

Kyle Ranieri

HMRT 400: Advanced Human Rights Colloquium

Professor Jim Silk and Paul Linden-Retek

20 December 2017

The Diné Marriage Act: A Colonial Relic and Human Rights Violation

I. Introduction¹

Kodóo hozho dooleel – “From here on there will be harmony”

In 2005, the Navajo Nation Tribal Council passed the Diné Marriage Act as a tribal equivalent to the Defense of Marriage Act signed into law by President Clinton in 1996, seeking to ban recognition of same-sex marriages on the Navajo reservation.² Although President Joe Shirley Jr. vetoed the act at the time, the Navajo Nation Council overrode the veto with a vote of 62-14 in support of the measure. The effect of the law was that previously recognized “naturalized” marriages which came about through long-term co-habitation of two people of the same sex under Navajo common law became newly annulled and prohibited. On the reservation, this discriminatory law served to further marginalize LGBT/*Nádleeh* Navajos and amplify outwardly homophobic expressions on the reservation.

Akin to the arguments used by opponents of marriage equality in the U.S. context and other global settings, the Diné Marriage Act’s sponsor Council Delegate Larry Anderson of Fort Defiance

¹ Note on framing of the essay: The tone of this essay is not purely academic, nor is it solely for advocacy, and this was intentional. My intended audience for this piece is a general Navajo public who might not be aware of certain aspects of our Creation Story, history, or traditional legal principles. In this sense the piece is educational, but it is educational with a cause. The tone weaves between academic neutrality and normative claims, and it does so in symphony with inconsistent use of the first- and third- person depending on the context. My hope is that although the piece might not meet the standards of an academic paper or the succinct efficacy of an advocacy document, it will serve as a catalyst for both and encourage further dialogue on the subject matter.

² CAP-29-05 (2005) – 9 N.N.C. § 2-4. “Diné Marriage Act.”

and his allies reasoned that the law was intended to “promote strong families and strong family values, not discriminate.”³ Whether the goal of the law was to promote family values does not change the fact that the law does not accord with Navajo tradition, history, law, or human rights standards. Not only is the law a fundamental violation of the human right to self-determination, autonomy, and freedom from discrimination, but it is also a self-imposed contravention of Navajo cultural rights as an indigenous people. The law demonstrates the internalization and self-perpetuation of colonial systems of power, which seek to limit Navajo understandings of gender, sexuality, and social organizing, and doing so also has the perverse effect of restricting Navajo imaginings of an indigenous future.

This paper will outline the multiplicity of reasons for why the Diné Marriage Act should be repealed by the Navajo Nation Council. Our Creation Story tells stories of *nádleeh* people—those with both feminine and masculine characteristics—being important figures, both as the first children of First Man and First Woman and as knowledge-bearers of pottery and basket weaving. There are historical accounts of *nádleeh* people being revered members of Navajo society prior to occupation by the United States and the deliberate cultural genocide of Navajo lifeways. Navajo legal principles of *k'e* and *hozho* require us to respect everyone in our community and uphold our ties of kinship. Excluding members of our community from the circle would cause *nayee'*, or the moving away from harmony in violation of *hozho*. Lastly, as a community which purports to value human rights we must follow through with that commitment and value *all* rights. All people have the right to both collective and individual self-determination, and this includes the liberty of determining how one governs one's life, free from misguided and unfounded restrictions. Freedom from discrimination is both a human right and a requirement for maintaining ties of kinship, yet *nádleeh* individuals face cumulative discrimination on the Navajo Nation, which exacerbates existing intergenerational trauma and marginalizes these valuable members of our community.

³ 9 N.N.C. § 3. “Purposes.”

The Navajo Nation is undergoing an exciting period of growth, cultural revival, and assertion of sovereignty. As a community in which everyone is connected with each other, we cannot allow some of us to be unfairly treated and prevented from living life honestly and to the fullest extent. No benefit comes from inequality, but great strength comes from a supportive community in which everyone is respected. It is far from the only step, but the repeal of the Diné Marriage Act will go a long way in respecting human rights, strengthening our community, and restoring *hozho* in the land between the Sacred Mountains, *Dinétah*.

