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Self-Determination and Indigenous Nations in the United States: International Human Right, Federal Policy and Indigenous Nationhood

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SELF-DETERMINATION AND INDIGENOUS NATIONS IN THE UNITED STATES

International human right, federal policy and Indigenous nationhood

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My paper will focus on self-determination.[1] Self-determination is a term that is used widely in the United States in respect to Indigenous affairs. In the time I have, I want to spend most of it discussing self-determination from the internal Indigenous perspective. Self-determination is being discussed in respect to Indigenous peoples at the international level, and it has long been used in respect to federal policy at the national level in the United States, since the 1970s. It is important to connect my discussion to both the international and national discussions because they impact one another.

At the international level, self-determination is a human right enshrined in both covenants of human rights, which state, 'All peoples have the right to self-determination'.[2] It has historical underpinnings, which begin with its application to nation states at the American and French revolutions.[3] Self-determination was first applied to 'peoples' after World War I.[4] Its application broadened after World War II when decolonisation of 'peoples subjugated by colonial or alien, i.e. European powers' occurred,[5] but the decolonisation movement stopped decisively

short of including Indigenous peoples.[6] Though it included 'peoples subjugated by colonial or alien, i.e. European powers', it emphasised that 'boundaries inherited from the colonial period were inviolate'.[7] Under this approach, Indigenous peoples were 'impliedly barred from asserting self-determination' because colonisation by settler populations was not included in the movement to decolonise.[8] Thus, the inclusion by the Working Group of Indigenous Populations of self-determination in the Declaration on the Rights of Indigenous Peoples represents a major assertion.[9] Article 3 stated, 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[10] The Working Group on the Draft Declaration constituted from within the membership of the Commission on Human Rights began considering the Draft Declaration in 1995.[11] Once the Commission on Human Rights finalised the text, the Draft Declaration was submitted to the United Nations General Assembly for final adoption and proclamation.[12] Although the Declaration is not legally binding, it will have considerable moral force.

The United States has asserted opposition to the provision on several grounds. The United States has made all the following arguments:

- international law does not recognise collective rights;
- Indigenous peoples are not 'peoples';
- right of self-determination applies only in colonial context, which does not include the situation of Indigenous peoples.[13]

The relationship of the United States to the Indigenous peoples within the nation has been described as a guardian–ward relationship, with Indigenous peoples having the status of 'domestic dependent nations'.[14] That is US federal Indian law in a nutshell. Tribes are possessed of inherent sovereignty — that is, powers they have never been divested of[15] — so it is that Tribes in the US have their own internal governments, with jurisdiction over their lands, yet are subject to the plenary power of US Congress.[16] They are quasi-sovereign, and are possessed of self-determination, as Congress carved it in 1975 to include the ability of Tribes to administer or contract federal programs and hence control federal dollars.[17]

When I speak of self-determination and nation building in respect to Indian nations in the United States, it is in the context of this guardian–ward, domestic dependent nation relationship between the federal government and Indigenous peoples. It is further informed by the

position the United States takes in respect to self-determination at the international level. This is self-determination from the outside in.

With this very abbreviated look at self-determination in relation to Indigenous peoples in the United States at the international and national levels, I turn now to discuss self-determination, and nation building within Indigenous nations. In doing so, I seek to shift the paradigm, from looking at self-determination as granted from without, to an inside view of self-determination from an Indigenous point of view — from within. I shift the discussion of Indigenous peoples as object and subject to Indigenous peoples as central, as voiced, and as self-possessed.

TRIBAL EXISTENCE AS SACRED

What is the Indigenous viewpoint of their right to self-determination? What is the Indigenous vision in nation building?

Autochthonous legal tradition

I begin by considering the legal tradition of Indigenous peoples. When first contact occurred, colonists ascribed little value to Indigenous ways. Indigenous peoples were viewed as uncivilised, unlearned, with everything to gain from the civilising influence of the colonist.[18] So unfamiliar was their legal tradition that by convenience and ignorance it was declared non-existent. All aspects of the way of the people were attacked: religion was outlawed, language, political organisation, dispute resolution, social and familial structure were devalued. Many Indigenous peoples did not survive, but those of us who did were able to retain and protect aspects of this legal tradition.

