-151)

Modern tribal governments are abusing their sovereign powers when they cite "tradition" to disenfranchise indigenous women from the ability to determine and participate in the lives and futures of their peoples and nations.

Internalized colonization of European constructions of gender and sexuality and can be witnessed in the enactment of the Diné Marriage Act of 2005. The Act states that "marriage between persons of the same sex is void and prohibited" (Diné Marriage Act [DMA], 2005). Furthermore, "the purposes of marriage on the Navajo Nation are to promote strong families and to preserve and strengthen family values" (DMA, 2005). Though gender diversity was present in the Navajo culture prior to 1890, "From the 1890's until the 1930's dramatic changes took place in the lives of Navajo because of exposure to, and constant pressures from, Western culture-not the least of which was the imposition of Christianity" (Thomas, 1997, p.156). Though gender variance was present traditionally within Navajo and Māori communities this knowledge has and continues to be subjugated and/or rendered invisible. Herdt (1997) similarly observed that "such violations of the sexual life ways of other peoples are not simply about sexuality; they are efforts to subjugate and justify the superior politics and religion of the colonising culture" (as cited in Hutchings & Aspin, 1997, p.18). As demonstrated in the previous chapter, indigenous peoples' worldviews are based on values of harmony, egalitarianism, and balance. These values are in direct opposition to European hetero-normative patriarchy.

This position of the Diné Marriage Act of 2005 stands in stark contrast to the Navajo oral traditions that teach that gender variant peoples serve a fundamental purpose to the survival of the people, and were valued, respected, and sacred. Indeed it demonstrates the adoption of colonial sexual attitudes which are intolerant of and marginalize homo-sexual or inter-sexed individuals. Furthermore, the position taken by the Navajo Nation in the Diné Marriage Act reflects dualistic concepts of gender and colonial constructions of sexuality that label inter-sexed or homosexual peoples as abnormal, deviant, and in opposition to “family values.” What these non-heterosexed individuals oppose, however, are not “family values” but colonial constructions of gender and sexuality that have been violently imposed and internalized by some Navajo people and called their own. The Diné Marriage Act blinds Navajo people to the existence of their traditional perspectives of gender and sexuality mentioned previously in the River of Separation story and the role of the Navajo nádlee.

The dynamics of colonial mentality in relationship to the earth and natural resources can also be observed in the formation of tribal corporate alliances and the adoption of capitalist aspirations by some indigenous governments and leaders. A case in point is the proposed construction of a 1500-megawatt coal fired power plant on Navajo land, a project developed jointly by Diné Power Authority and the corporate entity Sithe Global. Navajo Nation President, Joe Shirley issued the following statement in defending the development:

Native peoples, Navajo people included, regard the earth as our mother, the sky as our father, and certainly we are doing everything we can to take care of the air and the environment. At the same time we know that the deities want us to stand on our own, and that’s where Desert Rock comes in... Remember that this project is not just about energy. It is about tribal sovereignty, about independence, and quality of life for an entire nation. (Shirley, 2008)

Shirley’s argument is interesting on many fronts. First he states the Navajo worldview and philosophy regarding their relationship to the earth and the environment. He then quickly appeals to an authority, the Holy People, to justify

Desert Rock the development of a coal fired power plant. He then makes the false equivocation that natural resource exploitation will subsequently lead to tribal independence, sovereignty, and quality of life. What is interesting is that Shirley does not mention any other way to achieve tribal independence, sovereignty, and quality of life other than through the unsustainable exploitation of coal resources on Navajo land. Furthermore, and most chilling, is the invocation of the Holy People, as if he is the sole communicator with the deities and they tell him what they want. Shirley's position is an example of how colonial mentality and capitalist aspirations are adopted and defended by tribal government and leaders in the name of tradition.

Recently, Shirley issued another statement which supported the Hopi tribe's decision to deny local and national environmental group's access to their lands. The decision to deny access was spurned from Navajo and non-Navajo environmental activists who oppose the construction of Desert Rock. President Shirley stated:

Unlike ever before, environmental activists and organizations are among the greatest threat to tribal sovereignty, tribal self-determination, and our quest for independence....Navajo environmentalists and the non-Navajo environmental groups that support them work to the detriment of the Navajo people and Navajo Nation....The independence of the Navajo Nation is dependent on our financial independence, and our financial independence rests largely with the development of Desert Rock. (Shirley, 2009)

While Shirley's desire for financial independence can be felt by all Navajo people who have or who are currently experiencing the ravages of poverty and the hopelessness that chronic unemployment creates, he fails to understand that the unsustainable development the environmentalists oppose not only contributes to climate change but most importantly, it violates Navajo peoples' sacred covenant with nature and the laws given to them by the Holy People. Navajo people should not have to give up their culture to develop their economies. If all the Navajo people were to adopt Shirley's mentality, would Navajo still remain the Diyin Nohookáá

Diné, the Holy Earth Surface People, or would they become what they most, fear, fully assimilated, Navajo on the outside but a colonizer within? Glen Coulthard commented that, “strategies that have sought self-determination via mainstream economic developments have facilitated the creation of a new elite of Aboriginal capitalists whose thirst for profit has come to outweigh their ancestral obligations to the land and to others” (Coulthard, 2007, p. 452).

How can Navajo achieve independence if the means to get there is to oppress and silence the voices of Navajo and non-Navajo environmentalists who oppose the unsustainable development of their land and Mother Earth? Indigenous tribal leaders, through the adoption of the colonial mentality and colonial consciousness have equated the means, which is economic independence via global capitalism, with the ends being indigenous independence and autonomy. They sincerely believe that the means will lead to the end result, and that this result will justify the sacrifice of Nahasdzáán. Will economic development like the coal fired power plant truly give the Navajo people independence or is it rather treating the symptoms of inequality as opposed to healing the roots of Navajo poverty and oppression such as the unequal distribution of power, control, and authority by a colonizing state? Searching for freedom from the conditions of poverty and state control through unsustainable development is a re-entrenchment of colonial ideology as opposed to a movement beyond the colonial condition. The reliance on the state, its institutions, ideologies, behaviours, and practices are part and parcel of the colonial mentality that must be challenged if indigenous peoples are to break free from a colonized consciousness and ways of being.

Hokowhitu, in reference to the hybridization of Māori and European values, provides an explanation as to why indigenous men adopted colonial mentality in the first place:

The world they faced was a hybrid one and, accordingly, Māori culture had to rapidly transform to survive, sometimes replicating Pākehā culture, sometimes forging hybrid compromises, sometimes creating cultural bastions (such as the

marae [communal meeting place]) and deploying subversive methods to keep their culture alive. (Hokowhitu, 2008, p.120)

The internalization of colonial ways of being was a way to work with the colonizers, a form of adaptation and survival. However, Hokowhitu is quick to note that, “[t]he hybridization of Māori masculinity and British patriarchy must be acknowledged as an out-of-date performance which resulted from colonial circumstances but not longer serves an integrative function, and should be discontinued”(Hokowhitu, 2008, p.134). Navajo women and men must also recognize that colonized masculinity and European patriarchy is a performance which no longer serves Navajo people. Indigenous peoples must challenge and be critical of oppression that is delivered and perpetuated by both state governments and modern tribal governments; governments that all too often sustain, mimic, and or support colonial values and its institutions. The above examples indicate the misuse of tradition, the erosions of knowledge, usurpation of female power, and the disruption of traditional egalitarian social institutions.

The internalization of colonial values by indigenous peoples is part and parcel of the colonial project. In order to liberate and transform indigenous communities and minds and bodies from colonial confines, there must be a shedding of colonial attitudes and practices within the psyche of the colonized. As Alfred Memmi, explained:

Colonization distorts relationships, destroys or petrifies institutions, and corrupts men [and women], both colonizers and colonized. To live, the colonized needs to do away with colonization. To be a man [woman], he [she] must do away with the colonized being he [she] has become. If the European must annihilate the colonizer within himself [herself], the colonized must rise above his [her] colonized being. (Memmi, 1957/1991, p. 151)

To heal, transform, and rise above the colonized being, all indigenous peoples, both men and women, must actively work, critically shed, and rise above the

mental, physical, and spiritual confines of their colonial conditioning. Not only do indigenous women need to ask “where Tradition for women was being decided” as Two Eagles’ poem suggests, but all indigenous peoples need to be critical of when, how, and why “tradition” is being used, by whom and for what purposes. Indigenous women must, as Ngahuia Te Awekotuku (1991) powerfully stated:

[F]ocus on ourselves-demythologize the phallic concepts that have so long disabled us, and recreate our own sense of women culture from the richness that is our immediate inheritance. Take from ourselves without guilt those features of Maori being that are beautiful, matriarchal, strong- for there is at least as much to validate our women-loving vision as there is to undermine that white supremacy which our brothers challenge. (p. 64)

Indigenous women must reclaim their positions of power, and indigenous peoples, must reclaim and be proud of their traditions that respect and are tolerant of non-heteronormative peoples. Oral tradition and custom law must be decolonized from the state-centered, heteronormative patriarchal readings, interpretations, and applications that have been both imposed on indigenous peoples through colonization and internalized by indigenous peoples through assimilation. Oral traditions are meant to maintain harmony and ensure the survival of the people; they are not meant to be manipulated to serve the self-interest of some at the expense of others. Oral traditions were provided to serve the well being of all people, including women and non-heteronormative people.

In order to heal internalized oppression, indigenous peoples must recognize how the patterns of colonial domination operate and are sustained, within their own colonized being. Though it is undeniable that indigenous peoples are victimized by colonial systems, some indigenous people through the adoption of colonial mentalities are contributors to suffering, oppression, and imbalance. If real and meaningful healing, indigenous people, and all people must be responsible for the suffering and oppression they inflict on one another and on the earth. Indigenous peoples must reclaim their traditions and law from the grip of state-centered heteronormative patriarchy. Re-discovering and re-aligning with the ancient wisdom

found within indigenous law and oral traditions can help achieve the social and ecological harmony indigenous communities so desperately need.

### **Male Domination: Violence Against Women**

Another colonial nayée is male domination specifically manifested through violence against women. As illustrated in the previous sections, traditionally Māori and Navajo societies were egalitarian and in the case of the Navajo they were matrilineal. Indigenous women in these societies held positions of respect, power, and authority. This was evident in the Navajo oral traditions of Changing Woman and First Woman that speak to gender equality, sexual agency, and sexual autonomy. The power of women was also evident in the oral traditions and the histories of Māori women. The traditions and cultural practices speak to Māori women's sexual agency, their role in whakapapa (genealogy), and also the power of women to produce, and indeed enable, human survival.

Although women in these communities still possess power, it is undeniable that the balance of power between indigenous men and women has suffered dramatically as a result of colonial ideologies of male supremacy and female inferiority. Unlike Māori and Diné women's position of power and authority, settlers viewed and treated women as inferior beings. Women were to be controlled by men; devoid of power, voice, control, and sexual agency over their bodies and their property. Unlike the indigenous worldviews previously mentioned, that celebrate women's power and sexuality, colonization brought an ideology of patriarchy and male domination as seen in the English laws of *couverture*:

In nineteenth-century England, the husband was the authoritarian head of the family, with powers over both person and property of his wife and children. On marriage, husband and wife for many purposes became one person in law and all the wife's personal chattels [property] became the absolute property of the husband. (Law Commission, 1999, p. 18)

Hierarchical power relationships such as patriarchy have been normalized, culturally rationalized, and legally sanctified. This has had real consequences for indigenous peoples, women, and Mother Earth. As a result, "...tribes have seen a progressive shift from gynecentric, egalitarian, ritual based social systems to secularized structures closely imitative of the European patriarchal system" (Allen, 1992, p.195). As Joanne Barker noted:

These social relations [egalitarian relations] and the cultural beliefs on which they were based were most directly targeted by colonization efforts, from the period of early missionization through assimilation. The systematic undermining of everything related to Indian cultural beliefs about gender took its toll on the structure of Indian societies, specifically social and interpersonal relations. (Barker, 2006, p.132)

Colonial society disdained indigenous women's political, sexual, spiritual, and socio-economic powers and actively attempted to usurp these social institutions. This is true in Aotearoa where, "the influence of introduced laws and culture eventually affected the core of Māori society. When the English common law was applied to Māori women, their status was reduced to that of their English counterparts" (Law Commission, 1999, p.17).

Therefore, the colonization and subjugation of indigenous peoples did not impact indigenous peoples uniformly. As a result of colonization the law of balance, women's traditional knowledge, and the overall distribution of power and equality between genders has been strained and in some cases nearly destroyed. Indigenous women have, and continue to be impacted in unique ways as a result of colonial constructions of gender and sexuality particularly, in sexualized violence.