II. Creation Story⁴

Ndi nihi beehaz'áanii bitsé siléi ná ndaahya'áá t'abdii doo lahgo ánééhda,

Éí biniinaa t'áá nanibi'deelyáhaq doo nítch'i divin binááh nibihdaahya'aa ge'át éigo.

– *“Different thinking, planning, life ways, languages, beliefs, and laws appear among us,*

But the fundamental laws placed by the Holy People remain unchanged.”

Our Creation Story (*Diné Bahane*) tells us that we are all descendants of First Man and First Woman. Of their five pairs of twins, the first were *nádleeł* and described to have the essences of both man and woman. These two children would grow to become valued members of the nascent community for their gifts of creativity and work ethic. One of their largest contributions was to teach the Diné people the art and skill of pottery and basket weaving.

At some point during the development of this early community, First Man and First Woman got into an argument which culminated in the men leaving the women to live on their own. Recognizing the invaluable contribution of the *nádleeł* people, the men brought them along as well. At

⁴ Morris, Irvin. *From the glittering world: A Navajo story*. Vol. 22. University of Oklahoma Press, 2000.

the camp, they cooked for the men and brought along food without which the men would have been unable to survive.

The term *nádleeb* roughly translates to “one who changes,” and its root holds particular meaning for the Navajo people. Our most sacred deity is *Asdzáán Nádleebí*, which in English translates to Changing Woman. Although her name primarily comes from her ability to change in respects other than gender, the shared concept of change between *Asdzáán Nádleebí* and those who encompass both the essences of male and female is a testament to the reverence traditionally bestowed upon versatility and the ability to move between binaries.

As a people, we are making great strides in continuing our traditions and preserving our stories. As a part of this, we must sincerely assess what our stories teach us and evaluate the ways in which our contemporary understandings of community have gone astray from our stories due to centuries of cultural erasure. The *nádleeb* people were essential to the Diné people’s survival through their skills in pottery and basketry, and without them the men would not have survived when they parted with the women. Today, we must continue to value these members of our community for the same reasons: they are valuable and have much to contribute to our collective well-being, and to exclude them would only be to harm ourselves.

III. History of Colonization

Hwéeldi – “Long Walk”

The first contact between the Navajo and U.S. colonizers took place in 1846 when the U.S. army invaded Navajo territory during the Mexican-American War.⁵ Throughout this period, conflict

⁵ Bailey, Lynn Robison. *The Long Walk: A history of the Navajo wars, 1846-68*. Vol. 26. Westernlore Press, 1964.

between the Navajo and Western settlers was common, but the arrival of the U.S. army brought newfound confidence to settlers in exercising their colonial mandate. To stymie the Navajo livelihood practice of raiding which developed over time in response to territorial losses and increasingly limited resources, the U.S. army took action. Some attempt at resolving the disputes through treaties was made, but the army ultimately determined that the only resolution was to take complete control over the Navajo people. To permanently end the problem of raids, Colonel Kit Carson employed a scorched earth strategy of contaminating water sources, razing crops, and capturing livestock. On the brink of starvation, thousands of Navajos submitted to the military and were sent on a torturous walk to the distant Bosque Redondo where they would be held captive in a military fort and provided with sparse food and an abundance of disease.

The period of captivity from 1863 to 1868 was perhaps the most treacherous chapter of recent Navajo history. Jennifer Nez Denetdale explains that “In 1863, in the aftermath of the U.S. pacification of the Diné—when they were no longer seen as a physical threat—the war on them shifted to domestic, spiritual, and political terrains.”⁶ Indeed, the collective memory of Bosque Redondo remains with many Navajos through the oral histories of our elders, and the violent impact it had on Navajo lifeways would be impossible to quantify or fully account for. Denetdale explains that “the Bosque Redondo experience dramatically transformed the Navajo political system,” because it put a traditionally disparate tribe in close proximity with each other under the authority of the U.S. military.⁷ Strict rules were instated that were completely foreign to the Navajo, including the institution of a patriarchal system which stripped women of any land or other rights they previously held in Navajo

⁶ Barker, Joanne, ed. *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies*. Duke University Press, 2017: 69-98.

