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BOOK REVIEW

A Law of Blood: The Primitive Law of the Cherokee Nation, by John Phillip Reid. New York: New York University Press. 1970. Pp. 340. \$10.00.

When a recognized scholar of American legal history writes a heavily documented¹ study of an American Indian tribe which was populous² and prominent two and a half centuries ago as well as being highly regarded today,³ the result should be eminently worthwhile. It is. The author,⁴ with impressive academic credentials⁵ and two solid works of individual judicial biography to his credit,⁶ did his usual elaborate research in this anthropological and historical restudy and evaluation of the indigenous legal system (including customs and mores) of the Cherokee Nation prior to its being appreciably affected by the exploring and, later, invading Europeans. That his book does *not* focus on the twentieth century, or even the nineteenth century, is arrestingly emphasized by these sentences from its dust jacket:

During the early 19th century the Cherokees drafted their constitution, the model for other nations, and defended their rights in the courts to a far greater degree than did the other tribes. The Cherokee's request for law and their attempt to secure the rights of the American Indians through litigation rather than war, have their roots back in primitive times when they were distinctly a people of law. This book examines their law at the *earliest period of contact with Europeans*—their laws of the feud, marriage, property, war and international relations, as well as their constitution and government.⁷

This reviewer was favorably impressed by this book despite receiving a distinct shock from the book's second paragraph where, after quoting a latter-day Cherokee's appraisal of her ancestors as "self-confident and independent . . . generous. . . Fearless in danger, . . ." the author stated: "The Cherokees were generous and independent, but . . . they were neither self-confident nor fearless; indeed, if anything they were indecisive and pusillanimous."⁸ Reid then proceeded to say "[T]he Cherokees were the least warlike of all the great nations in the eastern half of the continent. Indeed, the other Indians thought them cowards . . . and they have been recorded [as] first entering history as a defeated people, forced by the Delawares to flee the Ohio Valley, and finally in the late eighteenth cen-

ture laying aside their arms forever, crushed by small bands of American frontier irregulars.”⁹

Without doubting the author’s sincerity, for he adds, “[I]t is generally agreed . . . that the Cherokees were among the most talented, the most intelligent, and were one of the least barbarous of the American nations,”¹⁰ one might note that the author does not quote the Tuscarora, who, because of attacks by the Cherokee, were driven as refugees from North Carolina into the [New York] Iroquois League.¹¹ The Catawba and the Cheraws were two other tribes who presumably respected Cherokee valor. A tradition in the Catawba tribe was that the tribe migrated southward about the time the whites discovered North America, reached Cherokee lands, had a day-long sanguinary battle with the Cherokee, slept on the bloody field, and the next morning proposed peace and brotherhood, which the Cherokee accepted. The Catawba thereafter wrested from the Cheraws the diminishing area the Cheraws ruled.¹²

Cornstalk, the Shawnee chief, must not have despised the Cherokee warrior. The very next year after his 1775 peace treaty with the whites, “. . . continued white encroachments sent him southward . . . to solicit aid of the Cherokees in a proposed general Indian offensive.”¹³ The author himself writes that the Cherokees *waged* against the Creek confederacy “a costly war which lasted, off and on, from 1715 to 1753.”¹⁴ Despite their relative unfamiliarity with field artillery, the Cherokee cavalry gave a creditable account of itself at the Battle of Pea Ridge against the Union forces, over half a century after “laying aside their arms forever.”

