Racial Justice Lawyering  
on Behalf of Indians and Other Indigenous Peoples  
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A courageous new report, *Louder Than Words: Lawyers, Communities and the Struggle for Justice* (A Report to the Rockefeller Foundation by Penda D. Hair, March 2001), is a well-documented call for continuing and revitalizing legal battles against race discrimination. It could not be more welcome. It is filled with fresh insights and analysis that give encouragement to everyone working to end race discrimination and racial exclusion. Our experience in racial justice lawyering for Native Americans lends dramatic evidence to the Report’s conclusion that legal work for racial justice is urgent work for this country. From our work, we can perhaps add some valuable lessons and innovations to those identified in the Report.

Legal advocacy on behalf of the Native peoples of the United States, Indian and Alaska Native tribes and Native Hawaiians, is a special case of racial justice lawyering in the United States. The core of our work is to challenge and overcome the explicit race discrimination and denial of constitutional rights that our federal and state laws inflict upon Native American nations and tribes and upon the Native people of Hawaii. The situation of Native American nations is unique, and the discriminatory laws affecting them are a surprise to most people. These discriminatory laws are one of the root causes of the enduring poverty and misery that characterize most Indian communities.

Our work consciously draws from and builds on the rich legacy of legal work for racial justice in this country. Like the civil rights movement 70 years ago, our legal strategy is to challenge and change the discriminatory laws that deny basic rights to Native American nations. Though legal work for native tribes has some unique aspects, many of us learned our early lessons in the civil rights movement. We have adapted many of the legal strategies honed in the civil rights movement, and lawyers and leaders from that movement are some of our greatest allies. Let me now turn to some of the special aspects of our part of the battle against racism.

First, we are dealing mainly with nations and tribes that are political and social bodies with their own governments. Most Indians and Alaska Natives are members of the more than 500 nations or tribes. Generally speaking, Native Americans seek respect, dignity and justice primarily as members of a nation or tribe. Assimilation or integration into the larger society is seldom expressed as a goal by Native Americans.
over half of Indians and Native Americans live away from their tribal communities, but even these individuals usually maintain strong ties to their nations and tribes. Indian and Alaska Native nations and tribes seek participation in society, political engagement, and economic development as distinct communities or collectivities.

At the same time, many, perhaps most, Indian individuals also seek participation as voters, workers, entrepreneurs, and professionals when they deal with the world outside their reservations. Native Americans are entitled to be citizens of the United States, have the right to vote, pay taxes, and to a great extent they participate in the broader economy and society of the country. Indian, Alaska Native and Native Hawaiian individuals suffer from racial discrimination as other races do -- in employment, housing, voting, public accommodations, law enforcement, and so on. As individuals, Native Americans have to fight against discriminatory treatment much as other individuals do.

It is the tribes, as societies, as land and resource owners, and as governments and repositories of culture, that are the focus of Indian and Alaska Native interests. And it is as tribes or nations that Native Americans are most discriminated against. United States law expressly denies to tribes a number of basic rights that are guaranteed to virtually everyone by the US Constitution. For example, the United States may lawfully take the land and other property of Indian and Alaska Native tribes without due process and without compensation. This astonishing doctrine was announced by the Supreme Court in 1955 in *Tee-Hit-Ton Indians v. United States*. The United States can also extinguish at will the legal existence of any tribe or tribal government. The courts say that Congress has “plenary power” over Indian tribes, meaning power to legislate practically without any constitutional limitation. These are legal deprivations placed only on Native American nations and tribes and no others in this country.

A unique legal factor in this field is the existence of hundreds of formal, legal treaties with Indian nations and tribes. These treaties are the legal foundation on which the United States bases its title to millions of acres of “national soil.” These treaties are legal contracts and the United States has received the benefits of these treaties. But surprisingly, the United States has always exercised the power and the supposed “right” to violate or abrogate these treaties at will -- usually with no legal liability at all. Because of this peculiar fact, Indian nations are the only people in the United States whose contracts with the United States can be violated with impunity -- with practically no legal remedy in most cases. Here again, discriminatory injustice against Native nations and tribes is part of the federal law itself.

Discrimination and injustice are also inherent in the two-edged doctrine in federal law that the United States is trustee for all Indian and Alaska Native nations and that the United States has “trust” obligations to defend these nations and their resources. The corollary is that the United States asserts trust title ownership of most Indian lands and claims broad power as trustee to dispose, unilaterally, of Indian assets and resources. This trusteeship is not subject to the normal rules of accountability, and the trusteeship cannot be terminated by the tribe. Because of this, there is discrimination and consequent
abuse. It has resulted in a bizarre duality in which the United States acts sometimes as defender and champion of Indian tribes and sometimes as the opponent of the tribes. The practice of the United States, as trustee, of paying for attorneys to represent tribes has been a source of some needed legal help and at other times a source of abuse and betrayal of Indian rights.

Much of the racial hatred and opposition to Indian and Alaska Native aspirations is aimed at Indians and Alaska Natives as tribes or distinct societies. It is, to hear the anti-Indian rhetoric, the existence of the tribes and the presence of their reservations that most excites antipathy and opposition. “Why can’t they just live like everyone else?” is a frequent query of those who oppose Native Americans. The irony is painful. Native Americans generally cannot live like everyone else because of pervasive discrimination. Maintaining their status as self-governing societies is one of the only sources of power and one of the only refuges for Indian and other Native American communities.

