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In the United States setting, Indian law may have many meanings. The focus and the substance of writing about Indian law will be determined by the meaning in which the term is used. Contributors to a journal devoted to comprehensive discussions on the law in its relation to Indians thus will have to define for themselves the particular areas comprehended under the general description of Indian law with which they plan to deal. Examination of some of the major fields may aid in an exposition of the functions of such a journal. The ensuing discussion is directed toward this end.

One area of study might deal with the pristine law of any one or more of the tribes occupying a domain before the arrival of the migrants from Western Europe in the seventeenth century. The opportunity for the study of this law, insofar as the borders of our country are concerned, is highly restricted. The tribes involved left no written or pictorial records to mark the operation of a legal system.[1] We do have the product of interviews, directed to those who have lived under such systems of tribal law, by trained scholars who then have reconstructed the systems as best they could.[2] We have the memoirs of those who themselves have lived under such systems, now that writing and printing to record them have become available.[3] However, we never can be assured that we have an accurate picture of the law as it was, uninfluenced by foreign contact. The external researchers have been men of other cultures, necessarily subjecting their comprehension and their analyses to filtration through their own background.[4] Moreover, their informants, as well as the authors of the memoirs, have had sufficient contact with the Amero-European culture that it must have exerted significant influence upon their own accounts.[5] Likewise, applications of the law that are being related come from the memories of recent generations. In almost all tribes, intermarriage with those of European descent has occurred.[6] The law studied, therefore, cannot have been uninfluenced by Euro-American ideas.

Making due allowance for all these factors, we still have materials from which to form an impression of this indigenous law. What emerges is not unlike that presented by studies of other primitive

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systems.[7] Law forms part of an amorphous mass, the mixture including also what today we term morals, religion, and ethics.[8] Administration is less by officiary and more by group action or by sacerdotal sanctions.[9] Primary concern is with keeping the peace and with maintaining group safety, although individual interests subsumed thereunder attain recognition.[10]

What is the utility of such a study? We gain from it a sense of the concerns of man living in a tribal state under comparatively simple conditions. We learn that even such a society arouses tensions and disappointments.[11] We have a basis for comparing the troubles of which law must take account in one primitive society as compared with like phenomena in another society, subject to variant geography, climate, natural resources, and spiritual direction.[12] We also have an opportunity to consider the impact between primitive law and a more complex system with which it finds itself in contact.

Another possible reference is to the historically recorded law of a self-governing Indian tribe in contact with the invaders from Europe. Usually the tribe will have been aligned with one or another of the groups of whites vying for control of the continent upon which they had arrived.[13] At times it will have tried to resist all encroachment.[14] Examples are many: the Iroquois Confederacy,[15] the Shawnees in the struggle over the middle border,[16] the Kickapoos,[17] and the Five (Civilized) Tribes of the southeastern United States. Inevitably, there will have been a cross-fertilization between the laws and the institutions of the two cultures. Notably this is true in the case of the Five Tribes who took on constitutional and legal forms borrowed from their white neighbors and antagonists but adapted them, with remarkable ingenuity, to their own needs.[18]

The Five Tribes present numerous examples of this adaptation. At least four instituted, through their written constitutions, fully developed legislative, judicial, and executive departments under a theory of separated and balanced powers.[19] Their courts produced written judicial opinions.[20] In the earlier days, the tribal legislation dealt with the institution of slavery.[21] Later, the laws were concerned with the replacement of the slaves by share-tenants,[22] whose disfranchised presence in increasing numbers ultimately doomed the Indian republics to extinction.[23] This provides one more demonstration in legal history of the impossibility of maintaining, in one society, two distinct groups in a setting of legal inequality. At all times, the tribes had to deal with the problem of intermarriage, and the provisions of their law give back an unflattering picture of the conduct of too many of the white spouses.[24] Interesting social insights are afforded by the first Choctaw law on ceremonial mar-

riage,[25] by the very modern Cherokee medical practice act with its preservation of the interests of the medicine man,[26] and by the Cherokee act providing responsibility of government for the torts of its servants,[27] long before the idea had caught on with substantiality in many American states.[28] The use of bargaining power by the Choctaws to make available allotment rights to their less fortunate brethren in Mississippi affords an interesting study in skills of negotiation.[29] The skill in legal draftsmanship arising from Five Tribe governmental experience carried over into the formulation of the constitution for the proposed State of Sequoyah,[30] which, in turn, provided the foundation for many elements in the constitution of the State of Oklahoma.[31] To say the least, the Five Tribe experience affords a rich mine for comparative legal institutional study based on indigenous foundations.

