



# **The Human-Rights Era of Federal Indian Law** *The Next Forty Years*

**By Walter Echo-Hawk**

What is the future of federal Indian law? The rise of modern Indian nations took place over the past 45 years. During the Indian self-determination era since 1970, hard-fought nation-building advances were achieved within the framework of federal Indian law. It is fitting to commemorate those formative years, especially on the 40th anniversary of the FBA's Annual Indian Law Conference. We cannot reflect on those years without asking: Where do we go from here?

Practicing attorneys share one thing in common: They are problem-solvers. The 21st-century lawyer will work in three areas over the next 40 years to (1) consolidate the gains made by Indian nations over the past 40 years, (2) guide those Indian nations that find themselves in new territory through uncharted legal waters, and (3) reform and strengthen federal Indian law so that it remains a vibrant legal framework protective of indigenous rights in the 21st century. The first two tasks are the grist of tribal attorneys with a firm grip on existing law. Their expertise is vital to servicing day-to-day client needs of modern Indian nations. The third task is one of law reform; it calls upon legal theorists, public interest lawyers, and visionary tribal leaders to become social engineers and fix certain mounting problems in the current legal framework. They must help Indian country repair damage done to federal Indian law by the Supreme Court in the post-modern era of federal Indian law, circa 1987–2015. Their task is strategic law development, for today we stand at the brink of a new era in federal Indian law, the human rights era, being ushered in by modern international human rights law. A new paradigm may be on the horizon for protecting indigenous rights in the United States. Scholars say this is one of those rare, law-making moments in legal history—a jurisgenerative moment—and it is unfolding before our eyes at the nexus of federal Indian law and international human rights law.<sup>1</sup>

This article addresses the law reform task that sits before us in the 21st century. It advances several propositions. First, it contends that Indian self-determination has expanded as far as it can grow under the existing legal framework. Indian self-determination is the national federal policy for Indian affairs to promote tribal self-government and turn control of programs that affect Indian tribes over to the tribes themselves. Progress has stalled in recent decades—or at least slowed to a struggle to maintain the status quo. Significant advances in the future may depend on proactively changing the domestic legal framework by reforming federal Indian law, strengthening it, and making it a more just and dependable body of law. The tribal sovereignty movement has faltered due to several engrained problems found in the existing framework, which will be discussed below. In addition, federal Indian law has not protected indigenous peoples in Hawaii, Maine, and Alaska in the same way that other federally recognized tribes benefit from the

law. Together, these problems work to retard Native America's stride toward self-determination, especially as that term is defined by modern international human rights law and applied to indigenous peoples by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), U.N. Doc. A/61/67 (Sept. 13, 2007). Finally, this article sees the Indian self-determination era drawing to a close and the rise of a human rights era. The paramount challenge for legal theorists, litigators, and tribal leaders in the new era will be to merge the best, most protective features from the current framework with the human rights framework provided by the UNDRIP standards to create a seamless, strengthened, and more just body of law for indigenous rights in the United States. That legal reform will allow the nation to complete the task of restoring Native American rights first set in motion in 1970 by the Indian self-determination policy. The goal in the new era is to embed Native American rights into the legal culture as inherent human rights, for only inviolate, indefeasible, and inalienable rights can safely secure the situation of Native Americans in the body politic with the full measure of their indigenous rights intact.

This article will first discuss how we got here after the formative years in the modern and post-modern eras of federal Indian law. Then it will identify problems in the current legal framework that need fixing in the 21st century. Finally, it will define the term “human rights” and discuss the advent of the human rights era that sits on the horizon.