I have been studying traditional law closely now for over a decade. Recently, I came across a book that has been very helpful to me in this work. It was written by H Patrick Glenn, a comparative law professor from the United States.[19] I appreciate two things about his work. First, it recognises the distinct existence of a 'legal tradition' of Indigenous peoples as among seven of the most important and complex legal traditions of the world, including Talmudic, civil law, Islamic, common law, Hindu and Asian legal traditions. Second, it provides a broad understanding of chthonic or Indigenous law in terms of its institutions, and substantive law and its founding concepts and methods. Most importantly, it comports with the general conclusions I have drawn from my study of the traditional law of Indigenous peoples.

Glenn refers to Indigenous law as chthonic law, because it is the law of chthonic peoples — peoples 'who live ecological lives by being chthonic, that is, by living in or in close harmony with the earth'.[20] He then describes chthonic law 'by criteria internal to itself, as opposed to imposed criteria',[21] an extremely important methodology when approaching Indigenous subjects.

Chthonic legal tradition emerges from experience, through orality (spoken word) and memory.[22] 'It is the oldest of traditions'; 'all other traditions have emerged in contrast to chthonic tradition'.[23] Its most distinctive characteristic is its orality (oral tradition).[24] Human speech and memory preserve it.[25] 'Unreliable and vulnerable', one might say, except that tradition has 'preserved that which it says to preserve for hundreds of thousands of years'.[26] It is not concerned with 'voluminous detail';[27] 'it rejects formality in the expression of law'.[28] Transmission is through 'oral education, in daily life'; it is 'a matter of daily practice, for all ages'.[29] It is communal, conducive to consensus.[30] When 'dissent emerged...new traditions were generated or created'.[31] It 'does not lend itself to complex institutions'; though there were institutions, 'the most common' being 'councils of elders', sometimes referred to as 'gerontocracy'.[32] Within the chthonic legal tradition, 'greater authority' comes from 'assimilation of tradition over a longer period of time',[33] thus elders are important to the society. Dispute resolution is 'informal', process is 'neither confusing nor alienating'.[34] (This is why we struggled with the elders on the Pueblo of Isleta Appellate Court with rules of procedure, which can be both confusing and alienating).[35] The goal is 'reconciliation rather than adjudication'.[36] (The elders always give people an opportunity, even at the last stage of appeal, to go away and settle, and instruct parties not to blame the Court if they do not like the decision, because they have only themselves to blame for not settling.)[37] 'There is...nothing...analogous to [substantive law]...only shared information on the way to live.'[38] Land and personal or movable property was not accumulated for wealth; land was occupied.[39] 'The chthonic use of land consisted of communal or collective enjoyment with no formal concept of property' — although ownership was tied up with use and occupation[40] and the concept of territory is real. Land 'could be used for hunting, farming, for limited forms of excavation...and other uses'.[41] There is no right to alienation of land recognised.[42] 'Chthonic law is...interwoven with all beliefs of chthonic peoples',[43] 'you cannot understand it without understanding other things'.[44] 'Law has its place' and it does not control everything else.[45] There are no rights in chthonic law.[46] 'The natural world is

sacred' with as much respect being accorded as to yourself.[47] Chthonic tradition and chthonic law are adhered to 'because you believe the world...depends on it'.[48] It supports a 'non-linear concept of time' and thus, 'a tradition of inter-generational equity', including 'ancestors and successors'.[49] The core of tradition is 'the sacred character of the world'.[50] '[T]radition cannot simply tell its members what it has always told them; it has to show why other ways are not better ways.'[51] 'The tradition had to continue to convince, or the people would lose their identity.'[52] 'Since the expansion of western and Islamic tradition, all chthonic peoples have recently seen their total information base expand, incorporating western or Islamic ideas or both.'[53] The great question is 'the extent to which the "new" information will have an impact' on the tradition or 'displace the core information or belief in the tradition'.[54]

It is through this legal tradition that we, as Indigenous peoples, know that we have the right to self-determination. It is the chthonic legal tradition that gives us our identity as peoples separate and distinct from other peoples in the world. It is critical to us. Yet, it is, in part, why we experience/have experienced the attacks we have endured on so many levels. The suppression of our religion,[55] our language,[56] the removal from and destruction and taking of our traditional lands,[57] the imposition of political organisation,[58] the physical removal of our children,[59] Western education,[60] all these impact and continue to impact our legal tradition, our identity, and it is this that I address when I speak of self-determination from the inside out. Assimilation has been a goal of United States federal policy toward its Indigenous population.[61] If we do not begin to see how our legal tradition is of utmost importance in our internal self-determination, we risk assimilating ourselves in the belief we are exercising self-determination.