The author has read as many sources as he reasonably could, including most of the best, and, testing them with a lawyer’s ear for consistency and probability, gives his readers the fruits of his extensive research and his own conclusions, citing the sources on which he relies. Thus he notes that “[T]he Cherokees have been classified as a mixture of the Algonquin-Iroquois dolichocephalic type and the Eastern and Southern brachycephals.”¹⁵ The author describes the terrain of their Appalachian homeland noting that the Cherokees had no truly national government and that their 50 to 64 towns were largely autonomous, divided into four or even five regional groupings. They spoke three markedly different dialects (the Lower, or Alati; the Middle, or Kituhwa, and the Upper, or Atali).¹⁶ The members of a particular town belonged to various of the seven matrilineal clans¹⁷ which permeated the nation, and the author concludes that the Cherokee could properly be called a “nation” because, in the eighteenth century, “nation” was used to describe both

an ethnic group and a geographical area, although in the nineteenth century "tribe" had become the customary term to apply to an Indian "nation," after, and presumably because, the non-Indian Americans had in the interim come into contact with the nomadic Western Plains Indians.¹⁸ The author adds, "If any external factor gave the Cherokees a sense of national unity, it was fear and hatred of their Iroquois [linguistic] cousins."¹⁹

Although the Cherokee clan system resembles that among Iroquoian and Muskhogean tribes generally,²⁰ the author recognizes it as central and paramount in Cherokee law, social organization, and culture:

It would be impossible to classify the clan in contemporary legal terms, except to say that it was the most important unit in Cherokee constitutional law. As the exogamous institution [within which intermarriage must not occur]. . . , as well as the agency responsible for the maintenance of order and the redress of wrongs, the clan seems to belong in the category of public law. But most of its functions, such as the education of children and the imposition of sanctions, were . . . private law. . . .

In actuality, the clan was too basic to Cherokee society to be discussed merely by legal concepts. It was "the family writ large." More than a family, the clan was a corporate entity based on kinship . . . an arm of government to which all police power was entrusted. Membership in a clan was more important than citizenship in the nation. Constitutionally speaking, there were no Cherokee citizens, only clan members. . . . An alien [once adopted by a clan, became] equal to any native-born Cherokee.²¹

The children of a marriage were the relatives of their mother, not of their father, and following divorce they would stay with her, not with him. If she died, her relatives, particularly her eldest brother, would claim and protect the children. Even during the marriage, the Cherokee youth was instructed and disciplined by his mother's brother. The father, being a stranger to his son's clan, would have to account to that clan if he harmed his son, and might be killed by it if he killed his son. The author tellingly emphasizes clan importance, and its dependence [fictional in the case of adoption of an outsider or white man into the clan] on the maternal relationship, by noting that some authorities translate the Cherokee word for "brother" (ditlu-nu-tsi) as "same mother";²² that the Cherokee language had no words for reckoning kinship on the father's side;²³ that among the Cherokee, as in many other tribes, the relationship between brothers having the same mother was the strongest of all kinship bonds;²⁴ that

the Cherokee must not marry within his own (*i.e.*, his mother's) clan nor within his father's clan, however distant in generations the common ancestor, but that a man's son and daughter by two different wives could marry each other, if belonging to different clans.²⁵

The book contains accounts of or references to many other features of Cherokee law, including clan responsibility; cities of refuge (which once encouraged the belief that the Cherokee were one of the Lost Tribes of Israel); infanticide (permitted to the new mother); inheritance; voluntary acceptance in homicide cases of compensation in lieu of a reprisal homicide against someone in the slain person's clan; the equal right of men and women to speak in local councils (and the right of a few honored women to speak in national councils), the reaching of council decisions by consensus after the dissidents became silent or withdrew from the meeting (this principle epitomizing "the Cherokees' abhorrence of any form of coercion"²⁶); ostracism; and the persuasive prestige rather than the power of Cherokee leaders.

The book has no labeled preface, foreword, or introduction, but hidden between the footnotes and the tolerable index and occupying less than a full page, is a paragraph headed "Acknowledgments" in which appears an otherwise unheralded but most encouraging clause: "... this first volume of a projected legal history of the Cherokee Nation, ..." ²⁷

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NOTES

1. Of the book's 340 pages more than 50 are devoted to footnote citations of sources, collected (for each chapter) near the end of the book. Except where otherwise stated, page references herein are to the book under review.