Still another department of learning to which the term "Indian Law" can be applied is the study of the relations between the government of the United States and the Indian tribes. Here the basic materials include the primordial acts by which these relations were effectuated,[32] the treaties, originally founded upon the conception that the tribes were quasi-sovereign but dependent entities with whom treaties properly could be made,[33] and the enactments passed, even by the First Congress,[34] under the power to "regulate commerce . . . with the Indian tribes."[35] The study must take account of the gradual replacement of treaties by statutes as the customary method for exercising federal power over Indian affairs. It will involve the interplay of statutes and of decisions, marking the ever-widening ambit of Washingtonian suzerainty,[36] and it will chronicle the final triumph of the statute as the sole means for managing Indian matters.[37] It must include due consideration of the bureaucracy[38] through which so much of the federal control has been exercised.[39]

Yet another area for study properly given the name of Indian Law involves the status of the so-called tribal governments set up either upon reservations[40] or in states where the reservation system does not obtain.[41] Such a study must consider the extent to which the reservation governments can be regarded as exempt from requirements imposed by the federal Constitution as some of these have claimed, even to the extent of denying to their "citizens" rights guaranteed by the Constitution of the United States.[42] The writer must be concerned with the degree of autonomy which these reservation governments may exercise, as against the Washingtonian government, and as against the states wherein the reservations are located.[43] There must be concern with the extent to which and the manner in which the autonomy granted actually has been exercised.

It will be concerned with intra-tribal political contests and the means of settling the conflicts thereby engendered.[44]

For the non-reservation states, a similar study must be concerned with the status of the individual Indian respecting the state wherein he resides. It must take account of so-called tribal governments, having proprietorial but not governing functions.[45] It must consider such things as the status of corporate entities, whether formed under federal statute or otherwise, to administer Indian-controlled enterprises.[46] It will be concerned with all aspects of Indian property and Indian personal relations and the interplay of state and federal laws thereon. As examples may be mentioned the adoption of Indian rules of descent and distribution for Indian land in some states[47] and the current concern of the National Conference of Commissioners on Uniform State Laws to make its drafts harmonize with Indian law.[48] The respective competence of the state and federal courts form part of this field of study.

This survey merely outlines several major areas which can be of concern to those interested in Indian law. It is evident that there will be plenty of material for future consideration. The Indian peoples are increasing in numbers. They are doing so on and off the reservations, alike, insuring the continued need for law in the adjustment of competing claims in which Indians are involved. Moreover, the various sciences, natural, physical, and social, must be brought in to assist the law. All this insures a broad, expanding, and continuing field of usefulness for a journal devoted to the law relating to Indians.

NOTES

1. "In writing of a plains tribe, therefore, one deals less with tangibles than in other sections of the country. One begins with living memories, works back to their recollection of other memories, and is then turned loose in the uncharted sea of legend. . . ." A. MARRIOTT, THE TEN GRANDMOTHERS, vii (1945).

It is true that Traveller Bird, in TELL THEM THEY LIE, *passim* (1971), purports to set out a survey of primitive Cherokee syllabary that would afford a means for the transmission of that law. But Bird confessedly got most of his information second-hand, and we have no means of knowing the authenticity of the ancient writings which he mentions among other sources. TELL THEM THEY LIE, 143. Moreover, much of his version of history is at utter variance with the accounts of other historians whom it is impossible to regard as suppressors of the truth or as unable to appraise their sources. *See* G. FOREMAN, SEQUOYAH, *passim* (1938); M. WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION, 22, 28 (1938); M. STARKEY, THE CHEROKEE NATION, Ch. V (1946); G. S. WOODWARD, THE CHEROKEES, 89, 131, 143, 222, 227 (1963); A. DEBO, HISTORY OF THE INDIANS OF THE UNITED STATES, 977 (1970). It seems proper to suggest that Bird's account is not to be taken as historically reliable.

2. The pioneer work in this area is K. LLEWELLYN and E. HOEBEL, THE CHEYENNE WAY (1941). The technique is carried on further by E. WALLACE and E. HOEBEL, THE COMANCHES, LORDS OF THE SOUTH PLAINS (1952).