It is interesting to me that the chthonic legal tradition is now being used as the measure of recognition of land rights and use of land in Australia[62] and Canada;[63] though legal tradition in the past tense is identified,[64] especially since chthonic legal tradition is alive. It exists.[65] In the United States, our adherence to chthonic legal tradition is being used to limit our jurisdiction over our territories and the people within those territories.[66] It is used in the negative sense,[67] in respect to the unacceptability of traditional law being applied to non-Indians and even to other Indians not of a particular Tribe[68] and there is great concern about what this does to the rights they enjoy as American citizens.[69] In some sense there is a degree of recognition of the very real difference between the chthonic legal tradition that survives in Indigenous communities in the United

States and the common law tradition of the country. However, the real problem is that there is not a serious understanding of the chthonic legal tradition. United States Supreme Court Justices write of traditional law as if unknowable rules will be applied to unsuspecting non-Indians in some unjust manner within our tribal court forums as justification for asserting that tribal court jurisdiction does not extend to the non-Indians who live, work and enter our borders. In *Duro v Reina*, Justice Kennedy spoke of 'unspoken practices and norms' in reference to legal method.[70] I am still trying to figure out what this refers to within a chthonic legal tradition, which is characterised by orality.[71] In *Nevada v Hicks*, Justice Souter laments the unwritten nature of traditional law and the difficulty of sorting out the 'complex' mix of law for 'outsiders'.[72] To me, the characterisation of traditional law as problematic because it is oral and unwritten represents an attack on the continued existence of our legal tradition because the underlying message is that we will gain more power and authority if we assimilate, if our law and our government and justice systems are just like the United States' system.[73] In my opinion, it is a great deception. It is also a continuation of the message that our legal tradition is inferior, when in fact it is a legitimate legal tradition; different, yes, less than — absolutely not.

So, this is my starting point for looking at self-determination from within. It is our chthonic legal tradition — our journey narratives, our origin stories — that provide the legal basis for our legitimate claim to self-determination. And once you begin with the chthonic legal tradition, everything else that has to do with self-determination, i.e. nation building, flows from it.

COUNTERVAILING FORCES

Assimilative forces

In 1934 the US Government enacted major legislation aimed at 'assisting' Tribes with their governance structures[74] which were badly affected by the allotment period in which millions of acres of land were taken from Indian reservations,[75] and by the removal of children to boarding schools,[76] and other policies of the government aimed at assimilating Indian people into the white population. As a result of the *Indian Reorganization Act*, non-traditional governance structures replaced traditional governance, many of which had broken down.[77] This displacement was accomplished for most Tribes through the

adoption of Tribal constitutions.[78] These constitutions introduced such concepts as individual rights, elections, voting and majority rule, and the concept of three branches of government — executive, judicial and legislative, interestingly, without the separation of powers[79] and checks and balance principles ingrained in the United States Constitution. They introduced ideas and structures unknown in the chthonic legal tradition. Today, as some Indigenous legal scholars look critically at Tribal governance systems, this shift from Indigenous concepts of political and social organisation is seen as a starting point for more severe political crises Tribes are experiencing today.[80] It is no surprise that Indigenous peoples who continue to operate within a chthonic legal tradition would encounter problems in trying to operate under governmental systems which are not related to the way they organise the rest of their lives.[81] So as nation building is discussed in the United States at present, there has been a movement to rewrite constitutions to reflect the chthonic legal tradition of Indigenous nations. Unfortunately, an ever present concern is how much difference will be tolerated by the federal government, as well as recognising that a degree of assimilation to Western ideas is evident in the very starting point — the re-drafting of a constitution.

