Denver Law Review

Volume 7 | Issue 9 Article 4

January 1930

# The Indian as a Lawyer

Editha L. Watson

# THE INDIAN AS A LAWYER

*By Editha L. Watson*

REACHING as far back as mankind itself, we find Law. The need of customs directing the lives of human beings, so that the most good might be done to the greatest number, must have been felt from the earliest dawn of reason. Such customs are the progenitors of our laws.

Among various tribes of North American Indians, social organization was developed to a remarkable degree. Every community of natives had a form of government. Laws, although unwritten, were strictly enforced, and deviation from them was punished.

## LEGISLATIVE AND JUDICIARY

Tribal government was the prevailing type of this social organization. In most tribes, military and civil affairs were separate. The civil government was lodged in a chosen body of chiefs of several grades, usually organized as a council, exercising legislative, judicial and executive functions in tribal affairs. In some parts of the country, women held office as chiefs.

"Both in the lowest and the highest form of government the chiefs are the creatures of law, expressed in well-defined customs, rites, and traditions." (Bulletin 30, Bureau of American Ethnology).

The Omaha were divided into ten gentes, each with a chief. Seven of these chiefs constituted a sort of oligarchy, and two of them exercised superior authority.

Among the Nootka, the tribes were divided into gentes, the heads of these divisions forming a council which determined the action of the tribe.

At the pueblo of Zuni, the governor attends to most civil matters, but the appointing body, consisting of certain priests, is the final court of appeal in matters of extreme importance.

In the greater part of the gulf area, the ruling power of the chiefs was very great. The Wateree were more like slaves than subjects of their chief. However, the Sun, or great chief,

of the Natchez, had an advisory council which sometimes considerably curtailed his authority.

The Abnaki had two councils, the grand and the general. The grand council, consisting of the chiefs and two men from each family, determined important tribal matters, and pronounced death sentences.

"When the (Chickasaw) chiefs thought it necessary to hold a council, they went to the king, and requested him to call a council. He would then send one of his runners out to inform the people that a council would be held at such a time and place. . . . All the talking and business was done by the chiefs. If they passed a law they informed the king of it. If he consented to it it was a law; if he refused, the chiefs could make it a law if every chief was in favor of it. If one chief refused to give his consent the law was lost." (Schoolcraft, quoted by Swanton, in Ann. Rep. 42, Bureau American Ethnology.)

The Chickasaw constitution of 1840 was an improvement over the unwritten laws of the tribe. The monarchial government was abolished and republicanism established. When the Chickasaw moved west, they agreed to adopt the Choctaw laws, by which a chief was elected every four years and captains every two years, the judges being elected by the general council. In 1856 the Chickasaw separated from the Choctaw and established an independent government on the same pattern.

The Creeks considered that "what was not done in the public square, in general council, was not binding on the nation." They held an annual general assembly in a principal village, where the chiefs must assemble to consider all matters of importance to the nation and its allies.

"Though the nation is summoned in what is termed their grand council, when the state of the nation is supposed to be examined into, and their oral laws made, the assembly say not a word in the matter. . . A few chiefs in the council house make the laws for their government, without condescending to ask an opinion or approbation in any case, the national body being merely convened to hear what is done, for after a law is digested by the chiefs, the national convention is informed of its tendency by the orator of the nation in a very

exact and precise manner." (Stiggins, quoted by Swanton, op. cit.)

Stiggins goes on to say: "They are the most obedient subjects under the sun to the penalties of it (the new law), be it oppressive or not. Should they infringe the law they will suffer beating, confiscation of their property or even death without a murmur or family resentment."

General E. A. Hitchcock, also quoted by Swanton, had this to say: "In each town there are persons called *lawyers,* from four up to 40 or even 45, according to the population, whose duty it is to execute the laws." Swanton comments: "By 'lawyers' we are evidently to understand leading men conversant with the customs and usages of their people." This strikes the writer as being a definition of the term as applicable to the modern exponent of the law as it was to the Creek.

General Hitchcock continues: "The general council for business is composed of the two principal chiefs and the Kings, including those of the Towns. . . There is another branch composed of one or two persons elected by each town from among the lawyers with one judge from the Upper and one from the Lower Creeks, which constitute what is called a Committee. . . Sometimes the number of the Committee is increased on important occasions. . . A law generally originates in the Committee. If approved there it is sent to the principal chiefs for their approval. If approved by the principal chiefs it is a law. But practically the chiefs make the laws and unmake them."