As colonization brought in the ideology of patriarchal dominance it also brought in state sponsored large scale rape, genocide, and violence. Colonization and the subsequent rapes, were weapons of war used by the colonizer to demoralize and destroy indigenous nations physically and spiritually. Violence against women, rape, and sexual assault has been, and continues to be, one of the greatest tools of colonial

destruction of indigenous peoples and nations, especially in the United States. As Andrea Smith (2003), Cherokee scholar and intellectual leader, noted:

[S]exual violence was a tool by which the bodies of indigenous peoples became marked as inherently violable and “rapable”- and by extension, their lands, and territories became marked as violable as well. Sexual violence also enables colonizers not only to destroy a nation but also to destroy their sense of being nation. Whereas the bodies of Indian men and women have been marked by sexual violence, the bodies of Native women have been particularly targeted for abuse because of their capacity to reproduce the next generation that can resist colonization. To destroy a people, one must disproportionately target women for destruction; consequently, symbolic and literal control over Native women’s bodies through sexual violence is essential to the colonial project. Thus, the issue is not prioritizing concerns of state violence over gender violence; rather, addressing gender violence is a critical aspect of ending state violence. (as cited in Smith, 2005, p.728)

In other words, the destruction of indigenous women’s bodies is central to the destruction of indigenous lands and peoples. If indigenous women are destroyed, indigenous nations are destroyed; therefore, the safety and well being of indigenous women is essential and central to the long-term sustainability and future survival of indigenous peoples. The bodies of indigenous women were and still are constructed as inferior, and worth- less than their non-indigenous compatriots, not only because of racism which placed indigenous peoples at the bottom of a social hierarchy, but also because they are women and in the European worldview this meant they were to be submissive and controlled by men. Indigenous women, as a result of these European views, therefore experience intersectional oppression as a result of their race, class, and gender.

Sexual violence against indigenous women continues today. Perry (2004) reported that, “Native and Alaska Native women are 2.5 times more likely to be raped

or sexually assaulted than women in the USA in general” (as cited in Amnesty International [AI], 2007, p.2). Furthermore, Tjaden and Thoennes (2000) in a US Department of Justice study concluded that, “34.1 per-cent of American Indian and Alaska native women- or more than one in three-will be raped during their lifetime; the comparable figure for the USA as a whole is less than one on five” (as cited in AI, 2007, p.2). In terms of violence:

The rate of violent victimization among American Indian women was more than double that among all women...American Indians were twice as likely to experience a rape/sexual assault (5 per 1000 persons age 12 or older) compared to all races (2 per 1,000). (Perry, 2004)

Amnesty International’s 2007 report “Maze of Injustice: The Failure to Protect Indigenous Women from Violence”, was a watershed in many ways for North American Indian women. As a result, greater attention has been focused on the issue of rape and sexual violence within North American indigenous communities and reservations. Since the publication of Amnesty International’s report, The Tribal Law and Order Act of 2009 was reintroduced to develop the capacity of tribal police, governments, and justice systems to protect indigenous women on reservation lands. However, the study is relatively silent on the fact that if “86% of all rapes committed against Native women are non-native men” (AI, 2007, p.4), then at least 14% of rape against Native women could have been perpetrated by Native men. Although this number may seem small, Native-on-Native violence is equally, if not more damaging. Indigenous peoples need theoretical and practical tools to deal with violence and sexual abuse that are perpetrated by both Native and non-Native men. Indigenous systems of gender complementarity have been dramatically impacted by colonial ideologies of domination. Even indigenous men are participating, and are perpetuating, violence against their indigenous sisters. How can indigenous nations argue for sovereignty when that very right is denied to indigenous women time and time again while their very body, like the land, is under siege? Both earth and the bodies of indigenous women hold the memory and bear the scars, of the colonizer’s ideology of violence against women, power, dominance, and control. Both women

and earth are suffering, from this system. Until, the monster of male supremacy and male domination is named and transmuted, it will continue to terrorize and threaten the sustainability of indigenous people and the earth for generations to come.

### **Summary**

Part II examined some colonial ideologies, behaviours, practices, and social institutions that negatively impact the lives of indigenous peoples. These particular *nayée* demonstrate the ways in which unjust colonial power structures and power dynamics play out in the lives of indigenous peoples. The prison system, internalized colonization, and violence against women are but a few of the *nayée* that threaten indigenous peoples and earth's stability, peace, harmony, well being, and survival. These issues are not isolated but must be placed in the larger context of decolonization, liberation, justice, and peace for indigenous peoples and all peoples.

From a Navajo standpoint, "the maleficent forces collectively called *nayee*'... cause disharmony, friction, and discord in daily life. Forces that are *nayee*' disrupt *hozho* and must be neutralized or eliminated to return things to *hozho*" (Austin, 2007, p.91). What solutions can indigenous peoples offer to neutralize and eliminate the *nayée*? How can indigenous peoples and indeed global society return their communities and world to *hozho* or harmony, where power is shared, relationships are respected, and justice restored? Kevin Gilbert, an indigenous Australian activist, stated:

To whom do we turn for justice? The heads of white society? Do we humbly beg the thief to act as judge? Do we ask the grazier, who fattens his cattle, his family, on land that was robbed from us in the most dastardly manner, for the return of our rightful property or at least a viable land base and reparation throughout Australia? No. It is not logical to expect the tyrant, the thief, to relinquish his unlawful gains. (Gilbert, 1993, p.24)

To whom can indigenous peoples turn for peace and justice? Can justice come from the West's laws, prisons, and police? Can justice come from the colonial

oppressor? No, peace and justice, as understood from an indigenous perspective, cannot come from western law and its systems of so called “justice,” because the worldview and the epistemological paradigm it is predicated upon, is based and infused with domination, disconnection, and oppression. Peace and justice therefore must come from outside the colonial worldview, “For the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change” (Lorde, 1979, p.99). Genuine change is what is needed to heal and transform society. Franz Fanon explained that, “those struggling against colonialism must ‘turn away’ from the colonial state and society and find in their own transformative praxis the source of their liberation” (as cited in Coulthard, 2007, p.456). Ancient law and wisdom is a source of liberation. The stakes are high, for it is peace, freedom and liberation from systems of violence and domination that is sought. Realigning with the ancient wisdom found in indigenous law can be a source of liberation. With ambition and with imagination indigenous law can aid humanity to design and reconstruct the world.

Indigenous visions of law and justice can aid humanity in remaking the world for they are not the master’s tools and they are not the inventions of empire. Traditional Māori and Navajo societies were based on balance and harmony and these philosophies and laws provide the evidence that societies can be based on equality and harmony as opposed to domination and oppression. They were not organized on hierarchy or hetero-normative patriarchal lines as seen in European society; this is evident in the origin stories that recognize and teach balance, the sacredness of life, the fundamental relationship to earth, the sacredness of women, as well as the stories that value and respect the unique gifts that non-heterosexual indigenous peoples offer their communities. Navajo and Māori people must uncover and reclaim these stories for, “Navajo stories such as [the ones previously mentioned]... have the power to act as anticolonial stories-counterstories to the colonizer’s story of male dominance over women, human dominance over the natural world, and European dominance over Native Americans” (Coker, 2003, p.292). Navajo and Māori law and oral

tradition can challenge violence against women and patriarchy because they represent balance and harmony between genders.

The wisdom of indigenous peoples, their visions of law and justice, can help humanity restore the balance and challenge oppression in all its forms. Re-learning the ancient wisdom found within indigenous laws allows society to imagine new/old ways of being; that can transmute, and heal multiple forms of oppression and suffering.

Part III attempts to provide alternatives to the unjust power structures and power dynamics previously mentioned by illustrating Navajo and Māori laws, justice traditions, and social institutions that were based not on domination, but on harmony and the balance and distribution of power. It will illustrate some of their social institutions, rules, obligations, and patterns for correct behaviour and ways of being which allowed them to organize relatively harmonious egalitarian societies.

### **PART III: INDIGENOUS LAW AND HEALING**

As illustrated in the previous chapter, colonization has created various injustices or monsters that indigenous communities and global society must overcome. Specifically, colonization has established and contributed to the development of a heteronormative patriarchal hierarchy, a hierarchy rooted in domination, over both human bodies and the natural world. However, the previous chapters have also provided evidence that counters the normalization of hierarchal systems, demonstrating that both Māori and Navajo societies and the practices of law and justice were based not on domination but on values and principles that included but are not limited to sacredness, balance, and relationships.

The question that must be asked is how society can heal and move beyond the unjust colonial hierarchal power systems and re-establish just and equitable relationships within and between themselves and their environment. How can humanity heal and re-connect with each other, with nature, and with the larger cosmos around them? Indigenous law and wisdom can provide the blueprint or guide for re-creating and re-making the world into a more just and ecologically sustainable place. Realigning with the ancient wisdom found within indigenous law and justice systems can be a source of revolutionary potentiality and a source of transformation and liberation from colonial paradigms and the confines of a colonized consciousness.

However, before discussing the specifics of Navajo and Māori law and its relevance for social change and justice, it is necessary to first dispel some common myths and misunderstandings surrounding the law of indigenous peoples. This section focuses on dispelling the myth that indigenous law is non-existent, secondly that law must come from state institutions, and finally highlighting how indigenous law and justice systems differ from European systems.

**Looking Beyond Colonial Myths**

In both Aotearoa (New Zealand) and in Turtle Island (America), the law of indigenous peoples has systematically been denied and or subjugated by settler societies. Therefore, proving indigenous peoples had law is one of the most difficult obstacles to overcome for indigenous law continues to be discounted, co-opted, ignored, and or disrespected by settler societies. As Moana Jackson Ngāti Kahungunu and Ngāti Porou Māori leader, has eloquently observed:

It is one of the tragedies of Western history that the culture-specific nature of its own systems of law has blinded it to the existence of law in other societies. This monocultural myopia, when coupled with the economic demands of an imperial ethic, has led to a dismissal of other cultural systems as not being “legal”, and a subsequent imposition of the Western way....Part of this, “limited appreciation” has led Pakeha [non- Māori] anthropologists and jurists to foster the myth that Maori society had no system of law. (Jackson, 1988, p.35)

Indigenous law and wisdom, as Jackson stated, is dismissed and in its place European law and institutions are imposed upon both the mind and body without question. The case is similar in the United States where, “[d]epictions of Indians as a ‘fierce race of savages’ characterized by a ‘want of fixed laws’ are frequently elaborated in the contemporary culture” (Williams, 1997, p. 19). The colonial myths that indigenous people did not, or could not for that matter, possess law and justice reflects and stems from a racist ideology of white supremacy.

Denying the existence and relevance of indigenous peoples’ law and legal traditions is part and parcel of the racial construction of indigenous savagery. The racial construction of indigenous savagery and inferiority is a historic fact as seen in Montesquieu’s *Spirit of Law*:

The publication in 1748 of Montesquieu’s *Spirit of Law* was a landmark....It was Montesquieu who introduced the word, “savage”....Montesquieu used the

word “savage” more precisely to describe the lowest types of barbarian...Enlightenment preoccupations with classification and notions of progress produced a range of ranking schemes which placed Europeans at the top of human hierarchies and the darkest-skinned peoples at the bottom. (Samson, 2005, p. 27)

European colonizers viewed and continue to view indigenous peoples with contempt and judgement, judging their societies, and their knowledge as inferior--dismissing indigenous peoples' ways of being and knowing as primitive. Indigenous peoples within European thought are constructed as uncivilized barbarians and this racial construction of indigenous inferiority is not inconsequential. Robert Williams Jr. observed in the U.S context:

Tribal Indians are people without civilization, without laws, and without place in the nation created by white Americans out of the frontier wilderness of North America. From the time of the Founding Fathers, the racist premises derived from this tradition have informed the basic framework of our nation's policies toward Indian tribalism and the basic rights of tribal Indians under U.S law. The acts of genocide and ethnocide perpetuated against Indians under U.S law have been justified as simply the extension of the West's enlightened reason upon the “savage” Indian-occupied frontiers of the New World. (Williams, 1997, p.17)

The racial construction of indigenous savagery, which positions indigenous peoples without laws and without civilization, have enabled colonial powers to deny indigenous peoples basic human rights such as self-determination and rights to lands and resources. They also enable the colonizers to commit acts of violence against indigenous peoples because, within this system indigenous people are inferior, less capable, less than human or are childlike humans that are in need of paternal care from a colonial father. Furthermore, these racial hierarchies are not artifacts of the past but are embedded in the legal frameworks, ideologies, and institutions that shape the current relationship between indigenous peoples and colonial states. The racial construction of indigenous inferiority and savagery creates and embeds a racial order,

where those of European descent rule and control indigenous peoples through a form of legalized racism. This is the colonial project and one that still continues subtly and not so subtly today.

The imposition of colonial law and the simultaneous denial of indigenous law, knowledge, philosophies, and ways of being perpetuate the myth of indigenous savagery. More over, the construction of racial inferiority has and continues to allow colonial powers and societies to dominate and control indigenous people's bodies and land. However, the denial and lack of respect for indigenous people's law and justice systems by settler societies serve other purposes than just perpetuating the myth of indigenous inferiority. As Warren (1993) noted:

Dysfunctional systems are often maintained through systematic denial, a failure or inability to see the reality of a situation. The denial need not be conscious, intentional, or malicious; it only needs to be pervasive to be effective. (as cited in Smith, 2003, p.76)

Dysfunctions within colonial consciousness, law, ideologies, and practices are able to remain hidden and obscured through systematic denial or destruction of other systems that are more, egalitarian, peaceful, ecologically sustainable, and just. The denial and destruction of alternative systems and ways of knowing embeds a racial order where white men and white institutions rule. The process of denial acts as a method of social control that denies the populace both indigenous and non-indigenous, access to alternative visions, of law, justice, and ways of being, making the imperial hierarchal heteronormative patriarchal model hegemonic, unquestioned, and unchallenged. The process of denial works to embed a system of hierarchy and oppression: a system where power and authority are held and are sourced in European males. The denial of other systems has created a world where people are conditioned to think white male hegemonic power structures and control is normal. The way the world is supposed to be and has always been. However, as demonstrated in the previous chapters through the examination of societies like the Navajo and Māori, it

is clear that the European world of domination and oppression is anything but normal or necessary.

