INDIAN LAW/ RACE LAW

A Five-Hundred-Year History

JAMES E. FALKOWSKI

INDIAN LAW/ RACE LAW

A Five-Hundred-Year History

JAMES E. FALKOWSKI

PRAEGER

New York
Westport, Connecticut
London

Library of Congress Cataloging-in-Publication Data

Falkowski, James E.
Indian law/race law : a five-hundred-year history / James E. Falkowski.
p. cm.
Includes bibliographical references and index.
ISBN 0–275–94318–6 (alk. paper)
1. Indians—Legal status, laws, etc.—History. 2. Indians of North America—Legal status, laws, etc.—History. 3. Indians of North America—Treaties—History. 4. Human rights—Western Hemisphere—History. I. Title.
KDZ480.F35 1992
346.701'3—dc20
[347.0613] 91–46995

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 91–46995
ISBN: 0–275–94318–6

First published in 1992

Praeger Publishers, One Madison Avenue, New York, NY 10010
An imprint of Greenwood Publishing Group, Inc.

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

10 9 8 7 6 5 4 3 2

Our interest in Indian self-government today is not the interest of sentimentalists or antiquarians. We have a vital concern with Indian self-government because the Indian is to America what the Jew was to the Russian Czars and Hitler's Germany. . . . The issue is not only an issue of Indian rights; it is the much larger one of whether American liberty can be preserved. If we fight only for our *own* liberty because it is our own, are we any better than the dog who fights for his bone? We must believe in liberty itself to defend it effectively. What is my own divides me from my fellow man. Liberty, which is the other side of the shield of tolerance, is a social affair that unites me with my fellow man. If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who never were Indians and never expect to be Indians fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth; we are fighting for what Las Casas and Vitoria and Pope Paul III called the integrity or salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes that should carry us through many defeats.

—Felix S. Cohen, 1907–1953[1]

Preface

I have been studying Indian law for about half my forty years. My first memory of native peoples was as a child, driving through the Allegany Indian reservation west of Salamanca, New York. I vividly recall seeing the shell-shocked faces of the soon-to-be-removed Seneca Indians on the front steps of their homes, which were surrounded by land that looked as if it had been carpet bombed to make way for the flood waters of the Kinzua Dam. It was many years later that I learned we broke a treaty with these people, not for flood control for Pittsburgh but to take the last Six Nations Confederacy lands in Pennsylvania and place one of their traditional religious centers under five hundred feet of water.

I began to pursue my academic interests in Indian law under the guidance of Helen DiPota at Erie Community College. After transferring to the University of Buffalo, I took as many courses as I could from the three best teachers (other than my parents) that I ever had: Oren Lyons, Howard Berman, and Johnny Mohawk. Mr. Lyons taught me about the theocratic indigenous government and religion that he represented. Mr. Berman taught me how to do original research. Mr. Mohawk taught me that the most complicated ideas in the universe can be broken down into easy-to-understand concepts, and vice versa.

After a brief respite from my academic career into a more concrete career, I followed my fate of pursuing the law. I attended the University of California at Davis, where I learned only how to pass the bar. In an

attempt to preserve my values, I coauthored a law review article that instinctively expressed many of the international human rights principles about which I was soon to learn more.

At the University of Essex (England), I gained international experience under the direction of Malcolm Shaw. My research was assisted by a project for Davis Weisbrodt while he was at Amnesty International. My dissertation at Essex focused on the international human rights of American Indians and coincided with the first chapters of the United Nations' *Study of the Problem of Discrimination against Indigenous Populations* and the founding of the Working Group on Indigenous Populations.

After beginning my professional career, first as a public defender and later as a district attorney, I followed the developments made by the working group with great interest. It has made substantial progress, but it still has not reached the top of the mountain. With the five-hundredth anniversary of legalized discrimination against the indigenous peoples of the Western Hemishphere, participants in the international legal system are pretending to listen to indigenous peoples for the first time, although they are still unwilling to make the fundamental changes necessary to remove the institutionalized discrimination against them. This book is not as eloquent as I would like, but it is the truth as I see it.

INDIAN LAW/ RACE LAW

Contents

Introduction

Indian law is race law.[2] This book is an attempt to illustrate that fact. The human rights of the indigenous peoples of the Western Hemisphere have been constantly violated since their lands were first invaded by European colonizers.[3] The Indian peoples have been subject to discrimination, ethnocide, and genocide.[4] Over the last five hundred years, the violations of their rights to exist, own land, and be self-governing have become institutionalized.[5]

The legal system of the European colonizers, as adopted by the European settler population, has developed special legal doctrines that only apply to the indigenous peoples and that legalize the "erosion" of the rights of the "vanishing race."[6] However, Indian peoples are not vanishing, nor is the process of the erosion of their rights a natural one.[7] Only recently has there been a reexamination of the pervasive racial prejudice inherent in the special legal doctrines that are used to place America's indigenous peoples into their legally anomalous situation.[8]

This book will trace the treatment of the indigenous peoples of the Western Hemisphere by the Christian-European "international" legal system to place current law into historical perspective. It will focus on the rights of Indian nations in their treaty relationship with the United States, although references to other indigenous peoples will be freely made. It will attempt to dispel some of the prevalent myths that were developed by

the overseas European settler population to disregard the inherent and inalienable right of indigenous peoples to self-determination.