While slightly ambiguous, the purport of the foregoing seems to indicate that Creek politics were considerably like our own.

## DESCENT

Lineal descent, inheritance of personal and common property, and the hereditary right to public office and trust, are traced through the female line in many tribes (clan), through the male line in others (gens). For instance, consanguine kinship is traced through the blood of the woman only, among the Iroquoian and Muskhogean tribes. How-

ever, by the legal fiction of adoption, citizenship in the tribe could be conferred upon an alien.

The primary unit of the above named tribes is the Family, which comprises all the male and female progeny of a woman and of all her female descendants in the female line, and such persons as may have been adopted into it. The oldest woman in it is the head of the Family. It may be composed of one or more firesides.

The members of such a Family have the right to the name of the clan of which their Family is a member; the right of inheritance from deceased members; and the right to take part in Family councils. All the land of a Family was the exclusive property of its women.

On the contrary, among the Algonquians of the north and west, descent was reckoned in the male line.

The Omaha child also belonged to its father's gens, unless the father were a white or negro, in which case the child belonged to the gens of the mother.

Natchez chieftainship, although male, was transferred in the female line. Thus, when the great Sun died, his sister's son became Sun.

Such personal property of the Chickasaw deceased as was not destroyed or buried with his body, went to the brothers, sisters, or sisters' children.

Land, with the Zuni, passes to the daughters in preference to the sons.

Eakins, quoted by Schoolcraft, says: "The descent of (Creek) property is fixed. It is willed as the parents please. But if no will has been made, the property reverts to the children. . . A written will is binding. A verbal will, established by two respectable persons, is valid also. . . In former times, all relics were taken possession of by the deceased's sister's eldest son. But now they are the subject of legacy as other property."

Swanton (op. cit.) comments upon this: "This statement, of course, dates from a comparatively late period in the history of the Creek Indians, about the year 1850."

## LAND AND PROPERTY RIGHTS

Occupancy was the only form of land tenure recognized by the Indian. Thus, in certain tribes, as long as a man cultivated his tract of land, his title was not disputed, but if he neglected it, anyone who desired might take it.

Property rights are vested among the Tule of Darien, Southeastern Panama, partly in the community or village, in which case any individual in the village has a right to the wood, fruit, or hunting rights, as the case may be. A second class of property, such as household goods, is the hereditary property of the women. Ownership of money and crops is vested in the men who have the energy to plant and tend the plantations.

Similarly, Chickasaw lands were held in common, except for the use-ownership of those who built houses or cleared fields in certain places.

Kwakiutl hunters own their hunting grounds, and fight trespassers so fiercely that generally one or both are killed. The same holds with berry-picking grounds, rivers, fish traps, etc.

In such regions as California, the killing of game upon the land of adjoining tribes was rigidly prohibited and sternly punished.

Among the Creeks, Chickasaw, and Choctaw, land was controlled by the towns, but the tribe as a whole exercised a sort of eminent domain. This was usually latent, appearing especially when the town wanted to part with lands to outsiders. Within the town, ownership depended on occupancy, and was terminated with it.

## MARRIAGE AND DIVORCE

Among the Eskimos, marriage is barred within specified degrees of kinship. There is no wedding ceremony. Monogamy is prevalent, but there is no law against a successful hunter, who can afford them, having several wives. Divorce is informal—either party may leave the other on a slight pretext and may remarry. Children generally remain with the mother.

On the northwest coast, marriage between members of the same clan is forbidden. The Kwakiutl purchases his wife, and must renew the payment under certain conditions, else the marriage is annulled. If the husband expels his wife from caprice, he must return her dowry. If she has been unfaithful, he keeps the dowry, and may demand the gifts he gave her parents.

Some California tribes have a real purchase of wives; some merely ratify the marriage by an exchange of gifts. Divorce is easily accomplished at the husband's wish, and where the wives have been bought, the money is refunded. Among the Hupa, the husband may claim only half of his payment if he keeps the children.

Pueblo laws are the exact opposite. The husband is adopted as a son by his father-in-law, and married life begins in his wife's home. Thus she is mistress of the situation: the children are hers, as also the house, household goods, and grain in storage, and she can order her husband to leave, should occasion arise.

Marriage among the Creeks gave the husband no right over his wife's property, and if divorced, she kept the children.

