

DOES THE RIGHT OF SELF-DETERMINATION INCLUDE A RIGHT TO A HOMELAND?

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Before I get started with what Professor Porter actually asked me to talk about I would like to pick up on some things that were brought out by the last panel before our break. In particular, I would like to mention something that I started thinking about in reaction to something that Clint Halftown of the Cayuga Nation mentioned, which is the really profound need for education in New York's public schools about the kind of issues that we are talking about here today.

People need to know about the history of New York State, and it has to include the history of the Indian Nations of New York State. The history of the Indian Nations of New York State has to be written not just from the perspective of the usual textbook authors but also in a way that reflects the perspectives of the Indian Nations.

On a personal note, I grew up in Cheektowaga, New York. If you have ever flown into Buffalo, you have been in Cheektowaga, New York, because that is where the airport is located. Growing up there, I was taught that Cheektowaga means "the land of the flowering crabapple trees" in the "Indian Language," as if there is some sort of generic Indian Language out there and that is where we got the term. I also grew up near Cayuga Road and Cayuga Creek. Cayuga sounds like an Indian name, but where did that come from? Who knows? I certainly was not taught that. I came out of my education in the New York public schools with this profound lack of knowledge about the history of my State and about the history of Indian Nations within New York State. When we think about the issues that are coming up in New York State today, whether it is in Central New York or Western New York where I come from, many of the people who are addressing these issues come from the same kind of educational background that I had—basically, a background of great ignorance.

This was suggested to me by some of the comments we heard in the last panel such as: what are local reactions of local people to these claims coming up? The reactions are generally: where can these land claims be coming from? What is this we hear about these Indian Nations? People have these reactions of disbelief in part because they had my kind of education. They did not learn about the history of the

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land of New York and of the Nations that had land within New York State.

Another popular reaction is that “we are one nation, the Indian Nations are not separate.” Well, they may think that but, if you know anything about American history and Indian law, you know that is not true. One of the fundamental principles of Indian Law, and of American history, is that we have many nations within the borders of the United States. Again, that certainly was not part of my education in New York State’s public schools. It was only something I learned about once I went to law school.

Therefore, my message is we need more education, beginning as early on as possible. By the time you get to the point where these kinds of issues come up, it is very difficult for people to face up to the fact that there is a lot that is missing in our education. It is difficult to re-think what you know and to re-educate yourselves at that point.

Professor Porter asked me to talk today about whether the right of self-determination includes a right to a homeland. As I thought about the question, I realized my immediate reaction is yes, and it is based on my teaching background. Among the courses I teach is an American Indian Law course and, in teaching that course, I am accustomed to the idea that the reservations that are the homelands of the indigenous peoples of the United States provide the necessary base for the exercise of self-government and also for the preservation of cultural integrity. That is the starting point and is essential for the very survival of Indian Nations.

I also teach a course in indigenous peoples’ rights from an international and comparative law perspective. In that course, we examine the rights of indigenous peoples around the world. In that setting, I have seen the necessity of having a homeland where people can exercise their authority in order to enable them to have the opportunity to preserve their cultural integrity and seek refuge from the pressures of colonialism.

As a teacher, I am used to not allowing my students to get away with having a gut reaction kind of answer to a legal question; and, therefore, I am not going to let myself get away with that either. I would like to spend some time pinning down some of the legal support for this proposition that the right of self-determination has to include the right to a homeland. The starting point is defining self-determination. What do we mean by self-determination? What do we mean by the right of self-determination? Once we define that then we can think more about how the idea of a homeland fits into that broader concept of self-determination.

Now, what is meant by self-determination? What does that concept mean in general? What does it mean for a particular people in a particular context? That is something we could spend literally days talking about and that is obviously not what we are here to do. It is certainly not something we want to embark upon at this point in the day, having already had all kinds of interesting discussion leading up to now. What we can do is think in general about what are the key aspects of the right of self-determination as it relates to indigenous peoples. I want to talk about that, both in terms of what international law has to say about the right of self-determination of indigenous peoples, and also in terms of what U.S. domestic law has to say about self-determination of indigenous peoples.

