



New Mexico Law Review

1 N.M. L. Rev. 425 (Winter 1971)

Winter 1971

Reid, *A Law of Blood; The Primitive Law of the Cherokee Nation*

D. Sabatini Joseph

Recommended Citation

D. Sabatini Joseph, *Reid, A Law of Blood; The Primitive Law of the Cherokee Nation*, 1 N.M. L. Rev. 425 (1971).

Available at: <https://digitalrepository.unm.edu/nmlr/vol1/iss1/17>

This Book Review is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

BOOK REVIEWS

A Law of Blood; The Primitive Law of The Cherokee Nation

By

JOHN PHILLIP REID

New York, New York University Press, 1970

The study of the primitive law of American Indians has always been an academic stepchild, receiving sporadic attention from legal and anthropological scholars. Major research in the area was done during the thirties, culminating with Karl Llewellyn and E. Adamson Hoebel's classic work, *The Cheyenne Way* (Norman, Oklahoma, University of Oklahoma Press, 1941). With the publication of John Phillip Reid's book, *A Law of Blood* we now have another major addition to the study of primitive legal institutions.

Professor Reid has attempted to reconstruct the primitive institutions and "legal mind" of the Cherokee Indians during the 18th century. Much has been written about the Cherokees in the 19th century, when their tragic history and remarkable acculturation made them the foremost of the "Five Civilized Tribes." But material on 18th century Cherokee society is more difficult to locate, and it comes almost entirely from accounts written by white men. Llewellyn and Hoebel had the advantage of being able to interview elderly Cheyennes, who could identify the critical elements of 19th century Cheyenne jurisprudence in each fact situation they witnessed and described. Professor Reid, lacking information from this primary source, relies upon accounts of legal incidents as related by British soldiers, traders, and colonial officials, who interpreted Cherokee legal behavior from an Anglo-European viewpoint.

Nor are later Cherokee legal documents a primary source in most instances. When the 19th century Cherokees adopted a coercive government patterned after an American state, complete with written laws, a police force and a court system, they abandoned and promptly forgot most of their primitive legal customs. So it is only occasionally that primitive custom can be verified by later statutes, such as when clan vengeance for homicide was outlawed in 1810 by "an act of oblivion for all lives which they (the clans) have been indebted." In 1819, a law "resolved, that it shall not be lawful for any white man to have more than one wife, and it is recommended that all others should have but one wife hereafter," and in 1825, this

law was extended to include "any person or persons whatsoever." (Laws of the Cherokee Nation, Talequah, Cherokee Nation, Cherokee Advocate Office, 1852.)

To reconstruct a picture of the Cherokee legal structure, Reid had to build on documented incidents, making allowances for the misconceptions of his white sources, deducting primitive customs from the later statutes of the acculturated government, and using comparative examples from other Indian tribes with similar cultures. He was thus putting together a puzzle with some of the pieces missing, as he openly acknowledges. Nevertheless, he gives a comprehensive survey of the substantive areas of Cherokee domestic and international law, taken from sources documented in fifty pages of footnotes. He then suggests some of the possible foundations of Cherokee jurisprudence and legal structure. "It may be too late to think Cherokee, nonetheless we must try. It is not enough to know what the Cherokees did, we must also know how and why they did it—knowledge that will always remain just beyond our reach." (p. 247)

Cherokee law was incomprehensible to the British colonist because it was based on different premises. "The key to the Cherokee legal mind was the Cherokee's desire for social harmony and their resentment towards acts of hostility. (It) did not contemplate the need for exact standards." (p. 249) The primary affiliation of an individual was to his clan, rather than to the nation or the towns which comprised it. In fact, a strong national government did not emerge until the 19th century, and then only under extreme pressures from colonists and settlers. Different Cherokee regions or towns could often be found on different sides during the incessant wars between the British, the French, and the various Indian tribes. Decisions were by consensus rather than majority rule, for an individual might not consider himself bound by a decision unless persuaded that it was in his interest to conform. Rather than coercion and punishment, social sanctions like ridicule, withdrawal and ostracism were used to bring wrongdoers and non-conformists back into harmony with the community. Criminal acts were considered violations against the wronged individual, rather than against the tribe as a sovereign government. Within the boundaries of established custom, an individual had equality and freedom of action.

Since the clan was the primary unit of Cherokee society, it had certain legal responsibilities. When a homicide (intentional or accidental) occurred, the clan of the victim had the right and the responsibility to avenge it. Members of the victim's clan could kill either the slayer or a member of his clan, and the case was considered closed. This hardly corresponds to Anglo-American ideas about justice and

punishment, but clan vengeance was a fundamental concept of Cherokee jurisprudence, well understood and accepted by every member of the society. "The Cherokees may have lacked forensic institutions, but they recognized certain rules of right conduct and knew the consequences that resulted from their breach." (p. 233)

Law does not exist in a vacuum; it functions within a social framework. Reid has very ably presented Cherokee primitive law in the broader context of Cherokee life. He indicates the influence of geography on Cherokee economic and political life. He analyzes Cherokee international law in relation to the political and military situation of the time. By including the social and historical background, Reid shows how the legal structure functioned to meet the needs of Cherokee society. *A Law of Blood* is an important book, not only because it is an excellent and readable presentation of a primitive legal system, but also because it casts light on the reasons and causes for Cherokee political behavior in the Colonial period.

Joseph D. Sabatini

Assistant Law Librarian, UNM

Editor, American Indian Law Newsletter