Pace Environmental Law Review

Volume 28
Issue 1 *Fall 2010*

Article 11

September 2010

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SYMPOSIUM

The "Preliminary Study" on the Doctrine of Discovery

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I am a member of the U.N. Permanent Forum on Indigenous Issues, I'm honored to say. I'm the North American representative. At that meeting, I presented a preliminary study on the Doctrine of Discovery.[1] That study was brought forward by resolution in 2009.[2] Let me share with you the title of that study. . .The name of it is "The Preliminary Study," and I bring that to your attention because it is a preliminary study of the impact on Indigenous Peoples of the international legal construct

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* Tonya Frichner served as Special Rapporteur to the U.N. Permanent Forum on Indigenous Issues and prepared the Preliminary Study. She is an attorney and President of the American Indian Law Alliance.

In her remarks, Ms. Frichner extended thanks as follows:

Well, I want to read to all my relatives, to the very distinguished guests that are at last here with us today, and also to his Excellency. I'd like to acknowledge my dear friend and native brother, John Haworth, the director of this very distinguished venue that is hosting us today. Thank you, John, for your very thought-provoking words and for acknowledging the leadership of Indigenous Peoples throughout these decades as to why we are here and how we got here. Thank you for sharing that. And also to our dear friend, Professor Nicholas Robinson, for putting this wonderful afternoon together [and], on this thought-provoking afternoon, for helping us through the Declaration on the Rights of Indigenous Peoples and being our friend and ally in this discussion. So thank you, Nick. I thank you, too, Pace University Law School and all its distinguished members who are here with us. Professor Robinson attended the United Nations' Permanent Forum on Indigenous issues and he certainly met at the U.N. at our annual sessions for two weeks. Tonya Gonnella Frichner, Remarks at the Symposium on Indigenous Rights: The "Preliminary Study" on the Doctrine of Discovery 28-29 (May 13, 2010) (transcript on file with PACE ENVIRONMENTAL LAW REVIEW and availanle in the archives of the Pace University School of law Library).

1. Special Rapporteur, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery,* Econ. & Soc. Council, U.N. Doc. E/C.19/2010/13 (Feb. 4, 2010) [hereinafter *Preliminary Study*] (by Tonya Frichner).

2. This occurred at the 8th Session of U.N. Permanent Forum on Indigenous Peoples in May 2009.

known as the Doctrine of Discovery, which served as the violation of their human rights.[3]

It was my responsibility as a Special Rapporteur of this study to bring forward the argument that it was time for the U.N., as a body, to begin to look at this legal construct known as the Doctrine of Discovery - bring it forward and begin to look at it seriously.

So in April, I brought forward the study formally to the Permanent Forum with a number of governments, a number of agencies, and about a thousand Indigenous Peoples who were at this session, and I introduced the study. And what I would like to do is a shorter version of that introduction and share that with you today with your permission. That is what I'm going to do, so we have it for the record. . .

So let me begin by sharing with you what Professor Robinson said earlier about the Declaration. What I pointed out when I began my dissertation was that the United Nations Declaration on the Rights of Indigenous Peoples is a significant step in the direction of honoring and upholding Indigenous Peoples' human rights, individual and collective rights, including the right to self-determination. The Declaration is the product of Indigenous Peoples working towards a problem they all share. However, the problem is not to be found in the actual text of the Declaration.

The first thing Indigenous Peoples share is the experience of having been invaded by those who treated us without compassion because they considered us to be less than human or even nonhuman. Dehumanization leads to the second thing we as Indigenous People share in common: being treated on the basis of the belief that those who invaded our territories have a right of lordship or dominance of our existence and, therefore, have the right to take, grant, and dispose of our lands, territories, and resources without our permission or consent. This is the reason why a discussion of the human rights and rights of free prior and informed consent is critically important with regard to Indigenous Nations and Peoples.

The preliminary study is a first step towards resolving the root problem that the Declaration on the Rights of Indigenous

3. *Preliminary Study*, *supra* note 1, at 3.