Looking beyond the colonial myths and making indigenous law and justice visible not only challenges the racial construction of indigenous savagery, inferiority, and lack of civilization, it also illustrates the dysfunctions of colonial systems which defy both the legitimacy and normalcy of colonial consciousness, law, and justice.

Making indigenous peoples' law visible demonstrates that there are more than just one way of embodying and perceiving, the self, nature, reality, and the universe. Perhaps making indigenous law visible can change not only what people know but how they relate to each other and the world around them. Law could be used to change the self and society. Most importantly, however, making indigenous systems of law and justice visible provides a blueprint that enables humanity to imagine a world where power is shared and distributed, a world that is both more egalitarian and ecologically sustainable than the one inherited and violently imposed as a result of colonization. Despite the racist propaganda, it is clear that indigenous peoples did indeed possess sophisticated systems of law, justice, and governance; systems that existed prior to and continued to develop after the arrival of Europeans. Traditionally Navajo and Māori were no exception.

### **Law and Justice: Indigenous vs. European Frameworks**

Another challenge in discussing indigenous law is that “law” is often falsely assumed to belong only to state institutions. However, this is not true for, as Pospisil (1971) observed, “law can be found in every group and subgroup of any society, regardless of the existence of formal state institutions” (as cited in Sekaquaptewa, 2008, p.331). Law can exist without the state and indeed:

For most of human history, some form of community justice has been the norm. The earliest written records go back more than 6,000 years. At the time, law and order was the responsibility of the community and the preferred method of treating the dispute was ritual punishment of the wrongdoer,

restoration to the victim, and restoration of the offender to the community.  
(Howley, 2002, p. 189)

However, the absence of state institutions is not the only difference between indigenous and European models of law and justice. Indigenous law and justice are diametrically opposed to European law and justice. For example, in the European model:

[L]aw is grounded in *legal positivism*. It defines law as a set of rules and norms that become binding insofar as some authority has the power to strictly enforce them....The rules and norms-the body of law-that this authority establishes and calls *objective rules* have no relation to moral values, natural law, or inherent order....Their binding character derives not from any intrinsic quality of connectedness to the nature of things but simply from the fact that some person or group has the external power to impose a particular set of rules as binding on everyone else. (McCaslin & Breton, 2008, p.522)

Legal positivism and the European model of law is centred on domination and power over others; administered through a hierarchal structure where power is held, determined, and exercised by mostly European males. The system of domination, which is European law, creates a dystopia, for in a hierarchal structure there can be no real equality or balance because power is not shared or equally distributed. The European legal system creates the conditions where the exploitation of both earth and human bodies are normalized and given legal sanction.

Indigenous understanding of law, unlike the European model of law, is not based on domination or rule by force but based on maintaining relationships, balance, and harmony. For example:

In contrast to legal positivism, the Indigenous concept of law is generally described as *natural law*....It is inherent in the natural cosmic order of which we are all a part and on which we depend for our existence....The most

fundamental reality factor that Indigenous law acknowledges (and Eurocentric law does not) is the reality that we are all related. (McCaslin & Breton, 2008, p.523)

There is no mention or recognition of sacredness, relationships, and interconnectivity in the European model of law. The values and principles at the foundations of European law rest on force, domination over, and disconnection from the natural and spiritual universe. Indigenous peoples' articulations of natural law and justice support McCaslin & Breton positions. For example, Oren Lyons, Faith Keeper of the Turtle Clan of the Seneca Nation of the Iroquois Confederacy, has stated, "We [Haudenosaunee] were told that the seed is Law. Indeed, it is the Law of Life. It is the Law of Regeneration" (Lyons, 1994, p. 33). Oren Lyons describes law as a natural process of life, of seed, and nature. There is no mention of state as the arbiter of law. Law in his articulation is based on the earth, and the need to have social harmony, peace, balance, and equality. Similarly Boldt and Long (1985) have also noted indigenous writings describing their perceptions of law:

Brothers and Sisters the natural law is the final and absolute authority governing Etinohah-the earth we call our mother. The natural law is that all life is equal in the great creation; and we the human beings, are charged with the responsibility (each in our generation) to work for the continuation of life. We the human beings have been given the original instructions on how to live in harmony with the natural law. (as cited in Wilmer, 1993, pp.117-118)

In both articulations of law, law is based on humanity's relationships with the earth and each other. The earth in both these articulations is the final authority figure and the law is based on maintaining and living in harmony with it. It is not the law of the state or an imposed system enforced from outside authority figures. Law in this regard serves the people and the earth rather than serving the needs of a state-- needs that rest primarily on control, domination, disconnection, from the earth and fellow human beings.

The law of indigenous peoples must always be seen in the context of relationships, spirituality, and culture. Law is more than a three letter word but a reflection of a people's consciousness and their perception of reality, relationships, sacredness, and divinity. The difference between western law and justice and indigenous law and justice is rooted in the different epistemological and ontological frameworks they inhabit and embody. The law of indigenous peoples reflects a position which at its foremost recognizes a spiritual life force, an energy that resides in all things, living and non-living. This energy is the connective tissue and fabric of the universe. There is no distinction, no separation, between the biotic webs of nature and the webs of human life. Law for indigenous peoples is a code which provides the blueprint to maintain the balance and harmony on multiple levels of being. The law is passed down from generation to generation to ensure not just survival but total holistic well-being. It is passed down to help the people harmoniously maintain their well-being and their relationships to each other and earth. Indigenous peoples' practices of law and justice are therefore distinct from European concepts and practices.

### **Indigenous Law and Justice**

Despite the racist propaganda, it is clear that indigenous peoples did indeed possess sophisticated systems of law, justice, and governance; systems that existed prior to and continued to developed after the arrival of Europeans. Traditional Navajo and Māori were no exception. This section will not only focus specifically on Navajo and Māori law, but moving on to that, it is important to first establish what is meant by justice and law. In terms of justice, Harvey (1996) has observed that:

Like, space, time and nature, "justice" is a socially constituted set of beliefs, discourses, and institutionalizations expressive of social relations and contested configurations of power that have everything to do with regulating and ordering material social practices within places for a time. (p.330)

Justice therefore is made, socially constituted, and socially constructed. As a result, perceptions and practices of justice are not universal or uniform but rather reflect and emerge from distinct worldviews, norms, and values, within each society. Justice, therefore, is a reflection of peoples' consciousness, worldviews, values, and reality. It should come as no surprise that indigenous peoples' visions and practices of law and justice emerge from and reflect their unique worldviews and perceptions of reality. The meaning of "law" also must be addressed. According to Leopold Pospisil (1971):

[I]n any group or subgroup, law is comprised of four basic attributes: (1) Authority; (2) Intention of Universal Application; (3) Obligatio; [obligation or the rights of one party and the duties of the other] and (4) Sanction. (as cited in Sekaquaptewa, 2008, p. 332)

Though this definition is useful in finding law, it could also be problematic for anything that does not fall into this categorical definition which may not be considered law but rather a custom, value, or belief. As a result of colonization, some traditional laws have been suppressed and subjugated; therefore, though the oral tradition and principle may still exist, the practice may have been discontinued making what was once a "law" a "value". Values under this definition may not be considered law and this is problematic. A more fitting and flexible definition comes from Williams (1998) in his explanation of Māori law:

Tikanga Māori [Māori law] comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning non-sanctioned customs. In tikanga Māori, the real challenge is to understand the values because it is these values which provide the primary guide to behaviour. (as cited in Law Commission, 2001, p. 17)

Although Pospisil's framework of law is useful, it fails to fully capture the importance of values in finding and discussing law. Values are equally important in finding law for they give a more fluid understanding of what law is and most

importantly what purposes and functions law is meant to serve. Kim McBreen has stated that, “The purpose of tikanga or Māori law is to maintain relationships among ourselves, and between us and our environment...This focus on values rather than rules allows flexibility...It is this flexibility that keeps tikanga constantly relevant” (McBreen, personal communication, December 8, 2009). Keeping law relevant is important for law is meant to serve the people and to meet their needs, not just for survival, but also for their social, physical, emotional, mental, and spiritual well-being.

Therefore, the next section attempts to focus on *rules*, as well as *values*, in finding and discussing both Navajo and Māori law and legal systems. The purpose of doing so is to find the laws and values that serve and are relevant to the current needs of indigenous peoples and society; specifically that is, finding the values and rules that can help humanity re-connect to each other, the earth, and the cosmos; laws which may facilitate the re-establishment of equality, peace, harmony, and balance personally, collectively, socially, and ecologically.

### **Complexity of Navajo and Māori Law**

Navajo and Māori law is incredibly complex and in no way can the complexity and dynamism of an entire people’s law and worldview be contained within these short pages. This section intends to provide only a cursory listing and explanation of some key concepts in Navajo and Māori law. Currently there are some 5,000 indigenous nations worldwide. Each one of these peoples has their own law and legal systems. Even within these groups, there are subgroups, pluralities, and internal differences. As Hopi scholar, Pat Sequaptewa, stated:

Any human society, I postulate, does not possess a single consistent legal system, but as many such systems as there are functioning subgroups. Conversely, every functioning subgroup of a society regulates the relations of its members by its own legal system, which is of necessity different, at least in some respects, from those of the other subgroups. (Sekaquaptewa, 2008, p.347)

Though it is undeniable that there are some commonalities within indigenous peoples and indigenous law, there are also differences. It is wrong to reduce or essentialize these systems; doing so would be a great injustice for it would deny their subtle complexities. This is certainly the case for both Navajo and Māori where there are regional differences and variations in law. However, as Moana Jackson has observed in relation to Māori:

Although there was some tribal variation, there was a distinct set of conventionally approved means of ensuring acceptable behaviour. Its bases, constructs, and methods of application were naturally quite different to the state centred models of Western jurisprudence. However, a system of social control and dispute resolution did exist and Maori people recognised it as a system of law. (Jackson, 1988, p. 38)

This section aims to understand what is meant by law and justice, as well as to highlight some key concepts common in both Māori and Navajo law such as sacredness, spirituality, balance, restitution, kinship, and natural resources. These concepts are identified because they can help and guide humanity in the re-establishment of more peaceful, balanced, and just relationships with themselves and the natural world. By no means does this section attempt to create a monolithic account of both Māori and Navajo law, legal systems, and justice practices in their totality.

Indigenous peoples, were not perfect, nor were they imperfect, and this thesis does not want to create a fantasy of indigenous peoples, their lives, or law. Indigenous peoples are human, and as with all human societies they had and still have social problems. The ancient stories of indigenous peoples testify to this and are filled with characters that face various challenges and dilemmas. The Navajo Creation story and the River of Separation story, all speak about various conflicts, when humans do not obey or forget to follow sacred laws and fundamental principles of life, chaos and imbalance emerges. The lessons within the oral traditions teach how to maintain balance and harmony, and when necessary how to restore the balance when it's disrupted. Indigenous peoples, like any other peoples, are not immune to social

problems. However, what is unique to indigenous societies is how they responded to the problems and how they controlled, minimized, and restrained the occurrence and scale of the social problems using their laws, philosophies, and justice traditions.

### **Key Concepts in Navajo and Māori Law and Justice**

Indigenous peoples have always used law as a means to maintain social harmony and unity. This is true for Navajo and Māori who had and continue to have law and justice traditions. As Robert Yazzie noted:

The Navajo word for law is bee'haaz'áanii. It means something fundamental, and something that is absolute and exists from the beginning of time. Navajo believe that the Holy People put it there for use from the time of beginning for better thinking, planning, and guidance. It is the source of a healthy and meaningful life. The precepts of bee'haaz'áanii 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. (Yazzie, 2005, p.42)

Navajo law is contained in both oral tradition and ceremonial practices. Oral tradition and ceremonial knowledge both teach the people how to understand conflict and how to heal and restore harmony when it has been disrupted, either personally or collectively. For Māori, “[t]he closest Māori equivalent to concepts of law and custom is ‘tikanga’” (Law Commission, 2001, pp.2-3). Like Navajo law, Māori tikanga governed all parts of life both personal, collective, and environment, for example,

There were....precedents embodied in the laws of Tangaroa [God of the Sea] which related to the use and protection of fisheries, and the laws of taonga which related to the transfer or exchange of tangible and intangible “treasures”. There were also specific but interrelated laws dealing with dispute settlement, and the assessment and enforcement of community sanctions for offences against good order. (Jackson, 1988, p.39)

**Sacredness**

As mentioned previously traditional Navajo and Māori worldviews were based on a cosmic order that recognizes at its core that all life is sacred, fundamentally interwoven, interrelated, and interconnected and this is reflected in their law. As Ani Mikaere (2003) observed, “[t]o Māori spirituality and law were inseparable” (p.23). The inseparability between the sacred and profane can be seen in the words *wairua* and *mauri*. According to, “Māori society everything.... has wairua and mauri. Mauri is the life principle and wairua is the spirit” (Ministry of Justice, 2001, p.60). Moana Jackson (1988) stated:

The traditional Maori ideals of law had their basis in a religious and mystical weave which was codified into oral traditions and sacred beliefs. They made up a system based on a spiritual order which was nevertheless developed in a rational and practical way to deal with questions of mana, security, and social stability. Like all legal systems it covered both collective and more specifically individual matters. (p.39)

Therefore, while Māori law was spiritually based, it is equally pragmatic and practical providing for individual and collective well being. Indigenous law is a reflection of this spiritual consciousness and awareness. From this space of awareness, the pragmatic and practical decisions were made, informing both ritual context and daily life. Similarly, Navajo traditional law reflected the spiritual beliefs of the people. For Navajo the sacred and profane spaces are one in the same:

There is no division of spaces between the sacred and the non-sacred. Not only human beings but all things in life are connected and interact according to a natural order. We not only observe this connection, but live in accordance with it based on a premise similar to the law and rules that are learned in modern society. We are concerned with the here and now, and with keeping the world in balance. This is the focus of our traditional teachings. (Navajo Nation Peacemaking Program [NNPP], 2009)

Both Māori and Navajo traditional law and philosophy were informed by a spiritual awareness and consciousness. This spiritual awareness of harmony and sacredness was the bedrock of their law, methods of conflict resolution, and dispute settlement. It is clear that the underpinning of Māori and Navajo laws and philosophy are grounded in an awareness and consciousness that recognized spiritual energy and sacredness in all things. Navajo and Māori law is based on spiritual wisdom and sacredness.

