

DUTY OF FAIRNESS AND HEALING

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Yá'át'ééh, Shí Díné Doo Shíghéí (Greetings my People and Relatives). I am Tábaąhí (Water Edge People) clan, born for Kiiy'aa'áanii (Towering House) clan, maternal grandfather Tódich'ii'nii (Bitter Water), and paternal grandfather Tábaąhí (Water Edge People). I respectfully share *K'é* (Kinship and Relations) with you in this month of *Ya'íishjáástsoh*, planting of late crops (July).

What are the duties in mitigating the division in the law and society? As declared in *Diné bizaad* (Navajo language), “*t'óó hot dah hazkééhgoóh há k'íhodoóqot* (one cannot resolve disputes when in a confused state).”¹ *Diné bi beenahaz'aanii* (Navajo traditional, Natural, Customary, or Common Law) teaches that “human beings, who have always been imperfect” need discipline and “cannot realistically . . . set the parameters for their own discipline.”² The concept of dissension was not heard of in ancient times for the *Diné* (the People). There are no words for “I am sorry” in our language. Our culture is best known through interactions and experience. If a disagreement occurs it is the Navajo way to “beg leave” of the person who was offended. A strong tradition exists and

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1. SC-CV-24-10, *Neptune Leasing Inc. v. Mountain States Petroleum Corp.*, 11 Am. Tribal L. 162, 170 (Navajo 2013).

2. *In re Seanez*, 9 Navajo Rptr. 433, 436, 9 Am. Tribal L. 329, 341 (Navajo 2010).

“[t]here is a custom to be followed . . . : you approach and ask. The act of approach suggests humility and equality. . . . [T]he act of approach and request strengthens ties and relations. The cornerstone of this custom is *K'é*.”³ *K'é* is kinship.

Disagreements do not create disobedience to the law under the system of *Diné justice*. What happens when there is disagreement with the law? What should happen when disagreement occurs? Has dissension bound the court's hands and prevented justice from being served? The heart of *Diné justice* operates on a much higher scale connected to viewing the world holistically. The concept of dissension is foreign.

This article shows a glimpse of how courts and the practice of law works in *Diné* society. The role of lawyers to serve the public trust, the jurists' duty of *K'é* (Kinship; Relations) and *Hózhó* (Beauty, Harmony, Balance), and the inseparable requirements of *Diné bi naat'áanii* (Leadership) are sacred facets of *Diné justice*.

The root of *Diné justice* is *Diné* fundamental law underscored through leadership. As *Diné*, we

are the image of our ancestors and we are created in connection with all creation. Upon our creation . . . we are identified by: Our *Diné* name, Our clan, Our language, Our life way, Our shadow, Our footprints. Therefore, we were called the Holy Earth-Surface-People [Diyin Nohookáá *Diné*]. . . . Different thinking, planning, life ways, languages, beliefs, and laws appear among us, But the fundamental laws [*Diné bi beehaz'áanii bitsí siléí*] placed by the Holy People remain unchanged.⁴

“*Diné bi beehaz'áanii* is the foundation of *Diné bi nahat'a* (providing leadership through developing and administering policies and plans utilizing these laws as guiding principles) and *Diné* sovereignty.”⁵

3. *Judy v. White*, 8 Navajo Rptr. 510, 542 (Navajo 2004).

4. NAVAJO NATION CODE tit. 1, § 201 (2014).

5. SC-CV-57-14 & SC-CV-58-14, *Tsosie v. Deschene*, 12 Am. Tribal L. 55, 61–62 (Navajo 2014).

I. HISTORY

The Navajo Nation (“Nation”) courts are the premier indigenous judicial system in the world. The courts have been called the “flagship of indigenous courts.”⁶ Today, it is judicial independence that maintains the Nation’s sovereignty. American Indian courts look to the Nation’s courts as the helm of sovereignty. The Hashkééjį Nahat’á (Judicial Branch) is conscious of the need for independence and the obligation to protect and guard the sovereignty of the Nation. The result of this independence is the courts are capable of conducting duties of restoring harmony, providing teachings on Diné bi beenahaz’áanii, and upholding sovereignty of the Nation.⁷ The *Diné* have determined the Hashkééjį Nahat’á sacred duty and responsibility is to uphold the values and principles of those teachings, to interpret laws, and render judgments.⁸