The Winnebago man generally lived with his parents-in-law during the first two years after marriage. Throughout this time, he was practically the servant of his father-in-law, hunting, fishing, and performing minor services for him.

Among the Huron and Iroquois, the proposal of marriage had to be submitted to the woman's council by the girl's mother, and their decision was final.

The Plains Indians practiced polygamy, the younger sisters of the first wife being potential wives of the husband. Among the Pawnee and Siksika, gifts to the girl's parents were an essential part of the marriage ceremony. In case of elopement, the girl and her family were disgraced unless subsequent gifts legitimized the marriage. A man had absolute power over his wife, hence separation and divorce were common.

Among the Natchez, the ruling class was not allowed to inter-marry, but was compelled to marry into the common people.

A Chickasaw widow must remain single for from two to three years, but widowers could remarry as soon as they desired.

In eastern Carolina, whoever married a widow must assume all of her late husband's debts.

## CRIME AND PUNISHMENT

Murder between tribes was usually a preliminary to war. Within tribes, it was generally punished by the relatives of the murdered man, who killed the slayer or one of his relatives of equal rank. However, in eastern North Carolina, shell money was so esteemed that murder could be compounded by its means.

Murder was always punished by death, among the Chickasaw. If one of this tribe killed another, he was in turn killed by relatives of the slain man. If the murderer could not be found, it was lawful to kill his brother.

On the other hand, when a murder was committed among the Osage, and a relative of the slain person threatened the life of the murderer in revenge, it was the duty of the chief to compel the relative to keep the peace. If he persisted, he was expelled from the tribe. The chief required the murderer to bring gifts to the relatives of the slain man as a peace offering.

Adair, quoted by Swanton (op. cit.) mentions a Creek law: "If an unruly horse belonging to a white man, should chance to be tied at a trading house, and kill one of the Indians, either the owner of the house or the person who tied the beast there, is responsible for it, by their *lex talionis.*"

Swanton also quotes Gregg, concerning Creek laws of punishment: "Murder, rape, and a third conviction of stealing, are punished with death, usually by shooting."

Stealing, for the first offense, was punished by whipping; for the second, by cutting off the ears of the guilty person; and for the third, by death.

Neglect of the regular morning plunge among the Creeks was deemed a heinous crime, and was punished by dry scratching.

In Virginia, offenders of various sorts were made to kneel and were then beaten. In Florida, one who had failed in sentinel duty was struck several times over the head with a club.

### MISCELLANEOUS LAWS

From Virginia as far as the Mississippi, every individual, old and well enough, must bathe in the nearest running water the first thing every morning. This rule was particularly applicable to the men, who began the practice in early boyhood, and kept it up all their lives.

No Winnebago man was allowed to talk directly to his mother-in-law, or to look at her. The same rule applied to the woman and her father-in-law.

In the southeastern United States, the married women of child-bearing age, of a clan, had the right to hold council to choose candidates for chief and sub-chief of the clan. They also had the right to impeach chiefs and sub-chiefs.

The Kwakiutl had a form of tribute to their chiefs: when seals were taken, they kept one for their families, and gave the rest to the chief. Half of the mountain goats, twenty or more of every 100 salmon, etc., were the tributes exacted.

The following is the form of oath used among the Chickasaw: "Do you not lie? Do you not, of a certain truth?" was asked of the witness, and he replied: "I do not lie; I do not, of a certain truth."

### LAWYERS

In early Indian times, as in modern days, the lawyer and the statesman were practically one and the same. Referring back to the definition of lawyers, as "leading men conversant with the customs and usages of their people", this is seen to be true.

Among ancient lawyers, the names of Dakanawida and Hiawatha are most prominent and many of the constitutional principles, laws, and regulations of the Iroquois confederation (which, by the way, was the first union of states north of Mexico), are attributable to Dekanawida. Hiawatha, his brilliant disciple, deserves to be more widely known than he

is, because he was the proponent of the original League of Nations and the early advocate of universal peace. By his unceasing efforts, Hiawatha caused the Oneida, Mohawk and Cayuga to adopt his ideas, and they in turn persuaded the Seneca and Onondaga to confederate with them. This was the original League of Nations.

At the present time, there are many prominent lawyers who claim Indian lineage including such men as Vice-President Curtis, (Kaw), Ex-Senators Robert L. Owen (Cherokee), Matthew S. Quay (Abnaki), Paul O. Husting (Menominee), and John Randolph (Powhatan), and Representative William W. Hastings (Cherokee).