### **Mana**

*Mana* is central to Māori law and philosophy. It is a word that has many meanings that can be difficult to translate into English; it is power, but not power as understood in the European sense. In terms of mana, “[e]very individual Maori is born with an increment of mana which...is closely related to tapu” (Mead, 2003, p.51). Power and authority thus had the ability to be shared and distributed in Māori society; this power, or standing, could belong to a number of people, elders, spiritual and political leaders, both male and female. Māori law and the administration of law was not patriarchal or hierarchal but profoundly egalitarian. People with mana were people of authority and power who were respected by the community. Not only are people imbued with mana, but “[n]atural resources contained mana...inanimate objects also had the ability to possess as much mana as animate things” (Ministry of Justice, 2001, p. 57).

Unlike European structures of authority where power comes from the king, queen, or state, power in the Māori worldview was sourced in both the spiritual universe and personal integrity. People with mana were trusted and had the jurisdiction to make decisions and administer law and justice within their society.

### **Tapu and Noa**

*Tapu* is also a central concept within Māori law, philosophy, and justice and is closely related to mana. As Moana Jackson stated, “Tapu was a specific restriction which could be placed on a person, an object, or a piece of land, and so render it especially sacred as a type of protection or prohibition” (Jackson, 1988, p.41). As

noted by Patterson (1992), tapu “acted in the same way as a legal system operated, as a system of prohibitory controls, effectively acting as a protective device” (as cited in Ministry of Justice, 2001, p.59). Moreover, “the human person is tapu. It is the responsibility of everyone to preserve their own tapu and respect the tapu of others. This includes the tapu of places (wāhi tapu) and the tapu of waters (wai tapu)” (Ministry of Justice, 2001, p.65). Certain areas could also be made tapu for example:

The process of rahui was instituted to prohibit particular activities for a certain time. It was invoked to prohibit entry into areas polluted by the tapu of death, to ensure conservation of food supplies, or as a political act to establish control over an area of resources. (Jackson, 1988, p.41)

Furthermore:

Everything was regarded as tapu. Individuals and group have responsibilities and obligations to abide by the norms of behaviour and practices established by the tīpuna [ancestors]. Tapu acted as a protective mechanism for both people and natural resources. Making something or someone tapu could either protect the environment against interference from people or protect people from possible dangers they may encounter. (Ministry of Justice, 2001, p.65)

Additionally, “[a]ny failure of the protection or breach of the prohibition would be due to human error and would be punished by ancestrally-defined sanctions” (Jackson, 1988, p.42). In addition to tapu, there is *noa*, which is “the undoing of the restriction imposed by tapu” (Mikaere, 2003, p.27). As Henare (1988) explained:

This is the mana and the tapu of women, in that they have the ability to free areas, things and people from restrictions imposed by tapu. Women are agents to whakanoa [to make noa, or to lift tapu]....This is their tapu, and they are tohunga [expert practitioner of any skill] because of their own specific areas of activity. (as cited in Mikaere, 2003, p.28)

Women under traditional Maori law were not only considered tapu, but could make things tapu or noa. Therefore women were integral to the administration of Māori traditional law and justice. Therefore, “[a]n affirmation of mana wahine is of paramount significance in order to understand the values of tikanga Māori” (Law Commission, 2001, p.35). Tapu and noa were critical to both Māori law and society. Women were considered tapu and were thus protected under Māori law and justice. Furthermore, women administered the law through their ability to make and unmake tapu conditions, Māori law and justice, therefore, was not male dominated.

### **Balance and Imbalance**

As stated in Part I balance and harmony is essential to indigenous ontology and is therefore a cornerstone in indigenous peoples’ perceptions and practices of law and justice. Maintaining balance and restoring social harmony when broken is central to Navajo and Māori law and justice. As Taiaiake Alfred (1999) has noted:

The goal of indigenous justice is best characterized as the achievement of respectful coexistence- restoration of harmony to the networks of relationships, and renewed commitment to ensuring the integrity and physical, emotional, and spiritual health of all individuals and communities. (p.42)

The goal of “co-existence” and the “restoration of harmony” characterize traditional Navajo and Māori law and justice. Within Navajo reality, this is summed up in the word “hozho” or walking in beauty. The aim of Navajo life is to walk in beauty at all times and into old age. Walking in beauty is both a state of consciousness and a way of being. It is the attainment of inner and outer peace, peace emotionally and spiritually, and peace in the natural and social world. The purpose of Navajo law and justice is to maintain and restore when broken, hozho or harmony. Ray Austin, former Navajo Supreme Court Justice, explained this process:

While the ultimate goal in Navajo life is *hozho*, a logical assumption suggests that due to the nature of human existence, including stresses, pressures, and errors inherent in human affairs and the trappings of modern life, the

harmonious state (*hozho*) would experience disruptions periodically. The maleficent forces collectively called *nayee'* in the Navajo language causes disharmony, friction, and discord in daily life. Forces that are *nayee'* disrupt *hozho* and must be neutralized or eliminated to return things to *hozho*.

(Austin, 2007, pp. 91-93)

Navajo perceptions of conflict are rooted to their unique spiritual reality, which stresses the necessity of maintaining a harmonious equilibrium in one's self and in one's community. Fundamentally, Navajo conflict resolution has both spiritual and practical implications. Similarly, Māori law was also based on restoring, healing, and maintaining balance:

Anti-social behaviour resulted from an imbalance in the spiritual, emotional, physical or social well-being of an individual or whanau: the laws to correct that behaviour grew from a process of balance which acknowledged the links between all forces and all conduct. In this sense, the "causes" of imbalance, the motives for offending, had to be addressed if any dispute was to be resolved- in the process of restoration, they assumed more importance than the offence itself. (Jackson, 1988, p.39)

Traditional Māori and Navajo justice was primarily aimed at restoring harmony within and between individuals and their world. This was a method that created inner and outer peace and sustained social stability. It differs greatly from the Western criminal justice system, which is based on an adversarial system leading to punishment of the offender as opposed to healing or restoring harmony to the perpetrator, the victim, and the family. For both Navajo and Māori, this process was locally controlled and involved some form of restoration. Robert Yazzie noted that:

Prior to the arrival of the Spanish (1598) and the Anglos (1846), Navajos governed themselves and resolved disputes in their own way. They lived in family groups and clans, and resolved disputes by "talking things out." The judges were the *hozhoji' naat'aah*, or peace chiefs. They were leaders, chosen

by community consensus, because of their wisdom, spirituality, exemplary conduct, speaking ability, and skill in planning for community survival and prosperity. They mediated disputes by encouraging people to fully talk out their problems, in order to reach agreed settlements and restore harmony in the community. Unlike European law, traditional Navajo law was not based on power but based on relationships, respect, and mutual need. (Yazzie, 2003)

European law as highlighted earlier, is “rule by force.” “Justice,” in the western sense, is the use of force to punish the offender. Unlike European law, Navajo and Māori law is not based on force or punishment but ultimately on healing by restoring harmony to the victim, to their prior state before the offense occurred. Furthermore, their paradigm of justice is focused on identifying and healing the root cause of the conflict in order to prevent it from happening again. Navajo justice is also collective and involved all impacted parties where decisions were reached through discussion and consensus. Similarly, traditional Māori justice and dispute resolution was local and attempted to restore the balance:

The process it seems, took the form of the people coming together for a hearing on the marae or inside a meeting house. These hearings investigated the matter at hand and attempted to restore the balance that had been disturbed. An integral component of the hearing usually meant redressing the harm done to the victim. (Joseph, 1999, p.4)

### **Restitution and Compensation**

Harmony, and the restoration of harmony when broken, was central to both Navajo and Māori social stability. The restoration of social harmony often took the forms of restitution and compensation. When an imbalance occurred, restitution and compensation were sought for Navajo this is called *nalyeeh* and for Māori, *utu* or *muru*. For Navajo, “[i]t is *nalyeeh*, or a demand to be made whole for an injury. *Nalyeeh* is also a process for reconciliation of victim and offender, whereby people in ongoing family, clan, and community relationships ‘talk things out’...for resolution.

(Yazzie and Zion, 1995, p.81). Furthermore, the process “uses apology, forgiveness, and “talking things out” [dialogue] to agree on an amount of restitution that will restore an injured party to a state of hozho. (Austin, 2007, p.112). Communities therefore, had a say in what form of restitution was adequate for the particular offense.

Māori also had a similar system of compensation and restitution as seen in social institutions of utu and muru. According to the Ministry of Justice (2001), when mana or tapu was transgressed either intentionally or unintentionally, utu and muru were applied to restore the aggrieved parties to their original “position”. This included but was not limited to “gift exchange” or the “taking of personal property”. While the precise form of utu and muru were dependent on the nature of the offense, utu could be deferred for generations while muru could not (pp.73-75). Furthermore:

Tribal histories are replete with examples where a whanau has had to accept the consequences for a member’s wrong doing. They range from the relatively recent payments of taonga made by an adulterer’s family to the whanau of the aggrieved spouse, to the large muru parties which sought recompense from whole villages. In each case, utu or the price of compensation was mediated through ritualised korero and was acknowledged by both parties as a just and appropriate means of settling a dispute. (Jackson, 1988, p.40)

Compensation and restitution were collectively decided. Family, victim, and community were able to speak about the offense and determine what action would be taken to heal and balance the wrong. Justice, therefore, was not individual, but collective, and based not on punishment, but healing and the restoration of the self and community. This is a form of community justice, where the people interpreted their laws and how they would be applied to control social harm and to remedy social transgression.

### **Kinship**

As mentioned in Part I, relationships are integral to indigenous people’s cultures and spirituality. Both Navajo “T’aa ‘altsoni alk’ei dah ndhii” universal

relations doctrine and Māori “Whanaungatanga” illustrate their belief that all living things are connected and thus, all beings are relatives. It is therefore no surprise that kinship was central to both Māori and Navajo practices of law and justice. The Diné call this *k’ei* and Māori call this *whakapapa*. According to Austin:

The Navajos use a sophisticated, matrilineal-based clan system (*k’ei* system) to trace lineage through their mothers and to identify clan relatives. Specific kinship terms are used to distinguish between older and younger brothers and sisters; between maternal and paternal grandparents’ between maternal and paternal aunts and uncles; and between male and female cousins on the mother’s side and those on the father’s side. (Austin, 2007, p.188)

The Navajo *k’ei* system not only traced the ancestry of the mother ensuring healthy genetic offspring it also served as a cornerstone in Navajo conflict resolution, law, and legal system. Austin (2007) stated, “[i]n the overall scheme of things, the *k’ei* [clan] doctrine imposes order in the Navajo social world” (p.197). There are four original clans which were created by Changing Women:

(1) Kiiyaa’áanii, the towering house, (2) Todíh’íi’nii, the bitter water, (3) Honagháahnii, backside or one who walk around you, and (4) Hasht’ishnii, the mud people.... Today there are many clans that have descended from the original four basic clans. (Navajo Nation Common Law Project [NNCLP], 2009b)

The *k’ei* system allows Navajo to identify clan relatives, which creates both social responsibilities and obligations between Navajo people who are both blood related and clan-related. For instance:

The *k’ei*, and its clan system, not only determines who is a relative, but also regulates duties, responsibilities, and reciprocity among relatives and non-relatives, and controls domestic matters such as marriage, inheritance, and property ownership. (Austin, 2007, p.198)

Māori whakapapa acts in a similar fashion, “Whakapapa is central to Māori society. Whakapapa defines both the individual and kin groups, and governs the relationship between them” (Ministry of Justice, 2001, p.27). Moreover they “recognised four kin groups: whānau hapū, iwi, and waka...Each kin group would be descended from an eponymous ancestor, and each individual of the kin group could trace their descent back to that ancestor” (Ministry of Justice, 2001, p.27).

Furthermore:

This belief led to an emphasis on group rather than individual concerns: the rights of an individual were indivisible from the welfare of his whanau, his hapu, and his iwi. Each had reciprocal obligations tied to the precedents handed down by shared ancestors. Although oral, the precedent established clear patterns of social regulation...The explanation for these rights and obligations, their philosophy grew out of, and were shaped by ancestral thought and precedent. The reason for a course of action, and the sanctions which may follow from it, were part of the holistic interrelationship defined by that precedent and remembered by ancestral genealogy or whakapapa. (Jackson, 1988, pp.39-40)

Family, clan, and relationships were central to the administration of Navajo and Māori law and justice. Navajo and Māori society were collective and so were the administration of law and justice. Relationships and collectivism fostered co-operation, mutual aid, reciprocity, and mutual trust. When law is based on maintaining relationships, it creates the conditions for having healthy social relationships. A legal vision that treats all living beings as relatives creates a world where relationships and all beings are respected and important to the health of the collective whole. Indigenous law is both collective and individual.