2. "They are generally believed to have been the largest Indian nation in the east" (P.6). Reid cites one authority as estimating there were 22,000 Cherokee in 1650. *Id.* Cf. CORRAN, *THE CHEROKEE FRONTIER: CONFLICT AND SURVIVAL*, 1742-62 (1962), 3: "In the 18th Century the Cherokee was the largest Indian tribe on the frontiers of English America; in 1755 they numbered upward of 10,000 persons, including 2,500 or 3,000 fighting men."

3. Non-Oklahomans are surprised to learn that in Oklahoma the two most famous Oklahomans are Sequoyah (inventor of the Cherokee syllabary) and Will Rogers (the Cherokee cowboy humorist, columnist, radio and movie star). In his own lifetime, Rogers' popularity was so great in Oklahoma that an unrelated white man, William ("Bill") Rogers, won statewide election to Congress by having his ballot listing read "Will Rogers". He served five terms, until that at-large seat was abolished. The "real Will's" son, Will Rogers, Jr., was elected to Congress from California.

4. Obviously not the trader John Reid, who insisted in 1775 that lawyer Richard

Henderson specify the exact limits of the land he wanted the Cherokees to deed to him, before asking them to sign the "path deed," Henderson retorting that after the deed was signed he would read the boundaries. J. BROWN, *OLD FRONTIERS: THE STORY OF THE CHEROKEE INDIANS FROM EARLIEST TIMES TO THE DATE OF THEIR REMOVAL TO THE WEST* (1838; Southern Publishers ed., 1938) 12. Trader Reid is not listed in the index of the volume under review.

5. A.B., Georgetown University, M.A., University of New Hampshire, L.L.B., Harvard, LL.M., and J.S.D., New York University, and a member of the New York University School of Law faculty since 1960.

6. *CHIEF JUSTICE: THE WORLD OF CHARLES DOE* [of New Hampshire] (Harvard University Press, 1967); *AN AMERICAN JUDGE: MARMADUKE DENT OF WEST VIRGINIA* (New York University Press, 1968). The latter volume grew out of the author's J.S.D. dissertation, and this reviewer sat on that dissertation committee.

7. Emphasis supplied. If "request" jolts, substitute "quest."

8. P. 4. (An obvious typographical error has been corrected).

9. P. 5 The Walam-Olum (national legend of the Delaware *confederation*) has the struggle of the Algonquin Delaware with the Cherokee continue throughout the reign of three chiefs before the latter removed from their Ohio home, possibly in 13th Century. BROWN, *OLD FRONTIERS*, n. 4 *supra*, 15.

10. *Id.*, at note call 17, citing, *inter alia*, VAN EVERY, *DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN* 11 (1966).

11. P. 8, 197.

12. GREGG, *RT. REV. A., HISTORY OF THE OLD CHERAWS* (Columbia, S. C., 1925), 3. *See also*, REID, 171.

13. BROWN, *OLD FRONTIERS*, n. 4, *supra*, 7.

14. P. 9. (Emphasis supplied.) In 1750 Governor Glen found the Creek men favoring making peace with the Cherokee, one reason being that the Cherokee warriors had closed the Creek trade path, impoverishing the Creek towns. REID, 115.

15. P. 4, n. 8, citing Bloom, *The Acculturation of the Eastern Cherokee: Historical Aspects*, 19 *N.C. HIST. REV.* 323 (1942).

16. Pp. 6, 9, 12.

17. P. 37.

18. P. 35.

19. P. 8.

20. Consult *HANDBOOK OF AMERICAN INDIANS NORTH OF MEXICO* (Hodge, ed. 1959), Vol. 1, 303.

21. P. 37.

22. P. 38, n. 15.

23. P. 41.

24. P. 40. *Cf.* at 39: "The consanguine kinship existing between uterine brothers and sisters is said to have been the warmest, strongest, yet most respectful in North American Indian culture."

25. P. 42. The author makes clear, however, that this rule applies only if the two wives were not in each other's clan. If the two wives were of the same clan this would not prevent the husband of one from marrying the other. If they were not of his *mother's* clan and not of his *father's* clan, one wife could be of the same clan as the other wife, but in such case their respective children could not intermarry.

26. P. 64.

27. P. 332.