### Native American Legal Activism Since 1970

Reformers cannot see a human rights future for federal Indian law until they know and understand the past. In 1970, President Richard M. Nixon announced the Indian self-determination policy. It was a decisive break from destructive policies of the past, and it inaugurated a brand new era in federal Indian law, the Indian self-determination era. The new policy ended years of government termination, assimilation, and paternalism in favor of an enlightened commitment to a self-determination principle designed to promote tribal self-government. Nixon recognized that excessive federal dominance over Indian tribes retards their progress and denies Indian people an effective voice in their affairs.<sup>2</sup> The new policy recognized tribal governments as the primary units of Indian policy and fostered expanded tribal government control over Indian affairs. It placed America upon a path toward strengthening Native American rights. It set the stage for restoring those indigenous rights that fell by the wayside during Manifest Destiny.

At the dawn of the self-determination era, the challenge was to implement the new policy. That task became the work of two generations during the tribal sovereignty movement and all three branches of the federal government. Forty-four years later, we can enjoy the fruits of that great American social movement. Standing on the shoulders of our forebears, we can mark the victories and defeats along the way that, for better or worse, shape Indian self-determination as that principle is defined by the current legal framework.

On the one hand, federal Indian law grew dramatically to nurture the spread of Indian self-determination. Congress enacted numerous laws to promote that goal. Those measures affect Indian life, property, governance, culture, and policy. A short list includes laws that grant increased tribal control over programs and services to Indians, Indian children, education, law enforcement and the administration of justice, housing, health, natural resource management, religious freedom, cultural and historical resources, repatriation, language, land return, and economic development.<sup>3</sup> The judicial branch confirmed the self-government powers of Indian tribes described in *Worcester v. Georgia*

31 U.S. 515 (1832) and its progeny.<sup>4</sup> The Supreme Court recognized the tribal governments' powers to tax and regulate persons and activities in Indian country; to adjudicate disputes through tribal courts; and to punish Indian and some non-Indian offenders who violate tribal laws.<sup>5</sup> In the executive branch, every president since 1970 subscribed to the new policy. They implemented it through executive orders that promote a government-to-government relationship, require agency consultation with Indian tribes, and protect various indigenous rights. Sparked by indigenous advocacy, all three branches collaborated to create a protective legal framework to achieve Indian self-determination in the American setting.

Much has been written about the successes that followed. In short, during the modern era of federal Indian law, Indian tribes mounted a tribal sovereignty movement to assert their governmental powers. Through litigation and legislation, Indian nations defined, refined, and activated their inherent powers of self-government. These nation-building advances led to the stirring rise of modern Indian nations. Today, some 556 federally recognized Indian nations are embedded in the American political landscape. They exercise tribal self-government powers recognized by all three branches of the national government. In asserting authority over their lands and peoples under federal and tribal law, most tribal governments became sophisticated, full-service indigenous institutions. Within the legal framework of federal Indian law, they enact laws and levy taxes; they operate courts, police forces, fire departments, medical facilities, businesses, colleges, schools, museums, and housing programs; and they provide jobs, infrastructure, social services, natural resource protection and economic development.

Looking back, attorneys in 1970 accepted the existing legal framework of federal Indian law as they found it, with good and bad sides; it was at once protective of indigenous rights but tainted by nefarious doctrines derived from the law of colonialism that have anti-indigenous functions. During the rise of the modern Indian nations under that legal regime, litigators did not mount legal challenges to the dark side of the law but rather lived with it and tried to make the best of it. Their strategic law development was simply to coax the courts into applying the most protective features in a modern day setting. That approach worked well enough in the modern era of federal Indian law until the late 1980s, when the Rehnquist court began tilting toward the nefarious side of federal Indian law with its anti-indigenous functions in the post-modern era. Tribal litigation under that strategy in the post-modern era is quite dangerous due to an 80 percent loss rate before the Supreme Court.<sup>6</sup>

In this regard, the legal strategy of the tribal sovereignty movement during the rise of modern Indian nations resembles the National Association for the Advancement of Colored People's (NAACP) early strategy for overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896). NAACP litigated from 1910–50 under the separate-but-equal doctrine to coax the courts into applying the most protective features found in the law of racial segregation; by 1950, NAACP stood at a crossroads, because it had taken the *Plessy* framework as far as it could go to achieve black aspirations for equality under the law.<sup>7</sup> At that stage, NAACP changed its strategy to mount a frontal assault on the separate-but-equal doctrine itself, leading to a brand-new legal framework of equality under the law espoused by *Brown v. Board of Education*, 347 U.S. 483 (1954). It may be that the tribal sovereignty movement stands at the same crossroads today after litigating 45 years under a legal framework that contains significant anti-indigenous features. Is it time to mount a frontal assault on the dark side of the law?