In 1968 Congress enacted legislation known as the *Indian Civil Rights Act*, which made certain Bill of Rights protections applicable to Tribal governments.[82] This Act reinforced the concept of 'individual rights' as paramount within tribal governments. I say reinforced, because many Tribes already possessed constitutions, which although not mirror images of the United States' constitution, contained Bill of Rights protections.[83] Thus chthonic legal traditions, which do not recognise individual rights, were faced with a prime directive to recognise and enforce individual rights. Chthonic legal tradition in the United States has thus been operating under at least two major acts, which have imposed non-chthonic legal traditions on peoples whose identity and existence is tied to their chthonic legal tradition.

My main point here is that Indigenous peoples faced with maintaining chthonic legal tradition within a nation state structure that imposes non-chthonic legal norms upon them must take special care that their chthonic legal tradition is preserved. As Tribes in the United States are contemplating 'nation building', it is imperative that we understand the importance of the chthonic legal tradition to our very existence as we reconsider our governance systems and how we are responding to the imposition of non-chthonic legal norms on our governments. I believe one of the most important steps is to consider what every act toward

nation building we engage in does to our chthonic legal tradition, as well as thinking about nation building as reinforcing our chthonic legal tradition.

Education (Western versus Indigenous knowledge and approaches)

Education is a necessity in the struggle for self-determination and nation building. However, it is important to recognise Western education as a two-edged sword. Western education is essential to prepare us to engage the outside system, to protect our interests in that system and to keep abreast and, hopefully, ahead. On the other hand, Western education and all that it represents, in terms of values, approaches and ideas, can be counter to maintaining a chthonic legal tradition within our nations. Here I will use two examples from the legal field. The Navajo Nation Supreme Court Justice Robert Yazzie, in an address to Indigenous law students, asked them to be careful that the tools they acquired in law school were not used to destroy the home that they returned to.[84] He told them that some of their Western education was not going to be useful within Indigenous communities, and, in some instances, that it could be destructive.[85] A 1978 study was published on the impact on Indian Tribes of the first generation of Indian lawyers.[86]

> Medcalf concluded that, despite their best intentions, lawyers working on behalf of Indian people failed in their stated mission of strengthening native communities and had contributed to the breakdown of native culture by imposing upon the Indians the full panoply of Anglo-American values, particularly the emphasis on individual rights.[87]

There is Western knowledge and there is Indigenous knowledge. Indigenous knowledge and approaches are key in the struggle for self-determination. Western formal education must be informed by Indigenous knowledge within Indigenous communities.

> Medcalf acknowledge[d] that the Tribal lawyers she studied were, in one sense, successful because they were able to assert Tribal rights to obtain political and economic power for their native clients. She concludes, however, that American-trained lawyers ultimately fail because they do not provide their native clients with a meaningful choice between retaining a distinct Tribal existence and adopting a lifestyle indistinguishable from American society.[88]

SELF-SUFFICIENCY

Self-sufficiency is a critical aspect of self-determination. Economic development has always created great debate within Indigenous communities. Exploitation of natural resources, leasing, commercial enterprises and development have all been controversial throughout the years. This is not a surprise with an understanding of the chthonic legal tradition. Most recently, the development of gaming by Indigenous Nations throughout the United States has raised many issues. On the positive side, gaming has shown the benefits to Indigenous Nations of the advantages of successful economic ventures where tribal gaming facilities have met success. It has brought economic self-sufficiency and political power. On the other hand, success has resulted in political crises in some communities. In some of the analyses that have been written concerning these crises, it appears a connection is made between the breakdown of traditional methods of resolving intra-tribal disputes and the non-traditional method pursued to resolve the crises.[89]

Indian preference

Self-sufficiency applies also to Indigenous organisations, governance and other institutions. Indigenous peoples must be in charge of their own institutions. One of the greatest criticisms of the Bureau of Indian Affairs (BIA), the federal department responsible for Indian affairs from the 1830s to the present, has been its paternalism. In the 1970s the BIA was a bastion of top-level non-Indian bureaucrats. The 1934 *Indian Reorganization Act* had an interesting provision providing that preference should be given to Indian people by the agency in appointment to vacancies.[90] The provision lay dormant in respect to promotions until the 1970s when it was used by the BIA,[91] under pressure in respect to its paternalism and overwhelming high employment of non-Indians at the management level in the department responsible for overseeing the majority of federal programs for Indigenous peoples. The BIA began implementing the Indian preference provision in giving preference to Indians for promotion over non-Indians.[92] The policy was challenged and upheld by the United States Supreme Court in *Morton v Mancari*.[93] As a result of this Indian preference provision, the BIA today employs a majority of Indian people to administer its programs affecting Native peoples.[94] The implementation of Indian preference was tied to the self-government