3. *See* A. BASS, THE ARAPAHO WAY, recording the memoirs of Carl Sweezy, Ch. 3 (1966). For the same method, but involving secondhand reporting of the original encounter, see T. ALFORD (as told to Florence Drake), CIVILIZATION, Ch. VI, art. 200 (1936).

4. *Cf.* M. MEAD, NEW LIVES FOR OLD, 3–17 (1956).

5. Note T. ALFORD, *supra* note 3, at 42: "It remained for civilization and the white man's system of living to breed discontent and make invalids of a large number of our people."

6. The accounts are full of the existence of intermarriage from the first contact between the two groups. To cite a few: J. CAUGHEY, McGILLIVRAY OF THE CREEKS, 11 (1938); T. ALFORD, *supra* note 3, at 1-3, 198; R. RUBY and J. BROWN, THE SPOKANE INDIANS: CHILDREN OF THE SUN, 193, 230, 269 (1970); G. FOREMAN (ed.), A TRAVELER IN INDIAN TERRITORY, 48, 187 ("I must say a good deal about the half-breeds, the true civilizers after all.") (1930).

7. *See* E. WALLACE and E. HOEBEL, *supra* note 2, 209 ff.

8. *See* R. POUND, JURISPRUDENCE, 27ff. (1959).

9. *See* D. BERTHRONG, THE SOUTHERN CHEYENNES, 71ff. (1963).

10. *See* K. LLEWELLYN and E. HOEBEL, *supra* note 2, Chs. 10-12.

11. *Id.* at 253ff.

12. *See* A. VAUGHAN, NEW ENGLAND FRONTIER: PURITANS AND INDIANS 1620–1675, 123 (1965), concerning the aggressive expansionism of the Pequot tribe, and its consequences. *Cf.* Judges, 18:27-31.

13. *See* A. DEBO, *supra* note 2, Chs. 4 and 5.

14. *Id.* 48, 50.

15. *See* G. NAMMACK, FRAUD, POLITICS AND THE DISPOSSESSION OF THE INDIAN, *passim* (1969).

16. *See* J. OSKISON, TECUMSEH AND HIS TIMES, *passim* (1938).

17. *See* A. GIBSON, THE KICKAPOOS: LORDS OF THE MIDDLE BORDER, 29ff. (1963).

18. "In the case of the Five Civilized Tribes we have attempts to cast Indian minds into new collective moulds which were in large measure of white origin and intended to lead the individuals composing them into an independent participation in white culture and white civilization." Introductory Note, by John R. Swanton, to G. FOREMAN, THE FIVE CIVILIZED TRIBES (1934).

19. Cherokee Const. (1839), Art. II; Chickasaw Const. (1850) Art. 3; Choctaw Const. (1859) Art. II; Muskogee Nation Const. (1867) Arts. I, II, III.

20. There was legislative provision to this effect in Compiled Laws of the Cherokee Nation, (1892) § 146, stating: "All decisions of the supreme court (intermediate and final), shall be made and rendered, as well for the government and guidance of the lower courts and the citizens of this Nation in general, as for the just and true interpretation of the law, and the settlement of the dispute and administration of justice between the parties. Accordingly, each decision shall be accompanied with a statement, as far and as full as may be practicable, or necessary for the purpose, of the grounds of law or evidence upon and by reason of which, such decision has been made. Each decision shall be attended or preceded by a distinct statement of the issue between the parties, the situation of the case as set forth by the evidence before the court, the law or laws governing the case, and the interpretation and application of the same by the court, with the reasons therefor, and the principles of law or evidence involved in the suit and affecting the decision thereof; and of such other

matters and considerations, having relation to the decision, which the court may deem essential to give value and force to a law precedent for the government and guidance of the courts and citizens of the Nation in similar cases arising thereafter." The Chickasaw legislature prescribed, more succinctly, that in "all cases decided by the Supreme Court, the judgment shall be in writing and pronounced in open court, with the reasons of the Court for the same, which shall be recorded by the Clerk of the Court in a book kept by him for that purpose." Laws of the Chickasaw Nation (1899), Act of Oct. 7, 1876, § 4.

The Muskogee Nation apparently made no legislative provision for written decisions by the Supreme Court, but such decisions exist. The Oklahoma Historical Society has a record book wherein decisions of the Cherokee Supreme Court are written in longhand. Decisions by the Supreme Courts of other nations also exist in its collections, but they do not seem to be comprehensive.