### **Natural Resources and the Environment**

While environmental sustainability may be new to the western world, this is not the case within the indigenous world. As mentioned previously, Navajo and Māori worldview, identity, self, and society are inextricably tied to the lands and resources around them. Navajo and Māori traditional laws regarding the management

of natural resources are premised upon the belief that the natural environment is sacred and holy. With Māori for example, natural resource management can be seen in *Kaitiakitanga* which:

[D]enotes the obligation of stewardship and protection....It is difficult to divorce *kaitiakitanga* either from, *mana*, which provides the authority for the exercise of the stewardship or protection obligation; or *tapu*, which acknowledges the special or sacred character of all things and hence the need to protect the spiritual wellbeing of those resources subject to tribal *mana*; or *mauri*, which recognises that all thing[s] have a life-force and personality of their own. (Law Commission, 2001, p.40)

For example, “It is common for example that the first fish is returned. It is also common that no gutting of fish or shelling of shell fish is allowed to occur below the high water mark” (Law Commission, 2001, p.40). Williams (1998) further noted, “the reason is that the dumping of fish or shell fish into the sea would provide both a spiritual and physical pollution of the sea and hence a detraction from its *tapu*” (as cited in Law Commission, 2001, p.40).

In the indigenous worldview human beings are related to water, the earth, and air. Because of this relationship the elements must be respected; indigenous law does this. These principles and values are the foundations of indigenous law and philosophy. The natural law or the law of nature for Navajo and Māori teach that Earth and all the natural resources on earth are sacred and that all life is connected thus all living things are part of a family. The natural law of the earth is permanent and is unchangeable; therefore, it is of incredible importance to live in harmony with the earth, indeed it meant the survival of the ancestors and future generations. Living in harmony, required that humans take from nature only what they need. Similarly, Navajo law and philosophy recognizes spiritual and practical need to protect natural resources:

All life is in connection with all creation. We are not the only inhabitants of Mother Earth; we share the land with the wildlife and vegetation...They [the ancestors] knew of medicines that could be made from wildlife and vegetation and of their application. They knew of ways to approach those vegetation and wildlife that have certain significance. They knew how to respect the natural resources by using the land and water for farming, dwelling, and security. (NNCLP, 2009b)

Navajo peoples' relationships with land informed their resource management practices. These practices of sustainability included agriculture, the sustainable use of their finite water resources, and harvesting of traditional medicine. The respectful use and conservation of local bio-diversity for natural resources was part and parcel of their traditional knowledge, culture, and customary law. Navajo and Māori traditional knowledge and law provides examples of an ancient system of ecological sustainability. In both Navajo and Māori law, all living and non-living beings, including plants and bio-diversity, are related and indeed sacred. As a result there was a deep solidarity built between humans and the natural world. Indigenous peoples are related to land, they were one with the land, and therefore they could not dominate or abuse the land, but had to live sustainably in harmony upon it. The word for "earth" in Navajo and Māori language as demonstrated in Part I, is Nahasdzáán and Papatūānuku, both denote "Mother". "Mother" is more than a metaphor; it is a real and literal ontological view of the natural world which underpinned and informed laws concerning natural resource management.

### **Summary**

Part III demystified colonial myths concerning indigenous law, that indigenous peoples lack law and legal institutions, and that law only belongs to state institutions. These myths function not only to perpetuate the myth of indigenous racial inferiority but also serve to hide dysfunctions in western law and justice systems by denying the existence of other systems that are more just and less oppressive. While indigenous peoples have been racially stereotyped as savage with "want of fixed laws," a cursory examination of indigenous societies illustrates the

contrary. Indigenous peoples are far from primitive; the ancestors possessed immense wisdom and sophisticated systems of law and justice that allowed them to maintain both social stability and ecological sustainability.

The framework for finding key concepts in indigenous law used both rules and values. The complexities and limitations of finding and talking about Navajo and Māori were also mentioned. Key concepts in Navajo and Māori law examined sacredness, focusing on mana, tapu and noa, mauri and wairua, as well as balance and imbalance, restitution and compensation, kinship, and natural resources. It was these principles, norms and values which created, nurtured, and fostered, harmonious relationships between themselves and the natural world.

When looking at Navajo and Māori law, key concepts emerge. One is that the law reflects and maintains their spiritual connection to each other, the earth, and the universe. The law is a means to uphold the importance, sacredness, and dignity of all life forms, men, women, plants, and animals. It is based on the recognition of reciprocity and the interdependency of all living beings and works to maintain that balance internally and externally. The community and family were responsible for administering justice within both Navajo and Māori society.

In both systems, the power to create and administer justice is under the jurisdiction of the people. Power is not sourced in any king, queen, state, or hierarchal power structure but rather it is sourced in both spiritual energy and in those who demonstrate wisdom and personal integrity exercised by women, men, and elders. Indigenous law and justice work to constrain and distribute power, it also acts a system of rules and obligations between human beings and between human beings and their environment.

Māori tikanga (law) is a dynamic, rich, and complex system based on ancient wisdom that interweaves sacredness, balance, inter-connectivity, and relationships into the fabric of everyday life. Law and justice for Navajo and Māori is sacred, it is ancient, passed down from time immemorial contained in ceremony and oral

tradition. While it is ancient, it is also a living and dynamic institution that above all else is meant to create peace and harmony within their communities. The law is how they understand their place in the universe and how they sustain themselves upon their land and with each other.

It is a law that is profoundly non-imperialistic for it stressed the balance of power, as seen in non-hierarchical egalitarian power structures, dialogue, and consensus decision making. Paradigms that emerge from European land and history are remarkably diametrical to the worldviews, laws, and justice traditions of indigenous peoples. The laws of indigenous peoples are often referred to what is called “natural law,” meaning law that is fundamentally rooted and based on the belief that all living things are sacred, connected, interrelated and independent. These beliefs fostered and created the conditions of social and ecological harmony, as well as solidarity and co-operation. The law of indigenous peoples also provides clear examples of societies governing themselves without the state or its institutions. Indigenous peoples’ visions of law and justice are based on spiritual truths that stress the fundamental need of maintaining harmony socially and ecologically. When all people and all living beings are related and sacred it is very hard to maintain systems of hierarchy and domination. This is the main difference between indigenous law and European law and society. Indigenous peoples’ law is the law of the people and reflects their values, their relationships to the land, to the spiritual universe, and to each other. It is for this reason that indigenous law is powerful for it demonstrates that human societies have and can live without the state or oppressive institutions like police and prisons.

The revitalization of indigenous law represents hope for a sustainable future, and is a powerful form of creative contention, that if implemented critically, can be a pathway out of the oppressive and unsustainable conditions previously mentioned. Indigenous law and wisdom has contemporary relevance for humanity. For as Andrea Smith (2006) observed:

[O]ur understanding that it was possible to order society without structures of oppression in the past tells us that our current political and economic system

is anything but natural and inevitable. If we lived differently before, we can live differently in the future. (p.97)

Living differently is exactly what humanity must do to have peace and sustain life on this planet. To escape from the confines of colonization, it is important to develop alternative systems to the current paradigm of hierarchy and domination which have been forced upon both indigenous peoples and humanity. Though it may be difficult to imagine a society that is based on balance, solidarity, sacredness, and co-operation, indigenous societies such as Navajo and Māori society demonstrate that such a society is possible. Indeed it has existed and can again.

Indigenous peoples must actively recover the values and laws that sustained and underpinned their traditional societies. Recovering the ancient law and wisdom of the ancestors is *a* way to bring about social change; it is a way to re-orient the mind and body to a more balanced state of consciousness and being. Indigenous law and wisdom can help humanity bring the balance back into the world for these visions and practices of law and justice are based not on disconnection, oppression, or domination, but on values of universal interconnectivity principles which enable social and ecological harmony, solidarity, and shared humanity. For as Coulthard (2007) has stated:

Rather than remaining dependent on their oppressors for their freedom and self-worth, Fanon argued that the colonized must struggle to critically reclaim and reevaluate the worth of their own histories, traditions, and cultures against the subjectifying gaze and assimilative lure of colonial recognition. (p. 453)

Indigenous peoples and civil society as a whole do not need to be dependent on the colonizers or empires version of freedom, law, and justice for their people or their planet. Indigenous legal systems are real examples of how societies for centuries governed and sustained themselves through values and principles of peace, reciprocity, social, and ecological harmony. Indigenous wisdom at this moment in history holds contemporary relevance and immeasurable hope for humanity, for it

challenges the normalcy of paradigms that exploit earth's last remaining regions of bio-diversity and the human body. Discovering alternatives to the current paradigms that exploit the natural world and the human body may spell humanity's survival. Realigning with ancient law and ancient wisdom may help humanity to re-establish a balance between ourselves and our planet. It may even allow humanity to imagine a universe which may be more just and more sustainable to the world we currently see.

However, the real challenge for indigenous peoples will be how to live and practice these values of law and justice in the 21<sup>st</sup> century. How are these norms, values, and expectations implemented today in the lives of contemporary Navajo and Māori? Moreover, how can indigenous peoples use these values and principles encoded in their law to solve problems in both their community and the world around them? Part IV will discuss some of the challenges and success Navajo and Māori have encountered when practicing their law and justice today.

**PART IV: INDIGENOUS LAW TODAY: MODERN INCARNATIONS PROS AND CONS**

While indigenous peoples continue to have many of the legal traditions previously mentioned, their ability to practice these traditions and administer justice within their ancestral territories has undergone dramatic challenges, as a result of both time and colonization. Indigenous peoples are in the process of revitalizing and restoring their law and legal systems. This movement is providing radical ways to envision conflict, law, and justice both within indigenous communities and beyond. However, this movement has not been easy or instantaneous, but a process, that is unfolding and continuing to develop. Part IV provides a brief history of the imposition of colonial law on Māori and Diné peoples, and attempts to examine the modern incarnations of Māori and Diné law, the pros and cons, as well as its future potentiality for healing and informing a larger theory of social justice and action; one that can apply to both individual and global conflicts.

**Brief History**

Colonization subjugated and blocked indigenous peoples' law and jurisdiction over their lands and people. While it is not the focus of this paper to detail all the ways in which Māori and Diné laws and justice systems have been subjugated by settler states, some analysis is needed. As Robert Williams (1993) noted:

Colonization of one race of peoples by another race then, indelibly inscribes a legal system of racial discrimination based on cultural differences, denying rights of self determination to the colonized race which has been displaced from the territory desired by the colonizer race. (p.35)

Colonial law or the laws of the state create a white racial order that denies indigenous peoples fundamental freedoms to their land, culture, and self-determination. Colonial laws were created with the intent of “civilizing” and or destroying indigenous people’s bodies and their ways of being human. Colonial laws

have and continue to be instrumental in the dispossession of indigenous peoples from their power, lands, and their culture; Māori and Navajo were no exception. Jackson, (1988) provides concrete examples of this,

Laws were enacted which both deprived Maori people of their traditional beliefs and denied them their rights as British subjects...for example the Native Lands Act 1862 individualised Maori Land Title and the New Zealand Settlements Act provided for confiscation. Other legislation suppressed religious practices, culminating in the various Tohunga Suppression Acts which prohibited “superstitious beliefs,” and provided for the imprisonment of those “designing persons commonly known as tohunga” [keeper of traditional knowledge such as spiritual and healing practices]. (p.51)

Western law was the instrument of colonial injustice providing both the legal sanction and enforcement for the oppression, criminalization, and punishment for being Māori. While colonial laws denied Māori title to their ancestral lands and property, it also tore at the very heart and soul of Māori by criminalizing and imprisoning the Tohunga, the spiritual wisdom keepers, who healed both the physical and spiritual bodies of the people.

Similarly, in Navajo land, the Bureau of Indian Affairs or the B.I.A [the federal agency charged with the administration and management of indigenous lands held in “trust” by the United States Government], was the mechanism by which the federal government asserted their dominance over Navajo land and people. This occurred in part through the establishment of western law and courts on Indian reservations for the Navajo this was the Navajo Court of Indian Offenses. For example in relation to Navajo:

[T]he first Indian courts - the Courts of Indian Offenses (also known as the CFR Court after the Code of Federal Regulations)-were created in April 1883 by the Commissioner of Indian Affairs. The code was designed to destroy Indian customs and religious practices, and used as a vehicle to control the Navajo People. The code of the Courts of Indian Offenses provided that

agency superintendents appoint Indian judges who could have only one wife and wear Anglo-style clothes. (Yazzie, 2003)

Courts were originally established on Navajo land with the intent of civilizing the “savages” with “want of fixed laws.” Furthermore, Francis Paul Prucha (1990) noted the following B.I.A crimes the Navajo Court of Indian Offences had to enforce:

[The prevention of] traditional dances; plural or polygamous marriages; practices of medicine men; destroying property of other Indians; immorality; intoxication; and any misdemeanour. In addition, any Indian who does not “adopt habits of industry” or engages in “civilized pursuits or employment, but habitually spends his time in idleness and loafing” shall be deemed guilty of misdemeanour and punished by fine or imprisonment. (as cited in Austin, 2009, pp.21-22)

In the late 1800’s, as demonstrated in the Tohunga Suppression Acts and the B.I.A crimes of the Navajo Court of Indian Offences, it was a crime to be Māori or Diné, indeed indigenous ways of being were grounds for imprisonment and fines. Every aspect of indigenous life was under surveillance by the government, spirituality, medical practice, even the freedom to dance was grounds for punishment. The imposition of western courts and western laws were the mechanism by which the colonizers will was enforced. Western law and the western justice systems as seen in the indigenous context never had anything to do with healing or “justice,” but rather were the instruments of colonial oppression used to criminalize, control, and punish indigenous bodies for being indigenous.