policy that was being promoted by the federal government.[95] The idea that Native peoples must be involved in the federal administrative body responsible for the development and administration of federal policy was an outgrowth of the federal self-determination policy. It is correct. Self-determination requires that Indigenous peoples must be in control of their own destinies. This principle applies at all levels — Indigenous, national and international.

EXISTENCE WITHIN THE NATION STATE

I want to conclude with two views of the operation of racism, discrimination and prejudice and speak to the barriers to self-determination they erect. I divide them into macro-aggressions and micro-aggressions, and begin with macro-aggressions. I had the opportunity this summer to hear Bartholemé Clavero, an academician from Seville, Spain, deliver a paper at the University of Arizona in Tucson, Arizona. It is his paper I use to describe the macro-aggression of racism, discrimination and prejudice in the United States.[96] Clavero makes the point that early on, and even currently, for some Indigenous populations, whether within nation states or subsets of nation states, Indigenous majorities have effectively been made Indigenous minorities through the constitutions creating the states, in particular those of Mexico and the United States.[97] He asks how it is that 'all current American states are Euro, either Latin or Anglo, but not Indigenous, regardless of the presence of Indigenous peoples as majority' within their own territory or in relation to the state as a whole.[98] He then shows how, through the construction of constitutions, the Indigenous are placed under the legislature and provisions of the constitution to create political subordination for Indigenous peoples. Clavero points out how, because of the historical inabilities of nation states to fully recognise self-determination of Indigenous peoples, the concept of self-determination as a human right is an important construction.[99] National governments on their own cannot easily be expected to overcome the historical layers of prejudice and discrimination that have given rise to such principles as wardship and domestic dependency. A restructuring of the relationship within nations to Indigenous peoples may, indeed, be possible, but the roots for constructions of federal Indian law principles run deep and may not be easily uprooted. The concept of citizenship, individuals participating equally with others, yet under status of wards, as exists in the United States for Indigenous peoples, runs counter both to the

Indigenous legal tradition and to self-determination and are imbedded with prejudice, discrimination and racism toward Indigenous peoples.

RACISM, DISCRIMINATION AND PREJUDICE — MICRO-AGGRESSIONS

Now I turn to micro-aggressions towards Indigenous peoples encountered in everyday life in the societies we are a part of. The existence of racism, discrimination and prejudice, whether it is based on colour, economics or status, has very real impacts on Indigenous populations.[100] They translate into alcoholism, suicide and exclusion from society. To the extent our people are lost to us through alcohol and drugs, death and imprisonment, we have lost their contributions to our societies, to our struggles. As a mother of two male children, I am acutely aware of the fact that in the United States the brunt of racism is borne by our young men of colour. It is for this reason that we must embrace struggles against racism, discrimination and prejudice as a part of the struggle for self-determination. Our liberation from these injustices is bound up with our struggle for self-determination. It is not just the macro-aggressions that hurt our people, it is the day to day micro-aggressions that take a major toll on the personhood of our people and cannot be tolerated.

I conclude by reiterating my major point. Our Indigenous legal tradition is central to our claim for self-determination. Our chthonic legal tradition is central to our identity. More of our attention should be focused on this legal tradition and its relationship to all that is proposed, imposed, contemplated, envisioned and ultimately accepted by Indigenous peoples. Everything should be reconcilable to our legal tradition. If it is not, we must rethink what it is we are doing. The struggle is ours and we will prevail. We can use all the help we can get. There is a saying for all those who would help: 'If you have come here to help me, you are wasting your time. But if you have come to help me because your liberation is tied up with mine, then let us work together.'[101] Let me leave you with the thoughts of an Indigenous person from the Sonoran Desert, a Tohono O'odham elder: 'If the education of our Indigenous peoples had been allowed to develop within the same framework as the American education system has been allowed to develop, our contribution to the world would be so much greater than what it is now.'[102]