On April 1, 2021, the Nation’s courts celebrated sixty-two years as an independent judiciary. The Bureau of Indian Affairs, under the United States Department of Interior, created the Navajo Court of Indian Offenses (also known as CFR courts) and brought Anglo Courts to the Nation beginning in 1892.⁹ It was the independence of the first Navajo judges in these CFR courts that preserved *Diné* culture and traditions. In the 1950s, a proposal was introduced in the State of Arizona to take over the Nation’s courts using the then newly enacted federal Public Law 280.¹⁰ In response, the Navajo Tribal Council approved a resolution abolishing the Navajo Courts of Indian Offenses and declared the existing courts as courts

6. *History of the Courts of the Navajo Nation*, NAVAJO JUD. BRANCH, <http://www.courts.navajo-nsn.gov/index.htm> (last visited May 27, 2021).

7. *Resolution of the Navajo Nation Council No. CN-69-02* ¶ 8, NAVAJO JUD. BRANCH (Nov. 8, 2002), <http://www.courts.navajo-nsn.gov/Resolutions/CN-69-02Dine.pdf>.

8. See *Kascoli v. Kascoli*, 8 Navajo Rptr. 739, 743 (Navajo 2005).

9. See *History of the Courts of the Navajo Nation*, *supra* note 6.

10. *Id.*

of the Navajo Tribe.¹¹ The resolution became effective April 1, 1959.¹² The establishment of its own court system was an inherent exercise of sovereignty by the Nation's government.

Today, the courts reflect the exceptional efforts of so many that came before, and the extraordinary efforts of the Nation's Legislative and Executive branches which cemented the Nation's government. Traditionally, the *Diné* had their own form of dispute resolution before a court system was in place. The *Diné* discussed and worked out challenges with leaders who were selected by communities. The Hashkééjį Nahat'á uses *Diné bi beenahaz'áanii* for the restoration of harmony. The peacemaking, healing objective (*K'é Bee Hozhoo Nahoodleel*) for resolution of disharmony was established prior to the advent of courts.¹³ Implementing Navajo culture through traditional justice remains the heart of the Hashkééjį Nahat'á. Peacemaking is highlighted by restorative justice, honor of elders, and respect for families. It recognizes the healing power of children and youth.

II. THE ROLE OF LAWYERS TO SERVE THE PUBLIC TRUST

The Navajo Nation Supreme Court ("Supreme Court") has the exclusive regulatory authority in the regulation of the practice of law within the Nation.¹⁴ It is a privilege, not a right, to practice law before the Navajo Nation Courts.¹⁵ Membership in the Navajo Nation Bar Association is an entry for the practice of law on the Nation. Each member is an officer of the court who has a

11. *Id.*

12. *Id.*

13. See Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 297 (2001) (discussing the Nation's peacemaking program, which is built upon a community-based disputed resolution ceremony that is "hundreds of years" old).

14. *Eriacho v. Ramah Dist. Ct.*, 8 Navajo Rptr. 598, 602 (Navajo 2004) (cited by *In re Seanez*, 9 Navajo Rptr. 416, 9 Am. Tribal L. 329, 337 (Navajo 2010)).

15. *In re Admission to Prac. Wilson*, 4 Navajo Rptr. 137, 137 (Navajo 1983).

“special responsibility to ensure the integrity of the Navajo legal system.”¹⁶

Differing from other jurisdictions, the Supreme Court recognizes that a lawyer working for the People is a na'taa'ni' (Leader) who should be further guided as follows:

As representative of the People, a leader for the People, and also for those you work with, you must advise and teach them of the laws of the Diné, even though they might not agree with the law; therefore, to be a leader and lawyer for the People, one must use and respect the laws of all the People.¹⁷

For example, government attorneys have a fiduciary duty not to obstruct, interfere, or influence the functions of the Navajo Nation courts.¹⁸