21. Generally speaking, the statutes which have come down to us in published form have been excised of all formal reference to slavery, save as to provisions referring to "free males." However, a few direct references occur in the Choctaw laws. In 1849, it was enacted by the Choctaw Nation, "That the Creek Indian woman who is now in bondage, and in the possession of Archercartubber, is hereby liberated, and that she be allowed citizenship in this Nation." Const. and Laws of the Choctaw Nation (1869), at 104, § 9. Apparently, slavery was not an ethnic institution. 21st October 1858, an act was approved appropriating one thousand dollars "in full compensation . . . for a negro woman and child, illegally taken," apparently from the owner, by authority of the then chief of the Pushmataha District. Constitution and Law of the Choctaw Nation (1869), at 180. 23d October, 1858, an act was approved providing for penalties, *inter alia*, for, without lawful authority, causing a "person to be sold as a slave, or to be deprived of his liberty, or in any way held to service against his or her will." *Id.* at 182. The punishment was branding with the letter "T" upon the forehead and 100 lashes "well laid on the bare back."

The treaties entered into with the government of the United States at the close of the Civil War recognize the abolition of slavery. *See* E. McReynolds, Oklahoma: A History of the Sooner State, 229 ff. (1954).

22. *See* Comp. Laws, Cherokee Nation (1892) §§ 652-58; Laws of Chickasaw Nation (1899) Act Approved Oct. 17, 1876, 229–31, Act Approved Sept. 24, 1887, at 202, 203; Act Approved Oct. 13, 1892, at 295, 296; Act Approved Sept. 28, 1893, at 309; Act Approved, Dec. 14, 1898, at 440–42; Constitution and Laws of Choctaw Nation (1869), at 149, § 5; 206, 337, §§ 1, 2; 379, §§ 1-5; 386, § 1; 388, § 1-3; 402, §§ 1, 2; 415, §§ 2-14; Choctaw Laws 1887, No. 10, at 7, 8; *Id.* 1897, No. 39, at 28, 29; Laws, Muskogee Nation (1892) §§ 246–251, 299–307.

23. *See* A. Debo, Oklahoma: Footloose and Fancy Free, 24, 34 (1949).

24. *See* Comp. Laws Cherokee Nation (1892), § 659, requiring "foreigner" desiring to marry a Cherokee woman to make oath or satisfactory showing, in securing license, that "he has not a surviving wife from whom he has not been lawfully divorced"; § 660 requiring the applicant to furnish a certificate of good moral character signed by at least 10 reputable citizens of the Cherokee Nation, Cherokees, Delawares, or Shawnees by blood, acquainted with him for at least six months prior, and a like certificate executed by the clerk "of the county of which he was last a voter"; § 661, requiring the applicant to take oath that he would not seek federal protection for rights inconsistent with the constitution and laws of the Cherokee Nation, to support which he has required to take oath, as well; §§ 667, 668, forfeiting all rights of the male non-Indian spouse if he abandons his wife. Compare Constitution and Laws of Choctaw Nation, (1869) Act Approved Oct., 1840, for-

bidding a white man to "marry in this Nation unless he has been a citizen of the same for two years" and specifying that "no white man who shall marry a Choctaw woman shall have the disposal of her property without her consent; and any white man parting from his wife without just provocation; shall forfeit any [and?] pay over to his wife such sum or sums as may be adjudged to her by the district court for said breach of the marriage contract, and be deprived of citizenship."

25. *See* Const. and Laws of Choctaw Nation (1869), Act Approved Oct. 8, 1835, p. 70, specifying that "the parties shall go before the captain or preacher of the gospel in the Nation, who shall ask the groom: 'Are you willing to marry this woman whom you hold by the hand as your lawful wife?' if he says yes, then the captain or preacher of the gospel shall then ask the woman: 'Are you willing to become the wife of the man who holds you by the hand?' if she says yes, or be silent, he shall say: 'I pronounce you man and wife.' "

26. Cherokee Nation Comp. Laws (1892) § 746: "Provided that this Act shall not be construed as applying . . . to enchantments in any form; . . ." Compare Constitution and Laws of the Choctaw Nation (1869), Act Approved Oct. 5, 1837, p. 73, providing that "no 'sucking' or 'conjuring' Indian Doctor shall have the right to take any such property as horses, cattle, hogs or guns from any sick person who shall die under his care; nor from any person else unless he raises up the sick, then he shall be entitled to whatever shall be offered him; yet he shall have a right to take goods." While the drafting is a bit obscure, the general policy is apparent, "no cure, no pay," and the act excellently pictures the social conditions of the time.