## Problems in Federal Indian Law that Need Fixing in the 21st Century

Despite impressive advances over the past 45 years, Native Americans have not reached the promised land. The extant legal framework labors under a number of deeply rooted problems that stall progress at the doorsteps to self-determination as defined by modern international law.<sup>8</sup> These intransigent problems are familiar in nations with inherited histories of colonialism; they operate to bar the door to the full recognition of indigenous human rights unfolding in international law.

First, there has been a gradual weakening of federal Indian law during the post-modern era. Since the late 1980s, the Supreme Court has steadily eroded the protective features, as the Rehnquist court (1986–2005) ruled against Indian tribes in 80 percent of the cases, and the Roberts court is following the same footsteps. As a result, tribal sovereignty is under assault by a Supreme Court that has lost sight of Justice John Marshall's inherent tribal sovereignty principle and the political charter in the protectorate described in *Worcester*.<sup>9</sup> The judicial trend toward diminishing the foundational principles has sorely battered tribal sovereignty. Instead of leaving it up to Congress to place limitations upon the inherent sovereign powers of Indian tribes, judicial impairment of tribal self-government is the order of the day under the novel implicit divestiture theory for limiting the inherent tribal sovereignty of Indian tribes on an ad hoc basis whenever five justices perceive that the exercise of such authority is inconsistent with the dependent status of Indian tribes.<sup>10</sup>

Second, scholars and legal theorists have identified the dark side of federal Indian law and traced its roots in medieval Europe.<sup>11</sup> In the 19th century, the baggage of colonialism and conquest was implanted into the American mindset, institutions, and legal culture so deeply that we are blinded to its presence today; but the imprint is clearly visible in the strands of federal Indian law that depart from the high ideals that normally animate the nation.<sup>12</sup> In a nutshell, the dark side of the law is tainted by notions of conquest that allow the government to divest Indian land title, extinguish aboriginal title, confiscate aboriginal land, and exercise unfettered dominion over Indian peoples and their property without their consent or the normal constitutional limitations that protect the property of others. Federal Indian law is also imbued with the law and mindset of colonialism imported from the early law of nations, complete with all of its legal trappings, such as the doctrines of discovery, plenary legislative power, and unfettered guardianship, accompanied by notions of racism and legal fictions created to achieve unjust results in Indian cases. As a result, many manifestly unjust decisions that rival *Plessy* populate federal Indian law, and they have never been reversed. Instead, the Supreme Court relies upon them to decide Indian cases to this very day. A prime example is *Johnson v. McIntosh*, 21 U.S. 543 (1823), which destroyed land ownership rights of Indian tribes based upon the doctrines of conquest, discovery, and the legal fiction that Indians are an inferior race of people with inferior characters, cultures, and religions.<sup>13</sup>

The dark side of the law is much-criticized by scholars. Indeed, there are many obvious problems with continued use of the above lines of judicial thought by 21st-century courts, but no frontal assault on that practice or those nefarious decisions has ever been mounted. The best that can be said is that the inherent tribal sovereignty doctrine and protectorate principles of the *Worcester* line of cases mitigate the hardships imposed on Native America by the judicial notions of conquest and colonialism. But there is a tension between these conflicting

lines of judicial thought that represents the internal struggle between the good side of the law, which is protective of indigenous rights in the setting of a benign protectorate, and the dark side, which strives to undermine that regime. Native Americans are caught in the middle. They cannot be self-determining while captive to spurious notions of conquest and unfettered colonialism. These problems in the law render Native American rights vulnerable, and they account, in large part, for the erosion of those rights seen in the post-modern era.