Stepping outside the United States and looking more broadly at international law, the idea of self-determination, as applied to indigenous peoples, has been evolving within the last few decades. Contemporary international law and the work of international legal institutions show there is growing acceptance of the application of the concept of self-determination to indigenous peoples. Moreover, along with the general concept of self-determination for indigenous peoples, there is also growing acceptance of the right to a homeland and the right to cultural integrity. As I will discuss later, having a homeland can be very crucial to preserving cultural integrity.

As a general concept, when we talk about self-determination, we are talking about the right of a people or group to determine what path they want their group to follow, both for the present as well as the future. It is a term that can cover a range of people and contexts; and, it can include the enjoyment of a separate, independent, and sovereign state. There are also other, more limited forms of autonomy that can involve self-determination without having all of the attributes of a separate sovereign state.

So, where do we see this right of self-determination in international law? First of all, it is in the Charter of the United Nations, an important foundational doctrine of international law. It also appears in a number of other key international law instruments. Historically, though, the right of self-determination has been denied to indigenous groups by international law. It was first recognized as a right applicable to all peoples in the twentieth century in the context of treaties involving the rights of minority groups within Europe.¹ In recent years, it has been

1. Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 *IND. L.J.* 673, 700 (1996) (discussing the development of international law on the rights of minorities).

increasingly associated with the rights of indigenous peoples. Nonetheless, at least to date, we do not have any sort of foundational international law instrument in force around the world that specifically declares that indigenous peoples do enjoy the right of self-determination. Nonetheless, I feel there is growing international consensus that indigenous peoples do possess a group-based right of self-determination and that right is explicitly acknowledged in U.S. domestic law.

The right of self-determination can be best understood by looking more at some of the specific rights that give shape to the right of self-determination. Among the rights generally considered to be essential to self-determination are the right to a homeland, the right to cultural integrity, and the right to self-governance on a land base. International recognition of the importance of these particular rights to indigenous people is reflected in a 1986 U.N. study's description of indigenous peoples:

Indigenous communities, peoples and nations are those, which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²

The right to cultural integrity, in particular, has achieved considerable acceptance within the international community and some people have argued that the right to cultural integrity is now a part of customary international law—basically, meaning international law that is binding on nations, even without explicit adoption in any international legal instrument. Also, it is increasingly being accepted as a right that is applicable to indigenous peoples. To me, it seems that the specific rights that are encompassed within that general right of self-determination have to be seen as necessarily woven together, particularly when you are looking at the rights of indigenous peoples.

I will start with thinking first about the right of cultural integrity. I think that in terms of the importance of preservation of cultural

2. Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1758 (2003), citing UN Subcommission on Prevention of Discrimination & Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations, para. 379, U.N. Doc. E/CN.4/sub.2/1986/7/add.4 (1986).

integrity, we have already heard from people that spoke this morning about how important this is to their particular people. So, I can only speak in general terms, and if you start with cultural integrity, then you can see that the preservation of cultural integrity is critical for the survival of indigenous nations as separate and distinct societies. In order to have the best opportunity for success in preserving your cultural integrity, you need to have some sort of land base that is under your control. In other words, you need a homeland on which you can seek to preserve cultural integrity. If the land in question has been your home for generations, then it may have incalculable value as a place tied up with the history of your people and might even be the place of the very creation of the people. It might include the places where the people feel they must go to perform ceremonies, which cannot be moved to somewhere else and performed in the same way. It also may include the places where you go to gather plants that you use in traditional healing practices or spiritual practices. It may be the place where ancestors have been laid to rest for many generations.

In order to truly exercise control over this homeland on which you are trying to preserve your culture, you need to have effective governmental institutions and effective legal systems, and enjoy the respect of other sovereigns. If outsiders can make the important decisions for your group and decide what is going to happen to your land, then your land is at risk as a refuge for your culture. In short, it seems that the right to cultural integrity, the right to a homeland, and the right to self-governance or self-government are mutually dependent and reinforcing. Again, I want to emphasize that these are just general abstract thoughts that I have brought together about the importance of a homeland to an indigenous people. To really get a true sense of the cultural ties of a particular people to their homeland, you must hear from people within that culture to understand how much their homeland means to them.

