

Book Review

WOODROW BORAH, JUSTICE BY INSURANCE: THE GENERAL INDIAN COURT OF COLONIAL MEXICO AND THE LEGAL AIDES OF THE HALF-REAL XI, 479 (1983)

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In 1942, Felix Cohen noted in *The Spanish Origin of Indian Rights in the Law of the United States* that the underlying principles of Indian law had their source in sixteenth century Spanish juristic thought.¹ Cohen's article, written when news of the Holocaust was emerging, suggested that a study of Spain's methods of governing the indigenous peoples of Mexico would lead to a deeper twentieth century understanding of the fine lines that separated protest from conformity, labor exploitation from genocide, and common cause from oppression. Although Cohen's call for a legal history of colonial Spain inspired new scholarship in the field of federal Indian law, much of that work consists of importing conclusions that historians have drawn from imperial sources such as statutes, papal decrees, canonical debates, and mendicant chronicles. These conclusions — as well as their interpretations and reinterpretations — are important to any study of the influences of Iberian colonialism in United States Indian law, but they are limited. Given the highly abstract and theological focus of imperial sources, conclusions drawn from them cannot easily be extrapolated to more mundane realms. Worlds in which elite Castilian theologians argued over the fate of the "Indian", for instance, were separated by great emotional distances from worlds in which more common native folk and non-native folk argued over whether a native had the right to sue a Spaniard, and if so, under what circumstances.

The demographic work of Sherburne Cook, Lesley Byrd Simpson and Woodrow Borah, all of the University of California at Berkeley, clearly illustrates the problem raised by too heavy a reliance on imperial doctrinal sources when studying the relationship between Spanish law and Indian reality. In a series of monographs published between 1948 and 1963, the three historians studied local tribute registers and church records to calculate a large pre-conquest Mexican native population and a rapid post-conquest population

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1. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States* 31 Geo. L.J. (1942).

decline.² Specifically, they posited that between 1519 and 1605, the indigenous population of central Mexico fell from 25,200,000 to 1,075,000. Important in itself, this demographic work nevertheless underlines the tricky problem of focus. If one were to rely exclusively on imperial sources, then evidence for the demographic decline that Cook, Simpson, and Borah argue occurred in sixteenth century Mexico, would blur. If, on the other hand, one were to rely on more local sources, as Cook, Simpson, and Borah did, then one would be compelled, as they were, to posit the virtual annihilation of the indigenous peoples of sixteenth century Mexico as *the* analytical backdrop to Mexican history. Stated more simply, the methodological issue raised by Cook, Simpson and Borah is one of how to reconcile imperial law with Indian reality or, even more simply, whether colonial law can be studied in a socio-economic vacuum.

Justice by Insurance, by Woodrow Borah, is an attempt to bridge the wide gap between the imperial world of colonial law and the day to day world of colonial society. Using what are essentially trial court records, Borah outlines the origins and workings of the General Indian Court of Mexico, a legal-administrative institution that heard native claims from 1592 to approximately 1820. The General Indian Court's antecedents lay in medieval Castile, where Christians kept Jewish and Moslem communities at a legal disadvantage by mandating the application of Christian law in inter-ethnic disputes. According to Borah, Spaniards followed this choice of law rule, more or less without revision, in their first Caribbean settlement on Hispaniola. Thus, on Hispaniola, in those rare instances when law was used to resolve a conflict between a native and a Spaniard outside of an *encomienda*, or forced labor, relationship, the choice of law rule operated in a way that heavily favored Spanish interests. Again, though not relied upon often, the effect of the choice of law rule was to finish the job that the Spaniards' physical brutality had begun. This meant that by 1525 the Spaniards had physically decimated the Indian populations, as well as legally decimating their legacy, on the island of Hispaniola and the Greater Antilles.

What historians now refer to as the Holocaust of the West Indies shocked the Spaniards themselves. And by the time the question of Indian governance arose on the mainland, the crown was prepared to take a more active role to preserve the means by which it would exploit the riches of central Mexico: Indian labor. Thus, although the *encomienda*, or forced labor system, was used to integrate native individuals into Spanish society as free crown vassals, the crown legally segregated the Indian estate, as a collective entity, from the Spanish estate. In this way, the crown created a dual republic whose stated purposes was to protect the Indian estate from the abuses of the settlers, by regulating Indian *encomienda* labor through a system over which bureaucrats, rather than *encomenderos*, had ultimate control.

Eventually, the settlers' demands for labor were too great to maintain a dual republic, as were the natives' persistent legal complaints in response to those demands, and the crown was forced to abandon its goal of dual Spanish-

2. S. COOK & L. SIMPSON, THE POPULATION OF CENTRAL MEXICO IN THE SIXTEENTH CENTURY (Ibero-Americana No. 31, 1948); W. BORAH & S. COOK, THE ABORIGINAL POPULATION OF CENTRAL MEXICO ON THE EVE OF THE SPANISH CONQUEST (Ibero-Americana No. 43, 1963); S. COOK & W. BORAH, ESSAYS IN POPULATION HISTORY (1971).