⁷ Denetdale, Jennifer Nez. “Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition.” *Wicazo Sa Review* 21, no. 1 (2006): 12.

society.⁸ The forced encampment ended in 1868 with a treaty between the U.S. government and Navajo leaders to establish a reservation, allowing for the return of the Navajo to a small fragment of their traditional homelands.

The Long Walk and Bosque Redondo were, however, only the beginning of a long and violent relationship between the U.S. government and the Diné which persists today. In addition to establishing the boundaries of a small reservation, the 1868 treaty also relegated authority to the U.S. government in determining the law and carrying out its enforcement. The domination strategy of relentless force used at Fort Sumner continued in the government's administration of the new reservation under James Carleton, Commander of the Federal District of New Mexico:

“[The Diné] understand the direct application of force as law. If its application be removed, that moment they become lawless... The purpose now is never to relax the application of force with a people that can no more be trusted than you can trust the wolves that run through the mountains.”⁹

Carleton reasoned that while “it may appear unjust to punish people for a violation of laws which they do not understand... it must be recollected that these Indians have got to be made to respect the bonds which unite civilized society, and the only practical way of doing this is by inflicting a punishment.”¹⁰ Although a Navajo Tribal Council was established in 1923, it was not until the late twentieth century that the tribal government was sufficiently empowered to make its own laws without the influence of the U.S. federal government, and consequently most of the Navajo Nation Code mirrors federal statute.

⁸ Ibid: 15.

⁹ James Carleton to Lorenzo Thomas, September 6, 1863, cited in Lawrence Kelly, *Navajo Roundup: Selected Correspondence of Kit Carson's Expedition against the Navajo, 1863-1865* (Boulder, CO: Pruett, 1970), 56-57.

¹⁰ Letter from Carleton to General Lorenzo Thomas in Washington, D.C., printed in ROBERT A. ROESSEL, *PICTORIAL HISTORY OF THE NAVAJO, FROM 1860 TO 1910*: 31-2 (1980).

The multigenerational process of colonization implemented by the U.S. government throughout the twentieth century included a war on non-Western sexual and gender norms, beginning with the establishment of a patriarchal society. Westernization of marriage laws occurred gradually with the prohibition of polygamy and institutionalized marriage became ubiquitous throughout the reservation.¹¹ Adultery laws swiftly and effectively eliminated any visible relationships between people of the same-sex or any outward gender expression considered deviant to Western eyes, in tandem with the proliferation of missionaries and the boarding school system.

As was the case with many Native American communities, the process of colonialism was so violent and thorough that even once the Navajo tribe attained some degree of self-determination after the reform of the Navajo Tribal Council in 1958 and subsequent judicial independence successes, Navajo actors themselves still enforced many colonial ways of living—especially those aspects supported by evangelical churches such as anti-LGBT sentiments. Linking the colonial past with the deceptively named “postcolonial” present, Denetdale argues that “declarations of heterosexual nation are found in tribal resolutions across several decades and were sanctioned again in the passage of the Diné Marriage Act in 2005.”¹²

Without historicizing current political debates within the context of colonialism, cultural genocide, and the resulting intergenerational trauma, we cannot fully realize efforts of cultural revitalization, decolonization, and self-determination. As Denetdale explains, “it becomes difficult to transform our nation and communities and move toward justice when we consistently reinscribe colonial values of heteronormativity, because we fail to see how cultural traditions have shifted in ways

¹¹ Pruchas, Paul Francis, ed. “Americanizing the American Indians,” *supra* note 4, at 302.