Dissension may develop when counselors of the law disagree with the law. Rightfully so, individuals represented by lawyers may disagree with laws created by legislative bodies. However, when lawyers are sworn in to uphold the standards required of lawyers, professional responsibilities are created. Since 1989, the Nation's courts have recognized that lawyers owe a duty to uphold the integrity and honor of their profession. The Supreme Court has instructed lawyers to dedicate themselves to public service, to inspire confidence, maintain respect, and enhance public and client trust.¹⁹ Adhering to rules of professional responsibilities is not the only requirement for practice in Navajo courts, lawyers and advocates are expected to know *Diné* culture and tradition, provide public service, and serve as leaders according to *Diné* teachings. These teachings are:

The *Diné* have always been guided and protected by the immutable laws provided by the *Diyin*, the *Diyin Diné é*, *Nahasdzáá* and *Yádilhił*; these laws have not

16. *Perry v. Navajo Nation Labor Comm'n*, 9 Navajo Rptr. 55, 57, 6 Am. Tribal L. 780, 785 (Navajo 2006).

17. *In re Seanez*, 9 Navajo Rptr. at 438.

18. *Id.* at 417.

19. *Bowman v. MacDonald*, 6 Navajo Rptr. 101, 103 (Navajo 1989).

only provided sanctuary for 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.²⁰

The Navajo Nation Council instructed all facets of government to adhere to *Diné* teachings when it found that

all elements of the government must learn, practice and educate the *Diné* on the values and principles of these laws; when the judges adjudicate a dispute using these fundamental laws, they should thoroughly explain so that we can all learn; when leaders perform a function using these laws and the symbols of the *Diné* Life Way, they should teach the public why the function is performed in a certain way or why certain words are used.²¹

Lawyers and jurists take a solemn oath (Naat'áanii' ádee hadidziih) incorporating these tenets: to obey and defend the Navajo Nation and its laws (Diné bi na'hat'á doo 'bibe nahaz'áanii bee sézjídóó, bik' eh ánísh't'éé doo, dóó bich'aah sézjì dooleel). In addition to defending laws, they swear that they, as leaders, will administer to the *Diné* with honor and respect. Finally, the affirmation of making and living a good life moves toward completeness. (Díí hózhoggo bee 'iiná 'adeeshliil doo hózhoggo shí 'iiná siláa dooleel.)

III. JURIST DUTY OF *K'É* (KINSHIP; RELATIONS) AND *HÓZHQ* (BEAUTY, HARMONY, BALANCE)

“*K'e* contemplates one's unique, reciprocal relationships to the community and the universe. It promotes respect, solidarity, compassion and cooperation so that people may live in *hozho*, or harmony.”²² It fosters human relationships through fairness and mutual respect, requires being fully informed, and is given the opportunity

20. *Resolution of the Navajo Council No. CN-69-02*, *supra* note 7, ¶ 2.

21. *Id.* ¶ 8.

22. *Atcitty v. Dist. Ct.*, 7 Nav. R. 227, 230 (Navajo 1996).

to speak.²³ Through “talking things out” under the principle of *K'é*, “courts assist in bringing litigants into *Hózhó* . . . courts bring people in dispute into harmony.”²⁴ Through consideration of different approaches, parties are brought “back into harmony” which is consistent with Navajo beliefs and principles.²⁵ *K'é* is applied as the primary principle under *Dine bi beenahaz'aanii* (Navajo traditional, Natural, Customary, or Common Law).²⁶ “*K'e* is the high standard which the People hold our leadership [attorneys] in their . . . exercise of power[] in service of the Navajo people who have chosen them[] and in dealings with each other.”²⁷ It is through these beliefs that decisions can be made.

Hózhó go iiná “literally mean[s] doing the harmonious plan, that the Diné shall live together as a viable community on our sacred lands in order to continue our way of life, *iina doo ninit'í*, which is an immutable principle of Diné bi beenahaz'áani.”²⁸ “Within the confines of professional responsibilities enumerated by rules, lawyers and judges are taught that Navajo thinking involves talking things out,” *Baayati'*.²⁹ *Baayati'* is a form of dispute resolution

based on the traditional practices of the Diné. Elders stress *K'e* because good relations are maintained by being respectful to your relatives and to all living things. With *K'e* and use of *Nitsahakees*, *Nahat'a*, *Iina*, and *Sihasin*, these help disputing parties communicate respectfully and effectively. Through *Nitsahakees*, the parties become aware of a problem

23. *Off. of Navajo Nation President v. Navajo Nation Council*, 9 Navajo Rptr. 325, 327, 9 Am. Tribal Law 46, 53 (Navajo 2010) (citing *Atcitty*, 7 Nav. R. at 230).