The most recent international legal pronouncements on the concept of self-determination as it applies to indigenous peoples appear in the Draft United Nations Declaration on the Rights of Indigenous Peoples. This document is now in a final draft form and is working its way through the United Nations system. What are some of the important aspects of this so-called Draft Declaration? It acknowledges that the U.N. Charter and other important instruments affirm the right of self-determination of all peoples; and, it explicitly states that that right

extends to indigenous peoples.³ It reads, “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁴ Other sections of the Draft Declaration then go on, in fairly substantial detail, to address some specific categories of rights, including land and natural resource rights, political autonomy and self-government rights, and cultural integrity rights.⁵ Moreover, the Declaration acknowledges the link between indigenous peoples’ control over their land—over their homeland—and their ability to maintain their cultural integrity.⁶

While the Draft Declaration is not a perfect document from the perspective of indigenous peoples; and, it has yet to be adopted by the U.N. General Assembly; it nonetheless represents a powerful, contemporary statement of the rights of indigenous people. This Draft resulted from the participation of many nations through representatives sent by the national governments as well as representatives from various indigenous nations.⁷ So, it stands as a powerful international endorsement of indigenous peoples’ right of self-determination. Having provided you with a sense of how things are happening on the international level, I want to move on to look more specifically at self-determination and Indigenous People in United States law.

To what extent do we see the right of self-determination linked to a homeland, as well as to the idea of cultural integrity? If you had time to flip through the federal statutes that are included in the U.S. Code that deal with Indians, you would find this particular statement, as well as variations of it, time and time again: “It is the policy of the United States to promote tribal self-determination.”⁸ But what does self-

3. U.N. Working Group on Indigenous Populations, Draft United National Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), pmb., para. 14 [hereinafter *Draft Declaration*].

4. *Id.* art. 3.

5. *Id.* arts. 25–30 (land and natural resource rights; arts. 31–38 (political autonomy and self-government rights); & arts. 12–14, 16, 24, 29 (cultural integrity rights).

6. *Id.* pmb., para. 8.

7. U.N., OHCHR, Working Group in Indigenous Populations, Mandate, at <http://www.unhchr.ch/indigenous/mandate.htm> (last visited Mar. 20, 2004) (noting that government representatives of indigenous people participate in the activities of the Working Group on Indigenous Populations, including the drafting of the Draft Declaration).

8. See e.g., 25 U.S.C. § 1772(a) (“It is the policy of the United States to promote tribal self-determination”). See also 25 U.S.C. § 450a(b) (“Congress declares its commitment to the maintenance of the Federal Government’s . . . responsibility to, Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy”); 25 U.S.C. § 2502 (“Congress recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination. . .”);

determination mean in these various statutory provisions? If you look at the statutes that use this term, as well as other statutes or provisions that mention self-determination in some way, you will see that they do not define self-determination. Nonetheless, if you look at the substance of each of those statutory provisions, you can better understand what the drafters of those provisions had in mind when they referred to self-determination. In doing so, you may start to think about the extent to which those provisions link self-determination to cultural integrity and control over a homeland.

Many references to self-determination in the U.S. Code are in provisions that relate to implementation of the Indian Self-Determination and Education Assistance Act. The act was passed in 1975 and includes the term “self-determination” right in its title. The Act authorized the transfer of a number of federal government programs to tribal governments for the tribal governments to run.⁹ It included Congressional findings concluding: “[T]he Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.”¹⁰ It also stated that federal domination has had the result of “depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government.”¹¹ It included Congressional recognition of “the obligation of the United States to respond to the strong expression of the Indian people for self-determination” and it voiced Congressional commitment to “the establishment of a meaningful Indian self-determination policy.”¹²

These provisions are linking self-determination to the political authority of tribal governments, as well as to the goal of fostering the economic self-sufficiency of reservations. You can also find similar sentiments if you look at executive branch pronouncements. An Executive Order of the year 2000, for example, required federal agencies to be guided by the principle that the “United States recognizes the right of Indian tribes to self-government and supports tribal

25 U.S.C. § 2701(4) (“a principal goal of Federal Indian policy is to promote. . .strong tribal government”); 25 U.S.C. § 3702(1) (“The purposes of this chapter are to . . .promote the self-determination of Indian tribes”); 25 U.S.C. § 4101(7) (“Federal assistance. . .should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance”).

9. Indian Self-Determination and Education Assistance Act (ISDEA), Pub L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450 et. seq.).