27. Cherokee Nation, Comp. Laws (1892) §§ 723-726.

28. It is noteworthy that, in the face of the constitutional vesting of judicial power in the courts, the successful suitor was not to get his money except through an appropriation by the National Council, on his petition accompanied by a duly certified copy of the judgment. Perhaps this may be interpreted as a safeguard against interference with public property or with the processes of government rather than as an attempt to provide for legislative review of judicial action.

29. *See* A. DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC, 273 (1934).

30. *See* E. McREYNOLDS, *supra* note 21, at 313.

31. *See*, 1 W. MURRAY, MEMOIRS OF GOVERNOR MURRAY AND TRUE HISTORY OF OKLAHOMA, 316 (1945).

32. *See* S. MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE, 215 (1965).

33. *See* 1 Stat. L. 54, Ch. 10, § 1 (1789).

34. *See* 1 Stat. L. 49, Ch. 7, § 1 (1789); *Id.* 502, Ch. 8, Art. 3; *Id.* 67, Ch. 13, § 1; *Id.* 123, Ch. 14, § 2; *Id.* 136, Ch. 31; *Id.* 137, Ch. 33, §§ 1-7.

35. U.S. Const. (1789) Art. I, § 8.

36. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 77 (1942).

37. 16 Stat. L. 544, 546 (1871). *Cf.* A. DEBO, *supra* note 29 at 290.

38. *See* E. BENNETT, FEDERAL INDIAN LAW, Ch. VII (1958).

39. A good account occurs in E. BENNETT, *supra* note 38, at 215-68.

40. *See* general discussion in E. BENNETT, *supra* note 38, Ch. VI, for an introduction to the type of problems which arise.

41. Oklahoma probably affords the most striking example of this type of state, alike as to the area involved and the numbers of Indians concerned. For instance, the Five Civilized tribal governments have been continued in existence by Act of Congress, 34 Stat. L. 822 (1906). However, they have no power to govern individuals. They function primarily as the caretakers and the administrators of tribal property and funds.

42. Native American Church of North America v. Navajo Tribal Council, 272

F.2d 131 (10th Cir. 1959); *see* criticism of this decision in Note, *Applicability of Constitutional Limitations to Indian Tribal Government*, 16 OKLA. L. REV. 94 (1963).

43. This incredibly complex area cannot be adequately covered by citation in an article of this character. Typical of the problems raised are *ex parte* Webb, 225 U.S. 663 (1912); Kennedy v. Becker, 241 U.S. 556 (1916); United States v. McGowan, 302 U.S. 535 (1938); Williams v. Lee, 358 U.S. 217 (1959); Metlakatla Indians v. Egan, 369 U.S. 45 (1962).

44. McCurdy v. Steele, 353 F. Supp. 629 (Utah 1973); Dodge v. Nakai, 298 F. Supp. 17 and 26 (D. Ariz. 1969) are some of the many cases indicating the complexities of this problem. Current news items respecting the American Indian Movement show similar disputes.

45. This is true presently of the "governments" of the Five Civilized Tribes. *See* note 40, *supra*.

46. *See* W. BROPHY and S. ABERLE (eds.), THE INDIAN: AMERICA'S UNFINISHED BUSINESS, Ch. 3 (1966); A. DEBO, *supra* note 2 at 290.

47. *See* S. BLEDSOE, INDIAN LAND LAWS §§ 98, 106, 107 (1909).

48. The measures proposed by the Conference for uniform adoption by the several states obviously must take account of the extent to which Indian privileges may be beyond the power of the state to legislate upon, and also must take into consideration the impact which clearly valid provisions may have upon legitimate Indian institutions. One example is § 206(a) of the Uniform Marriage and Divorce Act providing, *inter alia*, that a "marriage may be solemnized . . . in accordance with any mode of solemnization recognized by any . . . Indian Nation, or Tribe, or Native Group." The object of the first two classifications is obvious. The last was adopted on consideration of the fact that there are "indigenous or other aboriginal cultural groups who do not consider themselves to be Nations or Tribes, such as some of the native groups found in Alaska and Hawaii." *See* Comment to §§ 206(a) in Official Draft of Uniform Marriage and Divorce Act (1971), at 14. The Conference considers the whole matter of such importance that it has constituted a special committee to survey the entire field, and to report upon such changes in existing products of the Conference as are necessary to take account of new developments in Indian law.