

Journal of Law, Property, and Society

Volume 2

Commentary

November 2016

Commentary on *The Ongoing Indigenous Political Enterprise: What's Law Got to Do with It?*

Philip J. Deloria

Dalee Sambo Dorough, *The Ongoing Indigenous Political Enterprise: What's Law Got to Do with It?*, 2 J. L. PROP. & SOC'Y 71 (2016), <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Dorough.pdf>.

This commentary is in a series on the Indigenous Peoples Movement. See the introduction to this series and links to its other articles: <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-HardinAskew.pdf>.

Recommended citation: Philip J. Deloria, Commentary, *The Ongoing Indigenous Political Enterprise: What's Law Got to Do with It?*, 2 J. L. PROP. & SOC'Y 95 (2016), <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Deloria.pdf>.

This commentary is published for free and open access by the Association for Law, Property and Society (<http://www.alps.syr.edu/>). Other articles can be found on the Journal's website (<http://www.alps.syr.edu/journal/>).

Journal of Law, Property, and Society

ISSN 2373-5856

A publication of the Association for Law, Property and Society

Editors-in-Chief

D. Benjamin Barros
Dean and Professor of Law
University of Toledo College of Law
Ben.Barros@utoledo.edu

Jessica Owley
Associate Professor
SUNY Buffalo Law School
jol@buffalo.edu

European Editor

Lucy Finchett-Maddock
Lecturer in Law
University of Sussex
L.Finchett-Maddock@sussex.ac.uk

Executive Managing Editor

Dionne E. Anthon
Assistant Professor of Legal Skills & Values
Florida International University College of Law
danthon@fiu.edu

Commentary on
*The Ongoing Indigenous Political Enterprise:
What's Law Got to Do with It?**

Philip J. Deloria**

Dalee Sambo Dorough's paper, *The Ongoing Indigenous Political Enterprise: What's Law Got to Do With It?* serves as a beautiful bookend to the first paper we heard today, bringing us back around to the United Nations, and offering a sense of the intricacy and complication that ensue when we consider it as a primary forum for indigenous issues. Dalee shows us the strategy that has been central: of linking some of the non-binding provisions in the UN Declaration of the Rights of Indigenous Peoples to legal structures that are in fact binding – or that have the promise of that in the future. That attachment happens at the level of words themselves, and at the level of the ethical and moral positions that underpin both binding and non-binding declarations.

Our colleague Monica is a lawyer and thus better positioned to comment on the question of law. I'm actually a musician, which is not as useful. But I used to work in a wedding reception band in the 1980s, and I can remember playing the Tina Turner song "What's Love Got To Do with It?" over and over again. I think it's worth remembering where the chorus goes after the first line:

* Dalee Sambo Dorough, *The Ongoing Indigenous Political Enterprise: What's Law Got to Do with It?*, 2 J. L. PROP. & SOC'Y 71 (2016), <http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Dorough.pdf>.

** Philip J. Deloria is the Carroll Smith-Rosenberg Collegiate Professor in the Department of History and the Program of American Culture at the University of Michigan. In his comments he addressed the highly localized and varied roles that language and history play in efforts by indigenous peoples to claim rights and determine their future.

© Philip J. Deloria 2016.
<http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Deloria.pdf>

*What's love got to do, got to do with it?
What's love but a secondhand emotion?
What's love but a sweet old-fashioned notion?
Who needs a heart when a heart can be broken?*

The rest of the song – and it's worth noting that the second verse is about "confusion" and being "dazed" – takes us to a key dichotomy, which for me rests with the question of language. One reads the Declaration, hears the discussions of its provisions, and finds that it's very easy to get excited about the possibilities, about the ways in which indigenous peoples have forced certain kinds of legal language into international fora. That's what law – or love – has to do with it. On the other hand, I find myself lost in much of this language almost immediately. And I suspect I am not alone in this. There are a lot of terms at play; they're not always congruent with one another. What are human rights? What are civil rights? What are property rights? What are subsistence rights? What are self determination rights? Many time these words start to flow together in these discussions. They blur and conflate in ways that remove the kind of precision needed to make those words useful and powerful. The same thing happens with "populations," "peoples," and "nations." In other words, there is a vocabulary of slippery language that structures our discourse. In many ways, that language elides the raw realities of power on the ground. That is the place – nation-states and localities exercising power – where "your heart gets broken," where all these wonderful words are kind of "secondhand emotions" and "sweet old-fashioned notions," where one might end up feeling a little dazed and confused.

How we navigate this slippery language, then, emerges as a really important question. You read it, you think you get it, you sign on to it, and find yourself lost among the contradictions. For me, there's not only question of legal provisions bumping up against

power. There's also an emotional content to the grammar that is worth unpacking—because underlying it all is a constant reminder of the practical impracticability of the effort. I don't know if I'm the only one, but when I think about the UN, I don't consider it an institution that has any power whatsoever. How do I square my sense of possibility with my equally strong sense of futility?