Accordingly, most Indian rights lawyering is on behalf of tribes or nations or peoples, or occasionally on behalf of individuals asserting rights on behalf of the tribe or as a member of the tribe. Because of this, we are almost always working with communities at a “grass roots” or local level. Usually the political, governmental mechanisms of the communities carry out political, social and other forms of action to combat racism and discrimination in coordination with the legal work they carry on. As the Report concludes, racial justice legal advocacy is most effective when it is tied to real communities (in our case, nations and tribes) and to political action at the local and national levels.

It has been essential to our strategy and to overcoming the abuses that lawyers once perpetrated on tribes that complete respect be given to the decision-making authority of the tribal governments. Indian leaders, rather than their lawyers, must speak for their nations and tribes in negotiations, in Congress, at the United Nations and elsewhere. We lawyers play a crucial role, but it is to support and not to supplant the Indian governments, clan mothers, chiefs and other leaders. In this respect our legal advocacy is very much like the successful approaches of others that are studied in the Report.

The central reason that racial justice legal work is so important for Native Americans is that invidious racial discrimination is imbedded in the law that is applied every day to the indigenous tribes and nations in the United States. The discriminatory laws and legal doctrines mentioned earlier concern the governmental relationship between the federal government and the Indian and Alaska Native nations and tribes. It is the federal government itself that is doing the race discrimination and depriving tribes of basic rights. This governmental discrimination is so old and well-established that the Supreme Court itself continues to give it approval.

Knowing that even the Supreme Court approves of the denial of basic rights to tribes, we Indian rights lawyers undertook a very long-term campaign to change the climate of legal thinking and ultimately to change the law. We held conferences to focus attention on the plenary power doctrine and the Tee-Hit-Ton doctrine. We enlisted the
support of professional legal associations such as the American Bar Association. We enlisted leading law professors. We fostered and encouraged scholarly writing and publications. This was good but not enough.

Innovation and creativity were born of necessity and have been especially important in this field. Perhaps most noteworthy is our campaign, now more than a quarter-century old, to create new international human rights law for indigenous peoples and to bring international pressure to bear on the United States. To change the mind of the U.S. Supreme Court and to change the old and persistent evil of the federal law, it is crucial that we rely upon universally recognized standards of justice and that we have a forum beyond the Supreme Court.

As we began our work at the UN, we learned that the civil rights advocates of the NAACP Legal Defense and Education Fund, Inc. had, a generation earlier, taken a formal human rights complaint to the United Nations. We followed in these footsteps. Lacking a friendly forum in the federal courts, we persisted with long-term work at the UN. We sought to expose the discrimination against Indians in U.S. law and to create international legal standards to condemn and outlaw such treatment worldwide. This work has now produced an historic Declaration on the Rights of Indigenous Peoples that we expect the UN General Assembly to adopt a few years from now. At the urging of indigenous leaders, the Organization of American States is creating the American Declaration on the Rights of Indigenous Peoples, which like the UN declaration, will set international legal standards for the treatment of indigenous peoples by countries. These two declarations are laying the foundation for new international law that will outlaw discrimination by countries against indigenous peoples as groups. These emerging international law standards are spurring legal reform in the domestic law of countries around the world. Sadly, not yet in the United States.

We also filed formal legal complaints in the UN and in the OAS Inter-American Commission on Human Rights to challenge aspects of this discrimination against tribes in the United States and elsewhere. In doing this, we have literally helped to create an international jurisprudence of human rights concerning discrimination against indigenous peoples. This emerging jurisprudence of decisions, reports, resolutions and actions at the international level is contributing to the pressure for racial justice and legal change.

Another innovative characteristic of Indian and Alaska Native legal advocacy has been the integration of environmental concerns with Native American rights issues. It is a mostly-true generalization that, for Indian and Alaska Native peoples, protection of their cultures and ways of life and protection of the environment are seen as a single concern, not as separate issues. Typically, tribes do not speak of “environmental racism,” because attacks on the environment are regarded as another form of attack, a particularly serious one, on the community and its way of life. With great frequency we find that defending indigenous communities and creating meaningful rights for indigenous peoples in the United States and abroad mean creating protections for the environment, particularly for
indigenous resources. Racial justice lawyering for tribes inevitably means an immense amount of environmental protection work at both the national and international level.

U.S. District Judge Jack Weinstein, my former law professor, has said that the duty and soul of the law is to protect the poor and powerless. The wealthy scarcely need the law, but the poor have little else to protect them. Native Americans, constituting only 1% of the United States population, have little but law to give them protection in the United States society. Casino profits have made a handful of tribes wealthy, but the overwhelming number remain without significant economic or political power in the United States. This is another of the special circumstances that make racial justice lawyering so crucial for Native Americans and for the country as a whole.

Indigenous peoples in the United States seek justice in the context of preserving their cultures, societies and tribal governments. All are eager to establish just and productive relationships with the larger society on terms of mutual respect, equality and dignity. In all events, Indian individuals and their nations and tribes ought not be denied the fundamental rights that are universally accorded to others.

We are very far from this goal today. In this field, we have not yet achieved what African-Americans achieved in overturning the separate-but-equal doctrine. Native communities remain, on the whole, appallingly deprived economically and utterly vulnerable to the avarice and power of the larger society. The morality and integrity of this country depend upon resolving this situation in which hundreds of distinct indigenous societies feel that they are dominated, ruled and exploited without their consent.

This country has not yet rid itself of its colonial past nor uprooted the discriminatory laws that grew from it. To defend and apply these laws, as the federal government does, soils the national honor of the United States and cannot be justified. There is no sound rule of law and no national interest that calls for this injustice.

The challenge and opportunity are still before us.

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