Indian Law/Race Law will demonstrate how two systems of law—one applying to "civilized" peoples, and the other applying to the so-called "backwards races"—were devised and justified. It will explain the beginnings of this dual system of law in the Western Hemisphere which began with Columbus's so-called "discovery" of America and the papal bull Inter Caetera in 1493. It will outline the expansion of international law to include more of the so-called "backward races," but will also reveal how the indigenous peoples of the Western Hemisphere remain excluded. It will conclude that although the recent steps toward the international recognition of the problem of discrimination against indigenous peoples by the United Nations should be encouraged, care must be taken to end the institutionalized violations of the human rights of indigenous peoples.

NOTES

1. F. S. Cohen, The Legal Conscience 313–14 (L. Cohen ed. 1960): Cohen has been referred to as the "Blackstone of Indian law"; R. Strickland, Genocide-at-Law: An Historic and Contemporary View of the Native American Experience, 34 U. Kan. L. Rev. 713, 740 (1986); *see also* Biography of Felix S. Cohen, 9 Rutgers L. Rev. 345 (1954).

2. "The law affecting land rights of indigenous peoples in the United States is racially discriminatory, and manifestly offends fundamental human rights widely recognized in international law": Indian Law Resource Center, United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination, in Rethinking Indian Law 25 (National Lawyers Guild Committee on Native American Struggles ed. 1982); *see also* W. R. Jacobs, Dispossessing the American Indian: Indians and Whites on the Colonial Frontier (1972).

3. This is often expressed as the "discovery" of an inhabited land: F. Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest 39 (1975).

4. R. Sanders, Lost Tribes and Promised Lands: The Origins of American Racism (1978); J. Stewart and P. Wiley, Cultural Genocide, Penthouse, June 1981, at 80; R. Weston, Racism in United States Imperialism (1972); R. Dunbar Ortiz, Indians of the Americas: Human Rights and Self-determination (1984).

5. G. Alfredsson, International Law, International Organizations, and Indigenous Peoples, 36 J. Int'l. L., Spring/Summer 1982, 1, at 113; U.N. Doc. E/CN.4/Sub.2/NGO/98.

The American Indian's most valued possession is his land. From the moment English settlers debarked at Jamestown, Virginia, white men took Indian land. Two billion acres were taken from the time of the American Revolution until the end of the nineteenth century. By 1970, all Indian land acquired by white men had a value of $560 billion. Yet, a century earlier, the lands' original inhabitants had been paid only one tenth its value. Poverty and subservience have forever followed. "When the Indian was dispossessed of his land, he lost all hope of finding any niche in civilized society except that of servant or slave." [footnotes omitted]

L. Landman, International Protection for American Indian Land Rights 5 B.U. Int'l L.J. 59 (1987).

6. B. W. Dippie, The Vanishing American: White Attitudes and U.S. Indian Policy (1982); D. McNickle, Native American Tribalism (1973); R. Horsman, Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism, III, ch. 10, at 189 (1981).

7.

Contrary to the insistently repeated theories, indigenous populations are not in the process of physical disappearance but are indeed now increasing in absolute figures in almost all the countries concerned. In two cases they are also increasing as a percentage of the population of the country in which they live.

U.N. Doc.E/CN.4/Sub.2/476, at 2.

8. The American and English Encyclopedia of Law 213 (D. S. Garland & L. P. McGehee eds. 1889); W. Washburn, The Moral and Legal Justification for Dispossessing the Indians, Seventeenth-Century America: Essays in Colonial History (J. Smith ed. 1959); W. Jacobs, Dispossessing the American Indian 148 (1972); J. Clinebell & J. Thompson, Sovereignty and Self-Determination: The Rights of Native Americans Under International Law, 27 Buf. L. Rev. 669, 670 (1978).

1

The Early Development of International Law and the "Discovery" of the Western Hemisphere

International law reflects a constant tension between existing law and the rules that ought to govern relations among states.[1] Historically it reflects a double standard, with one set of rules that apply to Christian-European states and another set that applies to the so-called "backward races."[2] Although international law is evolving toward the recognition of the rights of all peoples, remnants of this double standard remain firmly entrenched in the body of existing international law.

What has come to be known as international law was originally called the European Law of Nations or, even more accurately, the public law of Christian Nations.[3] The major premise of the European Law of Nations was that, absent an agreement to the contrary, war was the basic state of international relations—even among Christian-European states.[4] The European Law of Nations had its beginnings in the microscopic city-states system of ancient Greece and Italy.[5] During the Roman Empire, the emperor was the single source of authority. After the fall of the Roman Empire, the Catholic Church became the dominant influence in the development of international law.