24. *Bizardi v. Navajo Nation*, 8 Navajo Rptr. 593, 597 (Navajo 2004).

25. *Allen v. Fort Defiance Housing Corp.*, 8 Navajo Rptr. 759, 765 (Navajo 2005) (quoting *Goldtooth v. Naa Tsis' Áán Cmty. Sch.*, 8 Navajo Rptr. 680, 691 (Navajo 2005)).

26. *Off. of Navajo Nation President*, 9 Navajo Rptr. at 327.

27. *Id.*

28. *SC-CV-60-10, Iiná Bá, Inc. v. Navajo Bus. Regul.*, 11 Am. Tribal L. 447, 457 (Navajo 2014).

29. NAVAJO NATION JUD. BRANCH, SECOND QUARTER REPORT 4 (2021), <http://www.courts.navajo-nsn.gov/Reports2/NNJB-FY2021-2Q.pdf>.

or dispute. With *Nahat'a*, the parties develop plans to resolve all issues. *Iina* reminds all parties of their maturity and experience in addressing disputes. With *Sihasin*, parties are hopeful for a successful outcome. When success is achieved, all parties walk in beauty before them, behind them, below them and above them. This is how harmony is restored.³⁰

To illustrate Navajo teaching, individuals have the responsibility to respect others. In *Kesoli v. Anderson Security Agency*,³¹ the Supreme Court explained, “Words are . . . not to be used to offend or intimidate.” “Words are sacred and never frivolous in Navajo thinking.”³²

In heated family discussion or community meetings, elders often say “*hazhó’ógó, hazhó’ógó sha ‘álchíní,*” which means “my children, patience and respect are due.”³³ The Court applies the concept of *hazhó’ógó* “[w]hen faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. *Áádóó na’nile’ dii éídooda,*” or “[d]elicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequence.”³⁴ In everyday living, one must approach it with *hozho’ogo* in mind.³⁵

Diné bi beenahaz’áanii incorporates all facets of dine life and justice. The Supreme Court highlighted that, “Guided by *Diné bi beenahaz’áanii* which emphasizes restorative justice *Diné bi beenahaz’áanii* imposes a duty on our government to provide avenues for restoration. *Diné* justice ‘throws no one away.’ *Diné bi beenahaz’áanii* gives our judicial system greater options and responsibilities than strictly applying

30. JUD. BRANCH NAVAJO NATION, EMPLOYEE POLICIES AND PROCEDURES 24 (2013), <http://www.courts.navajo-nsn.gov/HR/JBEPP2013note.pdf>.

31. 8 Navajo Rptr. 731, 732 (Navajo 2005).

32. *Id.*

33. Navajo Nation v. Rodriguez, 8 Navajo Rptr. 604, 615 n.5 (Navajo 2004).

34. *Id.*

35. *Id.* at 615–16.

punishments,” “under the principle of ‘hazhó’ógo.”³⁶ “[H]azhó’ógo requires a patient, respectful discussion with a suspect explaining his or her rights before a waiver [of those rights] is effective.”³⁷

In Navajo tradition, government and governing was a matter of the consensus of the people, and Navajos had a participatory democracy. It was, in fact, one of the purest democracies in human history. Long before the United States of America extended the privilege and right to vote to those who did not own property and to women, all Navajos participated in public decisions. Therefore, there is a strong and fundamental tradition that any Navajo can participate in the processes of the government.³⁸

IV. DINÉ BI NAAT’ÁANII (LEADER)

Diné justice contemplates conduct becoming a leader. A leader does not ever lay down the trust and the laws of the people he or she serves.³⁹ “In view of that, a *naat’ani* who holds the office of a judge, with the substantial powers of that office entrusted to him by the people, never surrenders the trust and the laws in the eyes of the public.”⁴⁰

Naata’aniis are required to be conscious of their authority to find sacred solutions. . . . Leaders do not ever lay down the people’s trust and the laws because a leader is taught that they must find the solution, for it is always available. . . . [A]s demonstrated in the design of the sacred wedding basket, a leader through adherence to the laws, the analysis of the stories of the Diné journey, and a positive

36. *Huangooah v. Greyeyes*, 11 Am. Tribal L. 171, 176, 178 (Navajo 2013).