Third, the body of federal Indian law is bereft of the human-rights principle. The courts in Indian cases never mention human rights, even though our nation springs from the human-rights principle, which is quite literally our foundational creed. Human rights are “the rights and fundamental freedoms that all human beings enjoy as a matter of right in the society in which they live.”<sup>14</sup>

During the birth of our nation, the proposition that each human being is endowed by “the sacred rights of man” that “can never be erased or obscured by mortal power” gripped the Founding Fathers as a fundamental organizing principle for the new republic.<sup>15</sup> Various descriptions of the rights of man, natural rights, or the rights of mankind, the idea of human rights was well-understood by the first generation as a body of natural, inalienable rights of all persons that derived from a larger authority and higher source—human rights that no government could deny and that all free and democratic governments were formed to protect. In fact, the denial of these inalienable rights led to the American Revolution. The Declaration of Independence memorialized the ideals that animated the Revolution:

We hold these rights to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to pursue these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Our revolution, then, was based on human rights. Those precepts forged a nation unlike any other that had gone before it, and they guided a great “experiment upon the theory of human rights,” in the words of President John Quincy Adams.<sup>16</sup> Human rights precepts rang from our lips at every important juncture in American history to inspire the rise and growth of the democracy. The precepts profoundly affected the writing of the Bill of Rights and the fulfillment of human rights in the abolitionist movement, the slavery debates, the Civil War, the women’s movement, and the civil rights movement of the 20th century. Our history reveals a nation dedicated to protecting human rights at home and abroad. Although we have not always lived up to these ideals, in each torturous detour the human rights principle impelled every generation to self-correct those shortcomings and redeem our core values.

Given the pervasive human-rights dimension in U.S. history, it is not surprising to find extensive use of human-rights precepts by the courts throughout judicial history.<sup>17</sup> Marshall was the first Supreme Court justice to use the phrase “human rights.” In *Fletcher v. Peck*, 10 U.S. 87, 133 (1810), he recognized that courts “are established to decide on human rights.” After surveying the use of human rights by the federal courts, Professor Jordan J. Paust found “a rich, often splendid history of use of human rights and equivalent phrases by U.S. courts over the past two hundred years.”<sup>18</sup>

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of law that stands in stark contrast to the profound commitment to remedial justice found elsewhere in American legal culture. When wrongs to Indians and their rights are concerned, the federal courts don the robes of the “courts of the conqueror,” to borrow Marshall’s language in *Johnson v. McIntosh*, *supra*, and they cannot resort to “principles of abstract justice” nor engage in debates about morality when defining Indian rights. For the rest of the century, the Supreme Court insisted that justice has no place in formulating the foundational doctrines of federal Indian law. In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), Justice William Johnson voted to deny relief in a concurring opinion that eschewed morality: “With the morality of the case I have no concern; I am called upon to consider it as a legal question.” Thus freed from moral strictures, he rejected the self-determination claim on the ground that such a right could not be accorded to a lowly “race of hunters,” because they are a “restless, warlike and signally cruel” race with “inveterate habits and deep seated enmity,” who could only “receive the territory allotted to them as a boon from a master or conqueror.” *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) reiterated that Indian land rights do not derive from inalienable rights; rather they rest on “good faith” and “such considerations of justice as would control a Christian people in the treatment of an ignorant and dependent race.” Under the doctrine of confiscation announced in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), Indian occupancy of ancestral tribal homelands devolved into simple “permission from the whites to occupy” the land—a bare entitlement that depends solely upon the compassion and grace of the American people. Justice Stanley Forman Reed added:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty ... it was not a sale but the conqueror’s will that deprived them of their land.