However, with the passage of time and the perseverance of the Navajo people, their relationship with the United States slowly began to change, from straight genocide and physical extermination, to assimilation and civilization, to finally the recognition of sovereignty and limited autonomy. The recognition of limited rights and autonomy started in 1934, with the passage of the Indian Reorganization Act:

In 1934, the Indian Reorganization Act became law. Section 16 of that law recognized the “existing powers of Indian tribes.” That section stands for the legal proposition that Indian Nations have the power to make their own laws and set up their own judicial systems - the basis for tribal courts. They were not created using federal power or authority; they are the product of a given Indian Nation's original authority. (Yazzie, 2003)

Two other cases were also instrumental in affirming Navajo Nation’s original jurisdiction, “...*Williams v. Lee* and *Native American Church of North America v. Navajo Tribal Council* upheld the Navajo Nation’s adjudicatory and regulatory powers, respectively, and significantly clarified and solidified the sovereign power of Indian nations” (Austin, 2009, p.28). The Navajo Treaty of 1868, the Indian Reorganization Act, *Williams v. Lee* and, *Native American Church of North America v. Navajo Tribal Council* affirmed the original jurisdiction and inherent powers of Navajo people to govern themselves. The Navajo Nation therefore has:

[S]tatus jurisdiction, which allows its court to exercise civil and [limited] criminal jurisdiction [Navajo Nation doesn’t have jurisdiction over Major Crimes including but not limited to murder, manslaughter, and other serious felony offences] over enrolled Navajo regardless of their place of residence and over Navajo children who are eligible for enrollment regardless of where they are found. (Austin, 2009, p.34)

As for criminal jurisdiction this:

[C]overs all crimes codified in the Navajo Nation Code along with its terms of punishment. The Navajo Nation courts have criminal jurisdiction over Indians and non-Indians who have assumed tribal relations with Navajos. The Navajo Nation courts can sentence a person to a maximum one year in jail or a 5,000 fine or both. (Courts of the Navajo Nation, 2010)

While the Navajo Nation has jurisdiction over certain crimes, their sovereignty and ability to exact justice is dependent on the race of the perpetrator, the location of the crime, as well as the nature of the crime; for example, if it is a felony

or serious offence Navajo does not have jurisdiction. The Treaty of 1868, the Indian Reorganization Act, the cases of *Williams v. Lee*, and *Native American Church of North America v. Navajo Tribal Council* are all foundational to the Navajo Nation's current ability to revitalize and use their traditional law and legal systems for their people and within their territories.

Though settler states and colonial powers have tried to extinguish indigenous peoples, their bodies, their memories, and their power through corrupt racist laws, they have not nor will they succeed. Indigenous peoples will show the world what law and justice really mean, what it can look like, how it can heal, and if critically applied, what it can mean to their communities and for the world. Despite the brutality of colonization, indigenous communities are not conquered but are living and actively seeking and developing real and meaningful paradigms of justice by restoring and practicing their ancient law and legal systems in creative and innovative ways. One powerful example of this ingenuity emerges from the Navajo Nation Peacemakers Court and the enactment of Fundamental Laws of the Diné.

### **The Fundamental Laws of the Diné**

Navajo Nation is in the process of restoring justice by practicing their ancient law through the Navajo Nation Peacemakers Court and the codification of Fundamental Laws of the Diné. The Fundamental Laws of Diné were officially codified in 2002 (NNPP, 2009). The law is based on the Navajo ontology and worldview and recognizes that:

The Diné [Navajo] have always been guided and protected by the immutable laws provided by the Diyin [Holy Spirit], the Diyin Dine'é [Holy People], Nahasdzáá [Mother Earth] and Yádilhil; these laws have not only provided and protected the Diné Life Way but has guided, sustained and protected the Diné as they journeyed upon and off the sacred lands upon which they were placed since time immemorial. (Navajo Nation Courts, 2002)

The fundamental laws encapsulate many of the core philosophies, traditional knowledge, and wisdom of the Navajo people and worldview. They included:

Diyin Bits'áádé Beehaz'áanii (Traditional Law), Diyin Dine'é Bits'áádéé Beehaz'áanii (Customary Law), Nahasdzáán dóó Yadiłhił Bits'áádéé Beehaz'áanii (Natural Law), and Diyin Nohookáá Dine'é Bi Beehaz'áanii (Common Laws). (NNCLP, 2009a)

The fundamental law reflects the ancient laws given to the Navajo by the Dyin Diné. The following touches on some of the key concepts mentioned in the fundamental laws. The laws are meant to be “guiding principles” of Diné sovereignty, and the “foundation” of Navajo government (NNCLP, 2009a).

The Traditional Law applies to all branches of the Navajo Nation Government, “executive,” “legislative,” and “judicial,” it also states that the Navajo people have the “right to choose leaders ”who will adhere to the “values and principles” of the ancient law (NNCLP, 2009a). The traditional law shows Navajo belief in democracy and the ability to choose their leaders. It also teaches that leaders should follow and govern by the sacred values set forth by the Holy People.

Diné Customary Law, “teaches the values and principles... of walking in beauty” of preserving “ké” (the clan system), the right to preserve “language,” the right for “family,” “children,” and “elders” to be “respected, honoured, and protected,” with a “healthy, physical and mental environment free from all abuse” and the right to “education” (NNCLP, 2009a).

Diné Customary Law displays Navajo’s desire to maintain the clan system and the language. Language is life. It is the way the oral traditions, songs, values, principles, and healing ceremonies, are passed down through the generations. The language is the essence of the people and if it dies, the culture goes with it. Language and culture are inseparable, carrying both history and identity. The fundamental law of the Navajo is an ingenious way law can work to preserve language. Perpetuating the Navajo language is of paramount importance and the Diné Customary Law demonstrates this principle.

The Natural Law teaches that “the four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honoured and protected for they sustain life” that the six sacred mountains be honoured and protected, that “all creation” have intrinsic, “rights and freedoms to exist.” It also teaches the Navajo people “have a sacred obligation and duty to respect, preserve and protect” the resources for “we were designated as stewards for these relatives” and this must occur “without exerting dominance for we do not own our mother or father” and it is “the duty and responsibility of the Diné to protect and preserve the beauty of the natural world for future generations” (NNCLP, 2009a).

The natural law elucidates the Diné people’s sacred relationship to land and its importance for the future generations. It speaks to Navajo people’s responsibility and obligation to be guardians of the land, water, and all the elements. Their love for their land, for the earth, motivates this law. The belief that land, animals, and the resources upon it have a “right” to exist demonstrates that all life is holy and humans cannot destroy them. The law speaks about the holy mountains, which mark the boundaries of the Navajo traditional territory. It is within this sacred space, where Navajo people are spiritually and physically protected and sustained. Land and resources are imbued with sacredness and the law recognizes and teaches this spiritual reality.

The Diné Common Law states that the “written laws of the Navajo Nation must be developed and interpreted in harmony with Diné Common Law,” to be used as “motivational guidance for the people and their leaders in order to cope with the complexities of the changing world” and that these values “must be used to harness and utilize the unlimited interwoven Diné knowledge, with our absorbed knowledge from other people” because “this knowledge is our tool in exercising and exhibiting self-assurance and self-reliance and in enjoying the beauty of happiness and harmony” (NNCLP, 2009a).

The fundamental laws of the Diné encapsulate language, worldview, culture, and oral traditions of the Navajo people. The fundamental law provides a guide and traditional framework for both the operations of Navajo Nation government and the Navajo Nation Peacemaker courts.

### **The Navajo Nation Peacemaker Division**

While Navajo Nation has been no stranger to western court systems, as seen in the establishment of the Courts of Indian Offenses in the 1800's, it wasn't until "the 1980's that the Navajo common law became official court policy through reinstatement of Navajo traditional peacemaking" (Austin, 2009, p. 37). Traditional Navajo Peacemaking is part of the overall Navajo Nation court system, however, parties can choose between western adjudication and Navajo peacemaking to resolve their disputes. The Navajo Nation Peacemakers Court and Navajo peacemaking:

[I]s one of the most renowned restorative justice programs in the world. Neither mediation nor alternative dispute resolution, it has been called a "horizontal system of justice" because all participants are treated as equals with the purpose of preserving ongoing relationships and restoring harmony among involved parties. In peacemaking there is no coercion, and there are no "sides." No one is labeled the offender or the victim, the plaintiff or the defendant. (NNPP, 2009)

Currently, "There are presently 242 certified peacemakers at large in 110 Chapters [local governments on the Navajo reservation]" (NNPP, 2009). As mentioned in Part III, Navajo law is based on a worldview which recognizes the sacredness of all living and non-living things, interconnectivity, and the need to maintain harmonious relationships. Furthermore, Navajo worldview stresses the fundamental importance of maintaining harmony personally, collectively, and within the natural world. Modern Navajo dispute resolution is still based on "talking things out". All relevant stakeholders are not only given the opportunity to speak to the issue but also are involved in finding the appropriate resolution to the problem which at times involves forgiveness, healing ceremonies, and restitution or nalyeeh for the aggrieved party. The k'ei (kinship system) and participation of relatives is essential

and indispensable to Navajo peacemaking and justice all of which is aimed at restoring all impacted members to a state of harmony or hozho. The goal of Navajo law and justice therefore is healing not punishment or discipline which characterizes the legal positivist framework of European law and justice. Additionally:

Peacemaking cases may be court-referred from either civil or criminal court. Alternatively, Peacemaking may be initiated by a petitioner on a claim that he or she has been, ‘injured, hurt or aggrieved by the action of another’ . . . . These self-referred cases make up the majority of Peacemaking cases. In self-referred cases, the Peacemaker liaison seeks authorization from the district court to subpoena the respondent and all other necessary parties identified by the petitioner. (Coker, 2003, p.289)

The ability to have cases self-referred is powerful for it provides the opportunity for people to actively seek justice and peacemaking voluntarily and on their own terms. Peacemaking uses Navajo common law which “is a process that uses principles that are internalized through song, prayers, origin scripture and journey narratives” (Bluehouse & Zion, 2005, p.159). Navajo culture and oral traditions are actively remembered and used to guide and resolve disputes. Furthermore, the Peacemaker’s, those charged with the responsibility of facilitating the sessions, are not lawyers but are respected and knowledgeable individuals from their communities. They may, “tell stories in their lectures to the parties, or they may refer to a character or a concept central to a story in order to illustrate a point. Gender complementariness is central to many of these traditional Navajo stories” (Coker, 2003, p.291). Peacemakers use Navajo oral traditions of peace, non-violence, and kinship to solve present day conflicts.

The Navajo Nation Peacemakers Division uses the concepts found within their fundamental laws, their traditional social institutions, their traditional knowledge, and their culture to inform, guide, and resolve civil and criminal cases. The peacemaker courts resolve disputes concerning, domestic matters, including but

not limited to such matters as “traditional marriage,” “traditional divorce,” “alimony,” “marital property,” “property and land permits,” “probate and wills,” “foster duties, paternity, child custody, and child support,” and “domestic violence”<sup>8</sup>(Austin, 2009).

### **Pros and Cons**

Navajo peacemaking has many positive impacts. Firstly, it applies a degree of non-discrimination toward Navajo practices of law and justice, restoring to some degree the dignity and original sovereign powers to Navajo people while providing a concrete example of indigenous self-governance in action. Furthermore, Navajo peacemaking illustrates a decolonized system of justice, a system based on healing and harmony which stands in stark contrast to the European model based on punishment which was discussed in Part III. It also provides an avenue where Navajo values are taught and, a place where the Navajo language and worldview can be applied and preserved. Navajo Peacemaking, if critically applied, could help to alleviate violence against women by focusing on Navajo beliefs in gender balance. Peacemaking, if critically applied also redistributes power to the people allowing them to become agents and actors of justice within their communities, through “talking things out” and consensus based resolutions. Peacemaking also provides non-Navajos the opportunity to re-vision and re-imagine what law and justice could mean for them by providing an alternative to western law and the dominant criminal justice system. Navajo justice displays a form of collective justice were both the victim, perpetrator, and their families are empowered to voice their concerns and seek solutions. Both the peacemaker’s court and the fundamental laws of the Diné exemplify the strength, resolve, and determination of Navajo people to live and be governed by their own law and justice. It shows their determination to teach and perpetuate their culture to the future generations.