37. *Eriacho v. Ramah Dist. Ct.*, 8 Navajo Rptr. 617, 625 (Navajo 2005).

38. *Bennett v. Navajo Bd. Election Supervisors*, 6 Navajo Rptr. 319, 325 (Navajo 1990).

39. See No. SC-CV-25-06, *Thinn v. Navajo Generating Station*, 7 Am. Tribal L. 558, 564 (Navajo 2007).

40. SC-CR-03-16, *Navajo Nation v. Tso*, 13 Am. Tribal L. 466, 475 (Navajo 2016).

approach will find a solution (*bi'á'íidzá*) around, through, or over that which confronts the people.⁴¹

Decisions continue to underscore the *naat'ánii* in service.

In our Navajo thinking, great responsibilities of public service are placed on a *naat'ánii*, greater than may be commonly understood in other jurisdictions. Those who wish to serve must understand his/her own need to self-assess his/her own qualifications under the laws, his/her own abilities to serve, and the great needs of the public that in numerous cases lack the resources to watch over the actions of the *naat'ániis* they select.⁴²

Custom and tradition teach of ancestral laws. It is said that

We consider ancient laws also. The ancient laws of the Holy People take precedence because these are sacred laws that we were placed here with. As an illustration, we recount the time in our history when the Navajo people, after being placed on this Earth, lived with the Holy People so they would be educated about our ancient laws—the right and wrongs. . . . The value system—the law of the Navajo people—is embedded in the language. Now you take that law and apply it. It is how our people survived as a society since time immemorial. . . . When you think about that and the law that was established by the Holy People, our human leaders of the past obeyed that. And they carried out the responsibility of instructing the young ones that they must also carry this on.⁴³

Navajo reasoning dictates transparency. People enter a *hooghan* (home) through the east door:

Although a *naat'ánii* enters a *hooghan* like the people he or she serves, the standard of conduct of a

41. SC-CV-60-10, *Iiná Bá, Inc. v. Navajo Bus. Regul.*, 11 Am. Tribal L. 447, 458 (Navajo 2014).

42. SC-CV-62-12, *Sandoval v. Navajo Election Admin.*, 11 Am. Tribal L. 112, 121 (Navajo 2013).

43. SC-CV-57-14 & SC-CV-58-14, *Tsosie v. Deschene*, 12 Am. Tribal L. 55, 62–63 (Navajo 2014) (Summary of Oral Argument on Sept. 26, 2014).

naat'ánii is higher and stricter. The *naat'ánii* indeed [is] expected to be honest, faithful and truthful in dealing with his [or her] people. Thus, a *naat'ánii* betrays the trust of the people when he or she chooses to sneak around the *hooghan* in search of a non-existent side door in an effort to be less than open and honest.⁴⁴

A *naat'ánii* is greatly respected by the people, however, a *naat'ánii* can be relieved of authority if he or she betrays the public trust placed in him or her.⁴⁵ “The relevance of this teaching is that it is going to have to take one’s individual hard work and sacrifices (*t’áá hwó ájít’éego t’éiyá*) to learn the skills necessary to sustain a prosperous life for an entire community.”⁴⁶

V. CONCLUSION

The principle of *k'é* “contemplates one’s unique, reciprocal relationships to the community and the universe. It promotes respect, solidarity, compassion and cooperation so that people may live in *hozho*, or harmony. *K'e* stresses the duties and obligations of individuals relative to their community.”⁴⁷

44. SC-CV-64-17, *Sherlock v. Navajo Election Admin.*, 15 Am. Tribal L. 136, 141 (Navajo 2017).

45. *See Navajo Nation v. MacDonald*, 6 Navajo Rptr. 432, 445 (Navajo 1991).

46. SC-CV-60-10, *Iiná Bá, Inc. v. Navajo Bus. Regul.*, 11 Am. Tribal L. 447, 457 (Navajo 2014).

47. *Atcitty v. Dist. Ct.*, 7 Navajo Rptr. 227, 230 (Navajo 1996).