Although international treaties were an important source of international law, the popes—claiming a line of succession back to Saint Peter—also played a central role in the development of international law. Citing their divine spiritual mission, the popes claimed supreme arbitral power over all Christian princes in temporal matters. On occasion, a pope would either

issue a bull (a formal authoritative statement) or would otherwise mediate disputes between Christian princes. These papal actions were backed with sanctions that proved to be effective at the time: interdiction (denial of communion or other sacraments) or excommunication.[6]

For hundreds of years, international law was confined exclusively to relations among Christian-European states. Gradually, the test of civilization—in a narrow, Western sense—replaced the test of Christianity as the condition for recognition as a member of the Family of Nations.[7] This transformation was fairly recent. Turkey became the first non-Christian state to be received into the Family of Nations in 1856, although its territorial sovereignty remained subject to restrictions until after World War I.[8] Contemporary international law claims to cover relations between all sovereign states, but as will be seen, the historical exclusion of some non–Christian, "noncivilized" states persists to this day.

The expansion of the European Law of Nations throughout the rest of the world only followed the expansion of European trade and colonization throughout the rest of the world. The primary purpose of the European Law of Nations was to assist in the process of European expansion. It was intended to advance the Christian, capitalist, imperialist interests of the colonizing European powers, and it showed little or no concern for the rights of non-European peoples.[9]

A number of historical antecedents laid the foundation for the dynamic period of European expansion that began in the fifteenth century. During the early Middle Ages, Europe was largely self-contained and self-sufficient. In the seventh century, Europe was more concerned with resisting the invasions of the proselytizing, colonizing Muslims than with expansion. The Muslims believed that they were commissioned by their God to bring the Islamic value system into the world through holy war.[10]

This period of European self-containment ended in the eleventh century with the Christians' own holy war—the Crusades. Although the Crusades had the primary purpose of expelling the Muslims from their occupation of Jerusalem, it also had the incidental effect of creating a demand for trade goods from the Far East, from which overland trade routes passed through the Mongol Empire to various ports in the Middle East. The major sea routes passed through the Indian Ocean and the Red Sea to Alexandria, Egypt. With the fall of the Mongol Empire in the early fifteenth century, the overland trade routes were closed and Venice obtained a monopoly over the trade from Alexandria.[11]

This Venetian monopoly led other European nations to seek new trade routes to the Far East. By this time, translations of the works of Ptolemy, the second-century Alexandrian astronomer and geographer, were available in Europe. Through exposure to these works, a growing number of Europeans believed that the world was round and that the best way to

reach the East was to sail West. Yet others believed that the best sea route to the East was to sail around Africa. Both these routes were attempted.

The exploration of the coast of Africa was mainly a Portuguese concern in the fifteenth century, although the Castilians had already occupied the Canary Islands (off northwest Africa). In 1452 Pope Nicholas V granted to King Alfonso of Portugal "general and indefinite powers to search out and conquer all pagans, enslave them and appropriate their lands and goods."[12] In 1455 and 1456 Pope Nicholas V gave Portugal the exclusive right to trade and acquire territory in the region lying south of Cape Bojador (western Africa), through and beyond Guinea "all of the way to the Indians."[13] Despite these papal grants, Castile made a rather dubious claim to Guinea based on earlier possession by their ancestors, the Visigothic kings.[14]

In 1469 the marriage of Ferdinand of Aragon to Isabella of Castile led the couple to achieve leadership in the expansion of Europe. With their marriage, almost all of what is now Spain became united, with the exception of Granada, which was occupied by the Moors. In 1479 Portugal and Castile negotiated a treaty that cleared up many of their disputes. Under this agreement, Alfonso V of Portugal renounced his claims to the crown of Castile and recognized the Castilian possession of the Azores (west of Portugal), Cape Verde Islands (off West Africa), Madeira (north of the Canaries), and Guinea.[15] The Portuguese then continued their southward explorations along the coast of Africa, while the Spanish turned their attention in other directions.

Ferdinand and Isabella of Spain were devout Catholics. They wanted to create a strong and unified nation, and they believed that the Muslims and Jews were a threat to this goal. In 1480 Ferdinand and Isabella established the Spanish Inquisition, which lasted over three hundred years. The Inquisition was a special court that imprisoned or killed all persons suspected of not following Roman Catholic teachings.[16]

The year 1492 was a big year for Spain. In that year Spanish forces conquered Granada, the last center of Moorish control in Spain, and the last of the Spanish Jews were either converted, killed, enslaved, or driven from the country. This was also the year that Columbus returned from his first voyage to the West, convinced that he had discovered a new route to India. On his way back to Spain, Columbus was forced by storms to land in Portugal, whereupon the king of Portugal claimed Columbus's discovery for himself. The Portuguese king believed that Columbus's discovery was within the bounds of Guinea.[17] Although the Portuguese had rounded the Cape of Good Hope (South Africa) by this time, it would still be another six years before Vasco da Gama reached India via this route and returned to Portugal.[18]

Upon learning of the discovery made by Columbus, Ferdinand and Is-