However, there are also areas to develop within both Navajo peacemaking and within the application of the fundamental laws. In terms of women and domestic

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<sup>8</sup> For an in depth analysis of Navajo common law, cases, and peacemaking read, Ray Austin’s *Navajo Courts and Navajo Common Law: A Tradition of Self-Governance* (2009).

violence, Coker (2006) noted that, “I found no evidence that Peacemakers or liaisons routinely screen for domestic violence or ask respondents whether they feel safe attending Peacemaking” (p.78). Navajo Nation Peacemaking sessions need to maintain the safety of the victim during and after sessions, especially when those cases involved domestic violence. Furthermore, as Smith (2005) stated, “The major problem with restorative justice is that it appears to depend on a romanticized notion of community that will actually hold perpetrators accountable” (p.727). Navajo peacemaking should develop more research on how perpetrators are held accountable and how well the peacemaking resolutions are enforced. Coker (2006) also noted, that “some Peacemakers might understand “traditional” values to refer to Christian-based gender hierarchies more than to Navajo values of gender complementariness” (p.78). Therefore it is important that both Peacemakers and parties to peacemaking develop a firm understanding of Navajo traditions of gender equity not re-inscribing colonial construction of gender and sexuality.

Custom law discourse must also be aware of gender dynamics and internal colonization, specifically facilitating women’s involvement in the interpretation, defining, and finding of indigenous law. Colonization and the establishment of patriarchal power structures removed indigenous women from positions of powers in both law making and in the administering of justice within their communities. Although, indigenous women and their rights may be mentioned in modern custom law, it is not so clear whether or not indigenous women were actively and equally involved in the process of creating modern custom law, either through being consulted, as to the content of the custom law, or in the act of physically writing, drafting, and interpreting the law. Internalized colonization helps to explain why indigenous women may be under-represented and/or denied the ability to co-create modern custom law.

Another area to develop is critically applying Navajo concepts of peacemaking, such as interrelatedness, relationships, dialogue, non-violence, and harmony to larger collective issues such as war and imperialism. Currently, Navajo

Peacemaking resolves interpersonal conflicts but it can and should also be used as a Navajo framework for ending violence and oppression in all its forms. Navajo peacemaking could be used as a theory for restoring social justice, global peace, and security. While Navajo Nation has a long history of serving in the United States military; as seen in the actions of the Navajo Code Talkers of World War II, Navajo Nation and Navajo people should be critical of participating in Washington's wars (Denetdale, 2009, p.137). While it is true Navajo traditionally had both ways of peace and ways of war (Austin, 2009, p.10), Navajo warrior traditions are distinctly Navajo, not the traditions of the United States military and empire. Tom Holm (1996) professor of American Indian Studies noted, "Native American nations did not normally conquer vast territories, engage in the wholesale slaughter of other tribes, occupy enemy lands, or seek decisive victory" (p. 67). Navajo warrior traditions like other Native American warrior traditions derive from small scale conflicts, and though violence was present, it was ritually restrained and minimized. Furthermore in Native American warfare, "The actual killing of an enemy warrior was considered to be the least important part of battle" (p. 47). The United States military, by contrast, employs decisive warfare techniques, where torture, rape of women, large scale destruction of land, and genocide, are not uncommon results of U.S military operations.

Navajo Nation and people can take a position of peace, opposing U.S imperialism, oppression, and the military occupation of other lands and peoples. Navajo Nation and people should use its peacemaking philosophies and practices to advocate for hozho and peaceful relations between and within nations. This would mean challenging the military industrial complex and the unabashed recruitment of Native youth into the armed services by focusing on youth, and by providing them with more socio-economic opportunities than the military. Navajo youth are at risk for recruitment not only because of poverty and lack of economic development within ancestral territories but also because of the misappropriation of Navajo warrior traditions. Replacing traditional warrior concepts with modern U.S soldiering is a perversion of Navajo sacred traditional knowledge. Navajo peoples and Navajo Nation does not have to participate or become complacent to the suffering and the

oppression of other peoples. Navajo Nation and people can recognize their shared humanity and their shared oppression and they can work together with other peoples and nations for the restoration of collective hozho harmony, liberation, peace, and well-being. More troops are being sent to Afghanistan where they will be fighting for a new, Manifest Destiny<sup>9</sup>, against the U.S Empire's new "savages" the "terrorists" the peoples of the Middle East.

In terms of the fundamental laws, one area of development is to clarify how and when the fundamental laws should be applied, especially in regards to tribal economic development. In 2005, the Navajo Nation Council invoked the Natural Law to ban uranium mining on Navajo lands with the Enactment of the Diné Natural Resources Protection Act of 2005 (Navajo Nation Courts, 2005). They cited Navajo traditional knowledge that, "certain substances...are harmful...and should not be disturbed...uranium is one such substance...therefore that its extraction should be avoided as traditional practice and prohibited by Navajo law" (Navajo Nation Courts, 2005). The ban on uranium mining is an excellent use of ancient law and principles in a modern context. Not only is it an act of sovereignty but it reaffirms Navajo people's relationship and responsibility as guardians of the earth.

However, as demonstrated in Part II, regarding the proposed development of the coal-fired power plant Desert Rock, the natural law was not applied. Rather a tribal leader as previously mentioned used the deities to support the proposed natural resource development stating, "We know that the deities want us to stand on our own, and that's where Desert Rock comes in." However, coal-fired power plants release carbon into the air which contributes not only to the pollution of the air but to the larger climate crisis but also negatively impact the health of the people. The Natural Law, therefore, is not always consistently applied and this is problematic. If the laws are fundamental, then they cannot be changed or applied only when it is convenient.

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<sup>9</sup> This refers to the practice and ideology of western imperial expansion.

*Michelle Cook*

This would violate Navajo people's sacred relationship to the land and their covenant with Gods, forgetting the laws as warned in the Creation Narrative will create chaos and imbalance in both the human and natural world.

Navajo economic development must occur within the scope of the fundamental laws, with the goal of making all development ecologically just and sustainable. Navajo people will be confronted with the choice of maintaining their law and sacred covenants to the earth or following the path of unsustainable natural resource exploitation so common in the west. The challenge for modern Navajo people is to find ways to develop their economies while also maintaining their traditional culture and laws.

As the United States continues to decrease its dependency on foreign oil, they will look to domestic sources; to indigenous lands to meet the nation's energy needs and desires. Nuclear power continues to be on the agenda as a clean energy initiative and Navajo Nation uranium deposits will remain a potential source for that power. Navajo Nation will have to hold on to their natural law as a way to protect themselves and their lands.

As Navajo Nation and peoples move into the 21<sup>st</sup> century, they will have to decide how they will use their law to move forward into the future. Will the sacred laws and practices of peacemaking continue to guide them on their journey or will it be applied only when it's convenient?

### **Māori Tikanga and Family Group Conferencing**

While Māori tikanga is alive and well and can be observed in countless ways<sup>10</sup> including but not limited to acts such as the *powhiri* (the traditional welcome ceremony), the *tangihanga* (customary funeral rites) and is taught at the university

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<sup>10</sup> In my personal experience I have observed tikanga applied in a multitude of contexts. I have seen areas on the East Coast of Aotearoa that have been made rahui; customarily prohibited from use and or access. I have seen tikanga practiced in classrooms and in group meetings through opening prayers, as well as the blessings of buildings to name a few. I have also observed the application of tikanga in work settings, university studies, the practice of law, traditional carving, music, ta moko (traditional tattooing), traditional weaving, song, and dance.

level, Māori people are still struggling with the state for jurisdictional autonomy over their lands and people. While this autonomy is part and parcel of Māori tino rangatiratanga (sovereignty), self-determination, self-governance enshrined in the Treaty of Waitangi, the Crown has yet to fulfil its obligations. Mead (2003) noted, “Past governments have been reluctant to introduce an alternative justice system for Māori arguing that there should be one law for all” (p.235). Two issues need to be addressed here, first “one law for all”, and secondly the word “alternative”. Applying one law for all is an act of racial discrimination against Māori for it is an imposition of foreign laws and foreign systems that have no origin in Aotearoa (New Zealand) or the worldview and ontology of Māori. One law for all is a blatant act of contemporary racism and colonization. It is therefore, “inaccurate in many respects, to portray this country [New Zealand] as one which has, or is moving into an era of ‘post colonialism’” (Tauri, 1999, p.163). Secondly, the word, “alternative” justice is truly a misnomer, for it fails to get to the real heart of the matter. While indigenous law and justice may be “alternative” to the state system, it is and will always be the first law of the land. The real issue at hand is not the creation of an “alternative law” but the restoration and recognition of a law that existed and continues to exist! Mead (2003) also mentioned that:

Marae justice is another avenue which is frequently advanced by Māori as the most appropriate cultural way of dealing with trouble. But there seems to be some reluctance on the part of the government to incorporate it into our justice system. (p.236)

The state’s reluctance demonstrates the state’s adherence to unjust power dynamics, the continued subjugation of Māori people, and their ways of being human. The core issue at hand should be correcting the imbalance of power between the state and Māori. Restoring jurisdictional autonomy is restoring to Māori the power which was violently taken from them on the basis of racial discrimination and the ruthless desire for land and resources. Restoring jurisdictional autonomy is an

issue of non-discrimination against Māori, their culture, their law, and their self-determination. Despite the state's reluctance:

[O]ver the last twenty years there has been a discernible push from Māori and other quarters for Māori custom law to be applied in a number of different areas of general law, including family law, criminal justice, and administration of land. (Law Commission, 2001, p. 27)

Today, one of the greatest challenges Māori face when attempting to rediscover and implement their visions of law and justice is state co-option. This is clear in Family Group Conferencing which is often sold to the world as an indigenous justice process but in reality it is not controlled by Māori. Andrea Smith (2005) refers to this as “romanitization” and has noted that, “[t]he romanitization is present often in the discussion of restorative justice in indigenous communities where restorative justice programs are typically described as based on indigenous practices” (p.727). Tauri (1998) observed that “By the early mid 1990’s, in true Gramscian style, the state began to respond [to] the counter hegemonic potentiality of the restorative justice movement by implementing major policy programmes aimed at integrating restorative justice into formal justice processes” (as cited in Tauri, 2010, p.2). Specifically the, “In New Zealand the state’s response centred on the youth justice system” (Tauri, 2010, p.3). Specifically, this process of co-option manifested as Pratt (1996) noted in “1989 with the Family Group Conferencing process” and the passing of the “*Children, Young Persons and Their Families Act*” (as cited in Tauri, 1999, p.158).

Though writers like Olsen, Maxwell, and Morris (1995) praise Family Group Conferencing as heavily dependent and informed by traditional Māori justice and involves Māori people, it has been argued that it is rather the state’s co-option or cultural appropriation of Māori justice. Māori are critical of both the “cultural appropriateness of New Zealand conferencing” and “deprofessionalisation and exclusion of Maori cultural expertise” regarding Family Group Conferencing and Māori. (Tauri, 1999, p.159) They cite the fact that “the majority of conferences are dealt with in the Department of Social Welfare office with only five percent held on

*marae*” (Tauri, 1999, p.159). These sentiments are shared by many as Marchetti and Daly (2004) noted:

Critics of sentencing circles or conferencing in Australia, New Zealand, and Canada note that these processes are often controlled by non-Indigenous authorities (although sometimes in consultation with Indigenous leaders). Even when Indigenous leaders control the *process*, they do not typically control *entry* into the process, because they do not control the criminal justice system. Nor do they have sentencing authority. (as cited in Coker, 2006, p.71)

Family Group Conferencing is not an example of Māori law and justice because Māori do not have power and control over the process. Family Group Conferencing is therefore an extension of colonial rule and unjust power structures. If self-determination, sovereignty, and justice are to be restored to Māori, power between the Crown and Māori will have to be restored, equalized, and balanced. This means giving Māori back their inherent original jurisdictional autonomy over their lands and people while also providing resources which will allow Māori to develop and practice their law and justice traditions. Navajo Nation has proven that indigenous people are not only capable of providing justice to their people but can do a better job of it than the state; Māori deserve and indeed are entitled to do so as well. Navajo Nation can and should help empower and support them in this endeavour.

### **Summary**

Part IV has looked at modern incarnations of Navajo and Māori law and justice and the successes and challenges they face in practicing those systems. Colonization attempted to destroy both Navajo and Māori law, however despite colonization, Navajo and Māori law and justice continue to exist both formally and informally. Navajo law can be seen in the codification of the Fundamental Law of the Diné and in the Peacemakers Court, both of these systems use ancient values of sacredness, relationships, harmony, and peace to guide the nation and resolve some civil and criminal cases. While the court and the codification of the law demonstrate

self-governance and, an alternative to western law and the criminal justice system, there are areas to develop and improve. One area to improve in terms of the Peacemakers Court is to ensure the safety of women who are involved in domestic violence cases, as well as providing data on how peacemaking resolutions are enforced after the sessions are over. Furthermore, ideally, the principles and values within Navajo peacemaking and fundamental laws should be consistently applied to issues such as the protection of natural resources and sustainable economic development. Navajo peacemaking could also inform a larger theory of peace and social justice, one that is based on non-violence, dialogue, and the restoration of harmony within and between nations.