¹² Barker, Joanne, ed. *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies*. Duke University Press, 2017: 74.

that allow for some of our citizens to belong less than others.”¹³ Cultural debates about LGBT people will remain whether or not we attribute their cause to colonization, but knowing the history is crucial for determining community values and knowing where we stand in relation to the history and values of our people.

IV. Law & Politics

“*Diné bi beehaz’aanii*” – “*Navajo Common Law*”

Imported colonial ideologies have veritably informed the modern beliefs of Navajo people, but the growing movement of cultural revival asks of us that we judge our contemporary laws and lifeways by our traditional value systems. What one finds is that even if anti-LGBT sentiments somehow emerged organically and not as a settler artifice, the Diné Marriage Act and similar Western-style laws would not stand against the central Navajo legal principles of *hozho* and *ke’e*, which are both operable jurisprudential principles in the Navajo tribal courts.¹⁴

The legal relevance of *hozho* (which we will reductively equate to ‘harmony’ for the sake of this interpretation) is primarily concerned with how the actions of individuals either move towards or away from it. The Navajo word for moving away from *hozho* is *nayee’*, which literally translates to “monster,” meaning “anything that gets in the way of a person living their life.” The term’s use in tribal courts is common, and its doctrinal ramifications are far-reaching, ranging from the procedure of double jeopardy to the standards applied in determining legal standing. *Hozho* prioritizes a consequentialist outlook by considering the effects of an action more than its initial cause. For example, *hozho* is used

¹³ Ibid.

¹⁴ Navajo Housing Authority v. Bluffview Resident Management Corp., No. SC- CV-35-2000, slip op. at 8 (Nav. Nat. Sup. Ct., Dec. 17, 2003).

as a standard of judicial review requiring that a court not accept a case if the consequences of doing so would worsen the situation further by straying from *bozho*, for example, by breaking community bonds.¹⁵ The Navajo principles of *ke'e* (kinship) and *ke'eei* (clanship) also call upon us to respect our relations with family and community. Assessing the Diné Marriage Act with these standards, it is clear that the law departs from *bozho* by antagonizing an entire subgroup of the community and doing more harm than good.

From a pragmatic viewpoint, repealing the Diné Marriage Act is politically feasible in both Navajo and American arenas. The 2015 U.S. Supreme Court case *Obergefell v. Hodges* legalized same-sex marriage in the United States making it the status quo, and now the majority of Americans and Native Americans support same-sex marriage.¹⁶ In the Navajo Nation, the revival of culture and tradition has become a powerful discourse which can be operationalized to support same-sex relationships and mitigate criticisms made on a religious basis. Whether the Diné Marriage Act is repealed by the Tribal Council or struck down through litigation in the tribal courts, it seems inevitable that its end is near when the only remaining vestiges of support for the law are evangelism and neocolonialism.

V. Human Rights

“It is the right and freedom of the people that every child and every elder be respected, honored and protected with a healthy physical and mental environment free from all abuse.”

– *Diyin Dine'é Bitsaqdeę Beenabaz'áanii (Diné Customary Law)*

¹⁵ Fort Defiance Housing Corp. v. Lowe, No. SC-CV-32-2003 (Nav. Nat. Sup. Ct., April 5, 2004).

¹⁶ Pew Research Center. “Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical.” Report. 26 June 2017.

Indigenous communities transcend the borders of nation-states physically as the people of their ancestral lands since time immemorial, but they also go beyond colonial borders figuratively in their collective identities and lifeways which exist separately from nationalism and its homogenizing project. Because of this identity, which goes even beyond the ideology of transnationalism and its neoliberal tendencies, indigenous communities are perhaps one of the most well-suited groups to lay claims to human rights at a fundamental level.