I also find myself wondering about the language of "culture," that emerges as so central in the discourse. I may be wrong about this—and perhaps some of those articles about land and resource protection are stronger than I remember from the last time I read the Declaration—but one of the things I oftentimes hear is a multi-chain argument that tends to privilege culture, cultural preservation, and genetic and natural resources. From that base, the chain of the argument leads to questions of landholding and political autonomy. These are often framed in relation to the interest in preserving a certain kind of cultural autonomy. Land, which is the toughest nut in every circumstance, ends up becoming a tertiary claim. Why do we need land? Well, we need it to preserve culture. And culture ends up being given a certain primacy in the moral base of the claim.

I was struck by the comment that perhaps the working group focused on land and resources was understaffed and under-populated, and maybe the language around these issues suffered as a consequence. The result may be the production of a very common discursive formation, in which culture becomes the prize for the subaltern and the colonized. The subaltern gets culture, authenticity, the desirable stuff, the "win" that is allowed under liberal multi-nationalism/multi-culturalism. But the trade-off for that prize is the loss of other things, most notably land and resources. This structure functions as a "win-win" for colonizing practices, which get to look tolerant and make concessions on the cultural front that actually serve colonizing interests, while at the same time continuing processes of

material dispossession. This question, it seems to me, needs additional interrogation in the context of politics of the UN Declaration.

It also seems to me worth thinking more precisely about who the agents are, what their interests are, and how variegated they are, across the full range of participants in UN indigenous organizing. It's just a fact that, on the ground in the United States, the "tribal" ends up being—for many people, at least—more important. As an example, we had a "Keywords" conference at Michigan five or six years ago, and asked a number of Native American Studies scholars to write little bits on certain key words. One of the words was "indigeneity" and Ofelia Zepeda, a Tohono O'odham linguist at the University of Arizona said, "Look, I've been doing on the ground research on 'indigeneity.' I've been talking to tribal people about this and they have never heard of it, don't care about it, think it's an academic word." She gave a very pointed paper about the essential uselessness of the term, at least for these people's lives. It may be that this is a species of (we dare not say this too enthusiastically) American exceptionalism, but it's not hard to find many instances in which treaties and "treaty rights" end up superseding a lot of these global and international discussions. And it's not just that the "tribal" ends up being important here on the ground in the United States, but there are also the regional organizations, the national organizations. We could start with the National Congress of American Indians, for example, which would lead to all kinds of issues—gaming, law, repatriation, land loss. Would these be read as international? National? Regional? Local? I wonder if there's not a real question about how many indigenous people in how many locations have the energy and inclination to give to an effort at UN? Who are those people? How are they motivated? What are the local goals they bring to the international stage? My colleague Rebecca Hardin earlier gestured toward the Seminoles. Do the Seminoles care about the UN

Declaration? Not so much. They're multi-national capitalists at this point. So who's investing the time? What does it look like on the ground there? How many tribes and peoples would see greater returns on their investment of time and energy at the UN than they would at the tribal or national level? So who exactly is representing what tribes in the U.S. context at the UN? And once you ask that question about the US, you have to ask it about indigenous peoples across the world.

One might also wonder if there's not a kind of teleology that leads to an odd place where human rights and civil rights meet at the end of an historical trajectory. In the case of the United States, there are four or five different kinds of historical regimes of dispossession and legal negotiation: the first being nation-to-nation treaties, and moments of state formation; the second, a moment of regional dispossession and the formation of reservation spaces and surveillance regimes; a third, the breaking up of reservations into allotted small parcels of neighborhood land—local dispossessions; fourth, a neo-imperial domestic national structure in the form of the Indian Reorganization Act; fifth, this moment that we arrive at now. Does this historical trajectory inevitably lead to a human rights kind of argument? Or to a treaty rights argument? Those, I think, are radically different kinds of trajectories, and the human rights argument does not necessarily—or even easily—emerge from the treaty rights argument. Indeed, one might argue that these two positions are very much open to contest in terms of their utility for specific peoples emerging from specific histories.

Is this particular political context—the global, the international—the answer to everybody's own particular histories of mechanisms of dispossession? I do small amount of comparative work in Taiwan, a country that never gets involved in this discussion because it

doesn't have a presence in UN—but which does have fourteen surviving indigenous tribes, a national museum, a federal agency, a Minister of Indigenous Affairs, all kinds of interesting economic programs, and four regimes of overlapping colonialism. Is theirs a history and a political situation that leads them to see what others see as opportunity in the form of the UN? I don't think so.

Lastly, I want to say that the Arctic context seems to offer an excellent opportunity to think through and work through some of these issues. When you consider climate, ice, geography, history, culture, this strong and interesting emergent group, (with an emergent shared identity in the form of the ICC) in relation to at least four nations (and probably more if the rush to the Arctic unfolds as one suspects it will), you have a case that calls into question the more familiar models. How often do we think of these issues in terms of two nation-states with a border between them, and one or more indigenous people in relation to that single border? This is a common way of thinking of how nation-state/indigenous relations play out. But here you have one indigenous group emergent as a collective in relation to multiple states—four nation-states with multiple borders drawn on this interesting shared circumpolar geography. It seems to me a perfect case study for thinking about how well the UN—as a context, a political institution, a mediator, even an advocate—might or might not play out on ground. In that sense, Dalee Sambo Dorough's paper gives us a *lot* to think about, in terms of the legal structures now in place, the histories and ethics that helped produce those structures, the possibilities they hold for strategic advance, and their utility in the context of a critical issue that will unfold in the very near future.

Thank you.