In sum, it is hard to find *any* human rights discourse in important Indian cases that define Native American rights, even though the courts freely and extensively use human-rights precepts in non-Indian cases. Instead, after expressly eschewing such principles, the so-called “courts of the conqueror” manufactured and applied doctrines devoid of human rights in an amoral body of law where justice has no place. This problem in the law accounts for the high tolerance for manifestly unjust cases found in federal Indian law.

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The end products of the above problems in the law are seen in 2015: (1) United States law does not see Indian self-determination as an inherent human right; instead it allows Congress to abolish or curtail self-determination and self-government at will, and the Supreme Court can trim tribal sovereignty at will by creating new federal common law doctrines; (2) equality and non-discrimination in federal Indian law are beyond reach so long as notions of conquest, colonialism, and racism flourish in the law; (3) under the implicit divestiture doctrine, the Supreme Court prevents tribal governments from protecting their citizens from violence at the hands of non-Indian offenders within their jurisdictions; (4) tribal culture is under assault due to a failure to *effectively* protect Native American holy places, intellectual property, languages, culturally appropriate education, indigenous habitat, and the ability to effectively transmit culture; (5) the hard-to-solve social ills that stalk Native American communities are tolerated because they are invisible in a land where public media, education, and information are unaccountable to Native Americans; (6) the political relationship falls short of the protectorate intended by *Worcester* because of inadequate indigenous participation in government decision-making and the dark side of federal Indian law; (7) deplorable socio-economic conditions, shocking gaps in physical and mental health care, and other indicators of societal trauma remain permanent fixtures for Native Americans, because the government does not view these social ills through a human-rights lens; (8) because Native American rights under federal Indian law are not seen as inherent human rights, tribes are plagued by second-class land rights and inadequate indigenous habitat rights; and (9) there are disturbing shortfalls between extant U.S. law and policy and the benchmark U.N. minimum human-rights standards that constitute the floor for all modern nations in the post-colonial world.<sup>19</sup>

Native Americans can only advance so far under an unjust legal regime and cannot bask in the status quo. Without a stronger and more just human-rights foundation, progress has stalled out. The problems in the law identified above are lingering inequities inherited from a bygone era that shock the conscience in 2015. They operate to bar the door to the full recognition of indigenous human rights. Consequently, the tribal sovereignty movement has not completed its work, nor has indigenous self-determination been fully attained in the United States.

Great strides have been made to strengthen Native American rights under the Indian self-determination policy, but the entrenched legacy of conquest and intransigent mindset of colonialism in the law are hard to eradicate. Against these powerful forces, the nation's stride toward indigenous justice has faltered. Much work by our nation remains before Native Americans can enter the body politic on a fair and equitable basis, with the full measure of their inherent indigenous human rights intact. This belated nation-building task enables nations with

histories of colonialism to come to terms with indigenous peoples. The last chapter on the American experiment cannot be written until that goal is realized and Native Americans stand in the light of justice. The key for entering that realm was beyond the reach of the forbears of the tribal sovereignty movement. Today, the pathway lies in implementing the human-rights standards of the UNDRIP into the legal culture and social fabric of the United States. Given the human-rights dimension in our history, it should not be difficult to inject the human-rights principle into federal Indian law and policy. Core American values insist on correcting the tortuous detour taken by the nation in its treatment of Native Americans during the rise and growth of our free and democratic society.

### Advent of the Human-Rights Era

On Sept. 13, 2007, the U.N. General Assembly adopted the landmark United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in a landslide vote of approval by member nations. On Sept. 22, 2014, General Assembly resolution A/RES/69/2 reaffirmed the United Nations' commitment to the UNDRIP. The declaration is the product of more than 25 years of focused work conducted by member states and indigenous peoples in the open and transparent processes of the U.N. human rights system.<sup>20</sup> Today the declaration has been endorsed by 150 nations, including the United States. President Barack Obama's endorsement was announced at the White House in 2010 during his annual meeting with tribal leaders. As such, the UNDRIP is technically part of United States policy. It ushers in a new era, though the implementation work to incorporate its principles into domestic law and policy has barely begun.