Peoples is intended to address. Indigenous Peoples are woven into the biological fabric of their traditional territories, which they are charged with a sacred responsibility to maintain for future generations.

What is now referred to as biological diversity is a direct result of Indigenous Nations and Peoples upholding the sacred responsibility for thousands of years.

Now, others think they have the right to take, commodify, and even destroy those systems, and their dehumanization and domination based on the Doctrine of Discovery are steps towards that end.[4]

Once indigenous protection based on ecological knowledge and wisdom is removed, the biological and ecological integrity of the traditional territory of a particular Indigenous Nation is open to attack from the forces of mining and other forms of biosphere exploitation and destruction. The removal of Indigenous Peoples' protection leads to destruction of the waters, trees, animals, and all other life forms intricately interwoven and networked with the lives of Indigenous Peoples.

This is what Indigenous Peoples have been experiencing, describing, and fighting for more than five centuries. We already see signs of ecological collapse in the over consumption of fisheries, massive deforestation, and toxic chemicals spewed across the earth and into waterways, which are the veins of Mother Earth. Indigenous Peoples and the ecosystems they protect are indicators of the health of the earth, and the prognosis today is a state of crises.

The preliminary study of the Doctrine of Discovery focuses on an argument that can be tracked back more than five hundred years to the days of Western Christendom.[5] It is an argument stated in a number of tabled documents authorizing the discovery and concept, and discovery and commerce.[6] The argument may be expressed as follows:

A Christian Monarch who locates or discovers non-Christian lands and territories has the right to claim a superior and

4. *See generally id.*
5. *See id.* at 6.
6. *Id.*

paramount title to these lands, territories, and resources. The Doctrine of Discovery states that non-Christian lands are considered to belong to no one because no Christians are living there and no Christian monarch or lord has yet claimed dominion. Once [a Christian monarch made] the claim of a right to dominion, sovereignty, and lordship,. . .that claim was transferable to other political successors.[7]

Francisco De Vitoria is one of the theologians who did not agree with the view that Christian discovery could give dominion over a title to non-Christian lands. He argued that Indians have the true dominion from both a public and private legal standpoint.[8] Other figures arrived at the same conclusion. The issue was debated at length in the early 1550s in Spain by Sepulveda. . .but no conclusive decision was arrived at.[9] No Indigenous Peoples representative participated in the debate. It was a debate among Christian Europeans about Indigenous Peoples.

And the issue is whether the Indians or Indigenous Peoples of the Americas were human beings. It was not a debate of Indigenous Peoples. Today clearly Indigenous Peoples have joined in the debate by declaring, most definitively, that we are human beings. However, for more than five centuries, the Doctrine of Discovery and dehumanization has been suspended and institutionalized, and this is the context of the work we are doing on the U.N. Declaration on the Rights of Indigenous Peoples.[10]

The preliminary study focused on the United States and points out that the Doctrine of Discovery was officially adopted by the U.S. government in 1823 in a Supreme Court decision known as *Johnson v. McIntosh*, 21 U.S. 543 (1823).

The *Johnson* decision expressed and used in its deliberations the argument that I mentioned earlier dating back to the days of

7. *See id.* at 8.

8. S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L L. 1, 2 (1991).

9. *See generally* Robert E. Quirk, *Some Notes on a Controversial Controversy: Juan Gines de Sepulveda and Natural Servitude,* 34 HISP. AM. HIST. REV. 357 (1954).

10. *See Preliminary Study*, *supra* note 1, at 10.