10. ISDEA, 25 U.S.C § 450(a)(2).

11. *Id.* § 450(a)(1).

12. *Id.* § 450(a)(b).

sovereignty and self-determination.”¹³ Statutes dealing with support for tribal court systems also cite this federal goal of tribal political self-determination.¹⁴

Self-determination is also mentioned in a number of statutes addressing the rights of Native Hawaiians.¹⁵ Some of those provisions explicitly use the term “right of self-determination” as opposed to just speaking of a government policy. For example, one provision states: “The United States has recognized and reaffirmed that. . .the aboriginal, indigenous people of the United States have. . .an ongoing right of self-determination and self-governance that has never been extinguished.”¹⁶ The right of self-determination, along with the right of tribal self-governance, also shows up in other statutes, such as statutes dealing with tribal housing and a variety of other matters.¹⁷ Finally, statutes focused on reservation economic self-sufficiency, such as those dealing with issues of employment, trade, and business development, have also cited self-determination as the foundation for the statute.¹⁸

The link between self-determination and cultural integrity is also acknowledged in the Native American Languages Act of 1990. It noted that Native-Americans’ languages are an integral part of their culture.¹⁹ The languages are critical to cultural and political integrity and the suppression of Native American languages and cultures conflicts with the self-determination policy.²⁰

In sum, both Congress and the Executive Branch use the term self-determination to describe the rights of indigenous peoples within the United States. They have linked the term to cultural integrity and to tribal governmental authority. But what about a homeland? To what extent do we see explicit provisions linking the idea of self-determination to homeland? This is what Professor Porter asked me to focus on most directly. So, let me spend some time focusing on that link more specifically.

13. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (2000).

14. Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3651(7) (2000); Indian Tribal Justice Act, 24 U.S.C. § 3601(3) (1993).

15. *See, e.g.*, Hawaiian Education Act, 25 U.S.C. § 4221 (2000).

16. Native Hawaiian Education Act, 20 U.S.C. § 7512(12)(E) (2002).

17. *See, e.g.*, Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101(7) (1996).

18. Indian Employment, Training and related Services Demonstration Act of 1992, 25 U.S.C. § 3401 (1992); Native American Business Development, Trade Protection, and Tourism Act of 2000, 25 U.S.C. § 4301 (2000).

19. Native American Languages Act of 1990 (NALA), 25 U.S.C. § 2901(3) (1990).

20. *Id.* at § 2901(8).

As I already noted, under developing international law, the Draft Declaration on the Rights of Indigenous Peoples does embrace the right of self-determination of indigenous peoples and acknowledges the link between indigenous peoples' control over their homelands and their ability to maintain cultural integrity. It already includes recognition of the importance of a homeland and how it relates to self-determination.

In the United States today, we use the term "reservation," or at least that is the term that U.S. statutes tend to use to indicate a tribe's legally recognized homeland. A tribe's reservation may overlap with its aboriginal territory or it may be in some other area, perhaps in an area to which the tribe was removed. The legal recognition of these homelands by the U.S. Government may come from a treaty, an executive order, or a statute. There are other tribes that are still trying to obtain recognition of any homeland at all.

So, to what extent has the U.S. Government explicitly recognized the link between self-determination and a homeland? Again, the terminology used here for a homeland is a reservation. As I have noted, the 1975 Self-Determination Act, and a number of other statutes that refer to self-determination, tend to focus on tribal government authority and cultural integrity without explicitly focusing on a land base—in other words a homeland—in which the power of self-government will be exercised and in which the people will work to preserve cultural integrity. These statutes do not explicitly link self-determination to the existence of a homeland. Nonetheless, they do implicitly acknowledge, through their references to reservations, the need for a land base to establish the space in which tribal authority, as a manifestation of self-determination, will be exercised, as well as indicating the space in which the tribe will try to preserve its culture. Therefore, the statutes are predicated on the existence of tribal homelands in which tribes exercise governmental authority and seek to preserve their culture.