Indian republics. The effect of the crown's abandonment was to shift the focus of imperial policy from one of segregating the Indian estate to one of regulating the Indian and Spanish estates at their interstices. This new focus, though meant to expedite the resolution of native claims against Spaniards, nevertheless served the crown's local interests quite well. By creating a special tribunal to which native litigants could bring their claims, and thereby invoke Spanish law, the crown facilitated the colonization of Mexico by legitimating Iberian rule on a case-by-case basis. Thus, for reasons not solely altruistic, the crown authorized its imperial agents to create the General Indian Court of New Spain, or the *Juzgado General de Indios*. It is this court that Borah studies from its creation to its demise.

Established in 1592, under Viceroy Luis de Velasco II, the court was unique in two respects. First, it had original, concurrent jurisdiction in legal matters involving native parties. Second, it was financed exclusively by the *fundo medio-real*. The *fundo medio-real* was one into which each native tributary paid one-half *real* per year for the right to court access and legal representation. Borah refers to the *fundo medio-real* as a form of legal insurance since all native tributaries were required to pay a half-*real* whether or not they used the court, thus spreading the risk of litigation equally between Indian users and non-users of the court in the greater Mexico City area.

Generally, Borah draws on sources that span the life of the court. Though when he constructs the frequency with which the court heard certain types of claims, he narrows his scope to an examination of what seems an arbitrarily chosen two-month period in 1784. Borah's reliance on a two-month sample, from a court that functioned for over two centuries, is the weakest part of the book. Yet his grasp of the subject leads one to trust that these two months were representative of the court's case load over time. Borah estimates that 43% of the cases brought by native litigants during August and September of 1784, involved property rights: land, chattel, easements, inheritance, or licenses. Another 38% of the cases named Spanish defendants but did not directly involve land: most of these complaints charged breach of duty or abuse of authority by local Spanish officials, though a significant few concerned labor disputes between natives and settlers. The remaining 19% of the court's cases were the result of intra-native disputes.

The significance of intra-native disputes is difficult to analyze without comparative data on how often intra-native claims were heard before native judges, or *alcaldes*, as opposed to Spanish judges. Even though Borah does not offer such a comparison, his claim that almost one-fifth of the court's cases involved native plaintiffs suing native defendants is significant. This high percentage, coupled with Borah's subsequent claim that native *alcaldes* heard only minor cases, suggests that native litigants sought Spanish justice when the stakes were high. Extrapolating again from the two-month sample, high-stakes cases between native litigants broke down into four categories: land; crime; inheritance (*cacicazgo*); and local political disputes over taxation, licensing, exemptions, election counts, town governance, and intra-tribal dissension. High-stakes cases between natives and non-natives, on the other hand, broke down into five areas: land; special privileges; negligent wrongdoing; debt and labor; and abuse of official power.

Borah's description, analysis, and examples (211 total) offer two important conclusions regarding the colonial legal relationship between the Iberian conquerors and the indigenous peoples of Mexico. First, the General Indian Court succeeded in providing native plaintiffs with a less costly, less prolonged, and less complicated legal procedure than that which existed for Spanish settlers. Second, Spanish law, at least on the local level, eroded native customary law over time, rather than superseding it in a single moment. This was true notwithstanding an intra-native choice-of-law rule that authorized Spanish judges to bind indigenous parties to applicable native customary laws that did not offend the judge's sense of reason, natural law, or Christian doctrine. These two broad conclusions, though important, nevertheless leave unanswered narrower questions about the court's practical success. For example, Borah offers no discussion of how likely native litigants were to win their cases before the court. Many of the case abstracts do not record the trial outcome, and many cases won in the Indian courts were appealed to the Mexican *Audiencia*, or supreme court. Borah does not interpret this lack of information in his sources, nor does he trace cases from the General Indian Court through their appeal to the *Audiencia*.

What Borah does offer in response to questions about the court's success are general discussions regarding why the court might not have been a preferred forum for native litigants. First, it appears that native litigants were quick to file claims with the court, but slow to prosecute them. Rates of frivolous suits, *apartamiento* (dismissal of a claim), and *suspense* (failure to pursue a claim) were high, leaving Borah to argue that native litigants either chose informal redress to a court decree, or else lacked the resources to see a suit through to the end. These claims, if they are correct, suggest a lack of institutional effectiveness, especially since the court was designed to serve as a pro-native tribunal, financed exclusively by the *fundo medio-real*. Second, although the Court had the usual mechanisms of force, fines, and repossession at its disposal, native litigants were discouraged by the illegal demand for fees made by low to mid-level Spanish officers of the court. Finally, although native litigants could choose to have the court apply native customary law, Borah suggests that the application of Spanish law generally prevailed. This last discussion is sketchy since Borah offers almost no explicit information about the Spanish substantive law. And, though Borah details the path that a lawsuit would take through the court system, he does not analyze specific procedural rules. Instead, Borah draws the general conclusion that because the court was designed to function as a pro-native forum, it was probably more effective in protecting native litigants than not.

Despite broad, outline coverage, *Justice by Insurance* is well conceived, researched, organized, and written. Published in 1983, this book remains ignored in legal historical works about the Iberian contribution to United States Indian law. This is a serious oversight. Borah's work on the General Indian Court is relevant to Indian law scholars for two reasons: it provides a look at the day-to-day legal relationship between the indigenous peoples of Mexico and the Castilian crown, and it offers an important methodological lesson on the use of local, as opposed to imperial, sources in legal research.