Western Christendom.[11] The Supreme Court referred to that Doctrine as the principle, and I quote, "that discovery gave title to the government by whose subjects, or by whose authority [it] was made, against all other European governments[.]"[12]

The Court explicitly referred to discovery by Christian people, notwithstanding the occupancy of the natives, who were heathens.[13] The United States Supreme Court Chief Justice John Marshall identified the Royal Charters of Great Britain pertaining to North America as the documentary source of the argument that discovery gave title to the government by whose authority the so-called discovery was made.[14] The Royal Charter issued to John Cabot in March of 1496 was issued as an imitation of earlier papal rolls.[15] It authorized Cabot and his sons to seek out isles, countries, and [lands] of the heathen and infidel, which before this time have been known or unknown to all Christian people.[16] This similar language was cited at the as the basis for the ruling in *Johnson,* that the United States had the ultimate dominion over Indigenous Peoples and lands.[17]

The *Johnson* ruling also cited recognition of the Doctrine of Discovery and assertion of dominion by Spain, Portugal, France, and Holland.[18] The ruling also mentioned the East India Company in relationship to the Doctrine of Discovery.[19] It should also be noted that the Doctrine of Discovery was related to Russia as well.

This ruling shows the global scope of the application of the Doctrine and its concomitant framework of dominance. It is on the basis of this line of thinking that Indian land rights have been characterized in U.S. law and policy as nothing more than a permissive right of occupancy, or permission from the whites for the Indians to occupy their lands. This was expressed by the U.S.

11. *Id.* at 11; *see generally* Johnson v. McIntosh, 21 U.S. 543 (1823).
12. *Johnson*, 21 U.S. at 573.
13. *Id.* at. 576-77.
14. *See id.*
15. *Preliminary Study*, *supra* note 1, at 12.
16. *Id.*
17. *Id.* at 12-13.
18. *See Johnson*, 21 U.S. at 574-76.
19. *Id.* at 575.

Supreme Court in the 1955 ruling, *Tee-Hit-Ton Indians v. United States*,[20] and the Doctrine of Discovery was referenced as recently as 2005 in the decision *City of Sherrill, New York v. Oneida Indian Nation of New York*.[21]

A strong case can be made for the view that the critical problems and human rights faced by Indigenous Peoples are all traced to the Doctrine of Discovery. The recent state of the world's Indigenous Peoples issued by the Permanent Forum on Indigenous Issues in January of 2010 pinpoints key indicators of the critical conditions faced by Indigenous Peoples.[22] Every one of the regional caucus statements that were made at this recent U.N. Permanent Forum meeting provides very clear documentation of the impacts of the Doctrine of Discovery and dominance on Indigenous Nations and Peoples in every part of the world.

Now, what does this mean in terms of the future? The Permanent Forum in its final report and in its deliberations has decided that in 2012 what the theme of the Permanent Forum will be for its 11th session: the Doctrine of Discovery as enduring impact on Indigenous Peoples and the right to redress for past conquests, referring to Articles 28 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples.[23] Article 28 of the Declaration refers to redress, and Article 37 refers to the protection of our treaties and our agreements.[24]

So, for Indigenous Peoples, that is a very good thing and a very positive thing because the theme of the Doctrine of Discovery historically will have to look at all of the dictated, mandated areas of the Permanent Forum, which includes human rights, social and economic development, women and children, environment, culture, and education. All of them will have to be looked at through the lens of the Doctrine of Discovery. That is a

20. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273-74, 277 (1955).

21. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 203 n.1 (2005).

22. *See* Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, U.N. Doc. ST/ESA/328 (Jan. 14, 2010).

23. *See* Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 28, 37, U.N. Doc. A/RES/47/1 (Sept. 13, 2007).

24. *See id.*

very positive move in terms of Indigenous Peoples. So, we see that as a good movement and a good step in the right direction.

But what I would like to do, with your permission, is to close with a quote that was made yesterday by Pope Benedict XVI. He is in Portugal, as we speak, visiting the shrine of Fatima, a very popular pilgrim shrine, and he was praying for priests to not fall short of their—and I quote – "sublime vocation," or to "succumb to the temptations of the evil one."[25]

The Pope called for the abuse crises that we're all familiar with, a truly terrifying issue, and he said, and I quote, "forgiveness is not a substitute for justice."[26] I think that we would all agree with that. Looking at the future work of the Doctrine of Discovery, I think we would all agree that forgiveness is not a substitute for justice.

Thank you. I am finished.

25. Rachel Donadio, *Pope, Praying for Priests, Visits Shrine*, N.Y. TIMES, May 12, 2010, at A6.

26. *Id.*