In addition, there are a few statutory provisions relating to tribal land and resources that do make explicit the tie between the right of self-determination and tribal rights with respect to a homeland. One good example is a 1983 statute that deals with the lands of the Devils Lake Sioux Tribe (now known as the Spirit Lake Sioux Tribe). It included a congressional finding that the reservation of this tribe was "a necessary foundation for continued self-determination."²¹ It also declared the reservation to be "the permanent homeland of the Devils

21. Act of Jan. 12, 1983 § 101(2), Pub. L. No. 97-459, 96 Stat. 2515.

Lake Sioux Tribe.”²² There are also several other statutes that deal with tribal land claims and other sorts of land-related issues that also mention self-determination.²³ By reiterating the policy of promoting self-determination, these statutes implicitly recognize the tie between self-determination and a homeland.

Now, one final thought about the idea of a homeland: Does the recognition of the existence of a homeland or the right to a homeland alone guarantee self-determination in the sense of complete autonomy and guarantee that a culture can, in fact, be preserved? Clearly, this has not been the case to date. Courtroom battles continue to be waged to vindicate tribal government authority over reservation lands and over the people and activities upon them. It is an inescapable fact that at times the federal government itself has stood as an obstacle to the achievement of true self-determination for the indigenous nations of the United States, regardless of what the statutes say about the United States’ recognition of this right of self-determination. Still, it seems that recognition of a homeland, while it may not guarantee self-determination in the sense of complete autonomy, nonetheless offers the best opportunity for a tribe’s right of self-determination to become a reality. In other words, a homeland seems necessary though not alone sufficient to achieving the goal of self-determination. In short, the right of self-determination must guarantee the right to a homeland, in which an indigenous nation can seek to preserve and develop its culture. If it does not, then the right of self-determination, whether voiced in international law or U.S. law, will fail to live up to its promise.

I wanted to add one note just before I finish. As I was getting my thoughts together for this talk, I thought one good starting place was the U.S. Code. I thought I would look for all the references to the term “self-determination” in the statutes included in the U.S. Code. I used Westlaw and searched for the term to see how many times it pops up in the U.S. Code. What I found is that term “self-determination” comes up regularly just in two contexts. One of them is in the statutes involving Indians that I have referred to. But the other key context is in statutes involving the rights of the disabled.²⁴

22. § 109, 25 Stat. 2515.

23. *See e.g.*, Cherokee, Choctaw and Chickasaw Nations Claims Settlement Act, Pub. L. No. 107-331, Title VI, § 601, 116 Stat. 2845 (2002); Cheyenne River Sioux Equitable Compensation Act, Pub. L. No. 106-511, 114 Stat. 2365 (2000); Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (1993); Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, § 2, 103 Stat. 83 (1989).

24. *See e.g.*, 25 U.S.C. § 15001(b) (“The purpose of this subchapter is to assure that

When I saw the statutes that deal with the disabled included in the results of my search, I thought they were not relevant for this talk because they are part of a different area of law. If I looked at those provisions more broadly, I could also say they are irrelevant because they focus on self-determination as right to be guaranteed to individuals. On the other hand, when we talk about self-determination and indigenous peoples, we are talking about a right to be guaranteed to groups, to indigenous groups, to enable them to make decisions for themselves in order to control the destiny of the group.

Upon further reflection, it seemed to me that there was something revealing about the fact that self-determination is embraced in statutes dealing with both Indian tribes and disabled individuals. When we think about self-determination and the indigenous peoples of the United States, both in the past and in the present, time and again we come up against evidence of the ways in which governmental policy has had a disabling effect. It has had a crippling effect on tribal governmental authority and on tribal attempts to preserve cultural integrity. Also, we have had court decisions that refer to tribes as “dependent nations.” Self-determination then means that indigenous peoples should be able to get out of the status of being dependent. They should be able to free themselves from the status of dependency. That is what self-determination is supposed to free them from.

Throughout our history, we see evidence of attempts to undermine the sovereignty and culture of indigenous peoples in the United States and to treat them as dependent peoples. Although some of the past policies have been repudiated, their legacies still live on. Statutory provisions that undermine tribal authority, like various federal government approval requirements, continue to exist within our law.

I can only hope that these restrictions will ultimately become a part of the past and that indigenous governments will once again have the opportunity to govern their land and govern their people free of the kinds of disabling restrictions that have been imposed upon their authority by congressional, executive, and judicial actions. If that comes to pass, then the right of self-determination would be a reality once again for the indigenous nations of the United States.

Thank you.

individuals with developmental disabilities. . .have access to. . .forms of assistance that promote self-determination. . .”).