While Māori tikanga is practiced everyday in various informal and formal contexts, the people are still struggling with the Crown to restore their original jurisdictional autonomy over their lands and peoples. They are also struggling against the co-option of their law and justice. While Family Group Conferencing is often sold as Māori restorative justice, the reality is that they have no control over the process, either through entry into that process or in sentencing authority. In both cases, Navajo and Māori have law; however their ability to practice their law and justice is an ongoing struggle of power and control. While it is true that Navajo peoples have regained a small measure of their original power and sovereignty over their lands and people; the small measures of power they have acquired is not enough nor is it acceptable, since it is still modern colonial states that define and determine the extent to which that power is exercised. Povinelli (2002) asserted:

[T]oday it appears, much as it did in Fanon's day, that colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political, and economic framework of the colonial relationship itself. (as cited in Coulthard, 2007, p.451)

While indigenous law and justice traditions hold hope for healing, the application of indigenous law and justice must be critical. Not only do indigenous peoples have to be critical about when, how, and why the law is used, they also have

to be aware of how their law and justice systems can be co-opted and/or used to reinforce unjust colonial power dynamics and structures. In the United States, “The relationship between American Indian tribes and the U.S federal government is an ongoing contest over sovereignty. At stake are fundamental questions of identity, jurisdiction, power, and control” (Wilkins & Lomawaima, 2001, p.5). The struggle for control, sovereignty, power, and identity seems to define the relationship between Māori and the Crown as well.

## **CONCLUSION: INDIGENOUS LAW OF TOMORROW**

The law of indigenous peoples reflects a worldview that holds life as sacred and interconnected. In order to sustain life, various forces, elements, and relationships must be balanced, respected, and maintained. Indigenous law, if critically applied, can challenge oppression in all its forms both locally and globally. The law of indigenous people challenges the normalcy of western law and justice by providing alternatives to the prison/criminal justice system that is based on hierarchy, punishment, discipline, and control. Indigenous law and justice confronts racist stereotypes of indigenous savagery and inferiority by demonstrating that indigenous peoples have and still can govern themselves peacefully through consensus and non-violence.

Additionally, the law, if critically applied, fosters and nurtures the just distribution of power between genders, challenging unjust heteronormative patriarchal power structures. The law, if critically applied, nurtures humanity's relationship with the natural world, providing concrete examples of sustainable resource management which defies the exploitation of the earth, air, and waters. Indigenous law can challenge and transmute colonial monsters such as the prison/criminal justice system, internal colonization, and violence against women by restoring power, peace, balance, and meaningful justice to both humans and the natural world.

Indigenous peoples' law, justice traditions, and wisdoms are systematically suppressed and denied in order to uphold the normalcy and legitimacy of unjust colonial power structures, social institutions, behaviours, and practices that rest on hierarchy and domination. It is a racist ethnocentric ideology that has reduced indigenous peoples to "savages" and their law and legal traditions to "lore." It is colonization that has rendered indigenous peoples law invisible and irrelevant for the world today.

Re-discovering indigenous law and justice traditions demonstrates that the western ways of being, law, and justice are not the only way to govern society or be human. Indeed re-discovering indigenous laws and philosophies shows that human society can and has indeed lived in relative harmony with one another and the earth. If this was possible once, it can be possible again.

Furthermore, restoring indigenous law and legal systems is inherently a project of female empowerment for colonial systems of justice and law suppressed and attempted to destroy indigenous women's positions of power, authority, and their ability to create and administer law and justice within their communities.

The restoration of indigenous law and justice traditions can help heal the imbalances confronting humanity today, the imbalance of power between genders and the humanity's relationship to the natural world. Restoring indigenous law means that justice is not an individual pursuit but a collective planetary endeavour. Restoring indigenous law and justice traditions restores social institutions, practices, and behaviours of harmony, relationships, and sacred interconnectivity; practices that are not based on the domination of the earth or the human body.

While Diné law is distinctly Diné and Māori tikanga distinctly Māori, they both converge around principles, norms, and values of balance, harmony, sacredness, and relationships. Indigenous peoples have always possessed and practiced, law and justice, therefore, the law of indigenous peoples is and will always be the first law of the land. Restoring indigenous peoples' law is an act of cultural preservation, as it reaffirms and rebuilds social institutions that are egalitarian. Restoring indigenous peoples' law is an act of decolonization, self-governance, a method of retaining traditional knowledge, language, and restoring practices of peace and reciprocity. It also undermines and challenges the idea that "one size fits all," that one law and one justice system can or should work for everyone.

Re-discovering and embodying the values of balance, respect, reciprocity, relationships, and sacredness are now more important to the world than ever before.

The last remaining regions of earth bio-diversity, as well as those tribes living within them, are threatened by practices and ideologies which attempt to dominate and destroy their bodies, cultures, and their ties to their ancestral traditional territories. Moreover, as the impacts of climate change become more real and tangible, humanity and the western world will be forced to consider and adopt new ways of being; ways of being; that do not exploit the earth or one another. Not only is more research needed to archive and document indigenous issues, but research must be coupled with direct action, actions that will defend, protect, and resource the world's indigenous peoples to ensure their dignity, prosperity, and survival. The revitalization of indigenous law represents a hope for a more equitable and sustainable future, and if implemented critically, can be a pathway out of the oppressive and unsustainable conditions that have brought humanity and many of the world species to the brink of extinction.

Living differently and discovering how humanity can live differently may spell the survival of the human species and countless other life forms. Part of restoring balance, harmony, peace, and justice to indigenous peoples, and humanity, involves looking beyond the colonial myths of indigenous inferiority and uncovering the wisdom and valuable practices of law and justice that pre-existed and developed after colonization; practices that may enable humanity to change.

Indigenous law has been and continues to be a guide to help us re-connect with each other, and nature, to remind us of the spiritual powers within ourselves and the universe around us. Similar to Fanon (1967), I believe, “the colonized must initiate the process of decolonization by recognizing themselves as free, dignified and distinct contributors to humanity” (as cited in Coulthard, 2007, p.454). Indigenous peoples' visions of law and justice can and do contribute to humanity for our law, philosophies, and wisdom show us that another world is not only possible but that other worlds did, and in some respects, still do exist-- worlds where being human meant respecting the sacredness of life, a world where we treat each other and all

living beings as family. As told in the Navajo creation story,<sup>11</sup> Navajo people transmuted and destroyed the monsters by re-learning and re-connecting to their sacred ancient law and knowledge. Reconnecting to the sacred law and ancient knowledge continues to have the power to challenge and transform monsters today.

**Restoring Indigenous Law by Living Indigenous Law**

Navajo people will continue to develop their law and justice and, in doing so, will show the world a way of settling conflict that is better than the state model--one that is based on healing rather than punishment, dialogue rather than violence, and consensus rather than brute force. Though the revitalization of indigenous law in tribal courts settings, like the Navajo Nation Peacemakers Court, is an incredible accomplishment and is undeniably powerful, it is not the end. It is not enough for Navajo law to be applied only in court settings in inter-personal conflicts, for traditionally Navajo law was applied to all things. Navajo people can use the traditional law to inform their actions as global citizens on global issues of importance. Most importantly, the youth need to see it; we need to live it, touch it, taste it, feel it, working in our lives and bodies, in our homes, our communities, our nations, and our world. Ani Mikaere similarly noted, “[t]he challenge for Māori, women and men, is to rediscover and reassert Māori philosophies, Māori law in their daily lives” (Mikaere, 2003, p.144). Similar to Ani, I believe the power of our law is only as strong as its use in our everyday lives. However, with any power there is great responsibility. If our law and wisdom is used and interpreted improperly, it can be used to justify acts of oppression that harm, and can destroy human beings and the earth. Our responsibility, as modern indigenous people, is critically finding our law and critically applying it in our lives so that our peoples and indeed all our relations<sup>12</sup>

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<sup>11</sup> As mentioned in the intro of this thesis.

<sup>12</sup> All our relations refers to the whole web of life, elements, plants, animals, earth, celestial bodies, and the human family regardless of race, gender, class, sexual orientation, and nationality.

can live in peace and beauty. To some this may sound unrealistic; however I believe that within our law there is power to heal and transform our consciousness by reconnecting us to ancient old/new ways of being human.

I firmly believe that without our own personal transformation/liberation from colonial illusions of an isolated and disconnected self from each other and the universe around us, the human species, will continue on a path of self destruction. If we ourselves cannot embody, practice, and/or experience that state of harmony and peace that our law and wisdom details, how can we dare advocate for peace and justice for our people or this earth? Living the law, practicing the law, practicing our ways of peace, is a source for our personal and collective liberation and healing. If humanity does not re-connect to the ancient wisdom, humanity may, destroy life on earth<sup>13</sup>. While the personal and social alchemy we must perform will not be effortless, it is essential for human and ecological survival and sustainability. Our personal and societal transformation is more important now than ever before. Indigenous law, wisdom, and ways of being human are some of the many tools and traditions which we can draw from to help us achieve this goal.

Prior to colonization our law was not isolated or separated into courts or conferencing but was holistically applied to all aspects of our lives, our law was a spiritual practice and way of life. Our law governed and nurtured the relationships between men and women, the earth, and our personal connection to the spiritual universe. Equally, our law is healing and it can, if critically applied, heal our people and restore our people and perhaps even the world, to beauty, peace, and hozho. That is why we must protect, preserve, value, and love our law ways, which is our ancient

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<sup>13</sup> According to a recently concluded meeting of the Indigenous People's Global Summit on Climate Change indigenous peoples expressed that: "We are deeply alarmed by the accelerating climate devastation brought about by unsustainable development. We are experiencing profound and disproportionate adverse impacts on our cultures, human and environmental health, human rights, well-being, traditional livelihoods, food systems and food sovereignty, local infrastructure economic viability, and our very survival as Indigenous Peoples" (The Anchorage Declaration, 2009).

wisdom. Navajo Nation, Navajo people, and all indigenous peoples must actively develop our capacity to practice our law and justice traditions, not only in court systems but by teaching it within our schools, in our universities, and most importantly using it daily in our lives and our work. When we reassert our law, our ancient wisdom, in our lives in how we approach and resolve various conflicts and issues, that is when the power of our law becomes real, that is when our law belongs to us, guides us, and embodies us. That is when our law is truly restored and revitalized. This way the law remains alive, living, and informing us in all that we do. This is how we once again make our law, our practice, and our living action. Our law has always been, and continues to be here for us, a spring of knowledge, given to us by the ancestors. That ancient wisdom is eternal; it is here at this moment, now, for us, to help us, to heal us, to serve us, and the earth. This is the power of the Beauty Way<sup>14</sup>. This is the power of our law.

Hozho Nahasdłii

Hozho Nahasdłii

Hozho Nahasdłii

Hozho Nahasdłii

It is finished in beauty

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<sup>14</sup> This refers to Navajo ways of being human, a spiritual practice, and philosophy of peace. The Navajo peoples science of life.

## GLOSSARY

### Diné

**Altsé asdzáá**- the First Woman-prototype of mortal females

**'Asdzáá Nádlééhi**- Changing Women

**Bee'haaz'áanii**- Fundamental from the beginning of time

**Diné**- Commonly called “Navajo” the indigenous people of the southwestern United States of America

**Diyin**-Great Sprit, Holy Spirit

**Diyin Diné**- Holy People

**Diyin Nohookáá Dine'é**- Holy Earth-Surface-People

**Hogan** -Home

**Hozho**- Harmony, balance, beauty, peace

**Hozhoji' Naat'aah**- Peace chiefs

**Hozho Nahasdlii**- It is finished in beauty, or beauty restored; a common way to close prayers

**Johonah-éh** -Sun

**K'e**- Norms that prescribe proper conduct towards universal kin or relatives

**K'ei**- Matrilineal clan system

**Nádleeh**-Female-male, male-female, inter-sexed person, gender variant person

**Nahasdzáán**- Mother Earth

**Nalyeeh**- or a demand to be made whole for an injury

**Nayéé**- Monsters both literal and metaphoric, anything that causes disharmony

**T'aa 'altsoni alk' ei dah ndlii**- Universal interconnectivity

**Yadilhil**-Father Sky

### Māori

**Aotearoa**- Land of the long white cloud; or the land known as New Zealand

**Atua**- Spiritual being, deity, god

**Hapū**- Extended kin group, consisting of many whānau

**Iwi**- People; descent group consisting of many hapū

- Kaitiakitanga**- Stewardship, protection of natural resources
- Mana**- Prestige, power, authority
- Mana Wahine**- Women of prestige and dignity
- Mana Tane**-Man of prestige and dignity
- Māori**- Term to describe the indigenous peoples of New Zealand
- Marae**-Meeting house
- Mauri**- Life principle
- Muru**- Restitution or compensation for offense; could not be deferred to another generations
- Noa**-Free from restriction
- Pākehā**- Non-Māori
- Papatūānuku**- Mother Earth
- Pito**-Umbilical cord
- Powhiri**- Traditional welcome ceremony
- Rahui**- A method of making a place, area, or resource prohibited from use
- Ranginui** -Father Sky
- Takatāpui**- An intimate companion of the same sex
- Tangaroa**- God of the Sea
- Tangata whenua**-People of the land
- Tangihanga**-Customary funeral rites
- Tāonga**- Treasures, prized possessions
- Tapu**- Sacred, restricted, prohibited
- Tikanga Māori**- Māori law and philosophies
- Tino Rangatiratanga**-Māori sovereignty
- Tīpuna**- Ancestors
- Tohunga**- Keeper of traditional knowledge including but not limited to spiritual and healing practices
- Tūpuna**- Ancestors
- Utu**-Return for anything, reciprocity, restitution, compensation
- Wairua**- The spirit

*Michelle Cook*

**Wāhi tapu**-Tapu of places

**Wai tapu**-Tapu of waters

**Whakapapa**-Genealogy

**Whakanoa**- To make noa, or to lift tapu

**Whānau**- Kin group, family, descent group, to give birth

**Whānaungatanga**- Universal interconnectivity, relationships to all things

**Whenua**- Land, placenta

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*Michelle Cook*

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