One of the human rights most frequently employed by indigenous actors is self-determination, which the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights define as the right of “peoples” to “freely determine their political status and freely pursue economic, social and cultural development.”¹⁷ Self-determination has been a crucial legal principle for the success of Native American tribes in enshrining their sovereignty, including the Navajo Nation. But simply because self-determination is defined as a collective right, however, does not mean that it is without applicability to the rights of individuals.

Community as defined by Navajo values requires full inclusion of every member of society. Traditional peacemaking practices show, for example, that no resolution is possible without every individual involved in a dispute, including the family members of those directly involved, having an opportunity to speak.¹⁸ In the same vein, a “people” is comprised of its individual members, and collective agency can only exist through the empowerment of individuals. The Diné Fundamental Law states that “it is the right and freedom of *the people* that every child and every elder be respected, honored, and protected” (emphasis added). This law demonstrates that Navajo beliefs recognize

¹⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999: 171.

¹⁸ Zion, James W. "The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New." *American Indian Law Review* 11, no. 2 (1983): 89-103. At 3rd page of article.

individual rights as congruous with and necessary for the rights of “the people” to be realized.¹⁹ To truly value self-determination as a collective human right, then, requires the empowerment of all members of a group—marginalizing large swaths of society through law in no way achieves this goal.

VI. Conclusion

Hozho nahasdlį́ – “We are restored to good relations”

The history of the Navajo people is not a simple one to tell; it is filled with painful examples of violence and an ongoing struggle with colonialism. Ever since the Diné were forced on the Long Walk in the nineteenth century, they have been forced to live under a rule of law foreign to their own and cruel in its philosophy. However, through resilience and ingenuity the Navajo were able to use the master’s tools to dismantle the master’s house, incorporating the traditional Navajo lifeway into the very system that set out to destroy it. Still, many colonial artifacts remain, such as persisting anti-LGBT sentiments. Currents of Christianity run strong on the reservation, and to many Navajos—especially those raised in the boarding school era—it is the core tenet of their value system. Despairingly, evangelical Christianity is one of the largest sources of homophobia and transphobia for the Diné as it is for many other populations, and its strong presence will likely not change in the near future.

Although the challenges facing LGBT/*Nádleeh* individuals on the Navajo Nation are plentiful, the progress Diné people have made in reviving their language, culture, and beliefs can support a reasonable sense of optimism about the future. Our Creation Story shows that *nádleeh* were valued members of community who contributed knowledge and skill for the survival of the Diné, but the

¹⁹ CN-69-02 (2002) – 1 N.N.C. § 1 (2002).

history of colonialism gives context to how traditional social norms were subsumed by patriarchal decree and heteronormative edict. But the Navajo Nation is experiencing a legal revolution in its use of traditional principles in the law, and with it colonial relics are being upturned. *Hozho* and *ke'e* both require full inclusion of all individuals in society, and each are operable doctrines in court. The human right to self-determination has been crucial to the Navajo Nation asserting its sovereignty, but it can never be fully realized without recognizing the individual rights of all Navajos to participate in and contribute to society and collective identity.

Although it would be a major step forward in decolonizing our laws, the repeal of the Diné Marriage Act is not the final battle for full inclusion of LGBT/*Nádleeh* Navajos. LGBT Native Americans are one of the most disadvantaged groups in the country and the statistics are concerning to say the least, with higher rates of food insecurity, housing discrimination, physical violence, and attempted suicide than any other LGBT racial group.²⁰ Rather than demonstrating a misplacement of political priorities, these overwhelming social disparities further show the need for inclusive laws as the beginning of a long process to undo the wrongs which have moved our community away from *hozho*. But so long as Navajos continue to revive their cultural traditions and inspire younger generations to do the same, the Navajo Nation will continue to strengthen, and the contributions of all its members will increasingly be acknowledged, encouraged, and revered.

Ahébee'—“Thank You”

²⁰ National Congress of American Indians. “A Spotlight on Native LGBT Communities.” Report. Available at: http://www.ncai.org/policy-research-center/research-data/prc-publications/A_Spotlight_on_Native_LGBT.pdf.