Drawn from the larger body of contemporary international human-rights law, the declaration addresses the full range of self-determination, property, civil, political, economic, social, cultural, religious, land, and environmental rights of indigenous peoples. It formulates minimum standards with high normative value for protecting the survival, dignity, and well-being of indigenous peoples. The standards are linked to nine core themes that run throughout the declaration: (1) self-determination and indigenous institutions; (2) equality; (3) life, integrity, and security; (4) cultural rights; (5) education and public media; (6) participation in government decision-making; (7) economic and social rights; (8) land, territories, and resources; and (9) treaties and agreements. Importantly, the text also defines the obligations of nations toward their indigenous peoples and provides guidelines for interpreting and implementing the standards. In short, the declaration provides authoritative guidance for interpreting and applying human rights in the indigenous context. It calls upon each nation to fully implement each standard through effective measures taken in consultation and partnership with indigenous peoples.

The declaration has remedial purposes. It seeks to abate the persistent denial of human rights by states with entrenched legacies of colonialism and strengthen just relations between the state and indigenous peoples in those nations through a nation-building process. The preamble describes the problem seen by the General Assembly: "[I]ndigenous peoples have suffered historic injustice" from "colonialism and dispossession of their lands, territories and resources," and this condition prevents them from exercising "their right to development in accordance with their own needs and interests." It expresses the need to respect and promote "inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

especially their rights to their lands, territories and resources.” To create conditions for realizing that goal, the preamble relies on principles of equality, diversity, and justice. It proclaims that indigenous peoples are “equal to all other peoples” yet retain a right to be different and be respected as such; and it declares that indigenous peoples “should be free from discrimination of any kind.” All forms of discrimination against indigenous peoples are sternly condemned:

[A]ll doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.<sup>21</sup>

Political incorporation of indigenous peoples into the body politic on a just and consensual basis is a widespread problem commonly seen in modern nations with histories of colonialism. They struggle to find ways to replace that engrained legacy and its lingering ill effects with enlightened laws, policies, and legal principles that create a more just balance so that indigenous peoples can be afforded the opportunity to enter the body politic on a consensual basis with their fundamental rights and aspirations intact. That nation-building challenge has confounded and eluded many modern democracies.

The UNDRIP helps nations meet that challenge by creating a pathway and fostering the conditions for indigenous justice. Such nation-building envisioned by the UNDRIP is intended to help former colonies mature into more just cultures in three important respects. First, state recognition of indigenous human rights is intended by the U.N. to “enhance harmonious and cooperative relations between the State and indigenous peoples, based on respect, democracy and respect for human rights, non-discrimination and good faith.” Second, recognition of indigenous land, habitat, and environmental rights will “contribute to sustainable and equitable development and proper management of the environment.” Third, a strengthened partnership between the State and its indigenous peoples is established through the application of the standards to indigenous peoples.<sup>22</sup> As such, the declaration is aimed at nothing less than healing inherited legacies of injustice through acts of atonement and reconciliation so that civil society can move forward with a more just culture.

The declaration has the potential to shape the future character of federal Indian law in the United States.<sup>23</sup> The impact on the dark side of the law is enormous, for none of its nefarious doctrines comport with U.N. standards. That has two-fold implications: First, incorporation of the standards into U.S. domestic law can supplement and strengthen the very best of our legal culture in its finest hour and make those rules of law more dependable and reliable; and second, the principles of the declaration would trim the dark side of federal Indian law and redress the erosion of its protective features by the Supreme Court trend in recent decades. That makes for a more just body of law, better suited for the post-colonial world of the 21st century.

### **Legal Status of the UNDRIP in International and Domestic Law**

Rules of conduct are made in international law from two principle sources: treaties/conventions and customary international law derived from the usages and practices of nations. Customary international law is oldest and original source; and the norms in customary international law carry the same binding force and authority as treaties.<sup>24</sup> The declaration is derived from U.N. human-rights treaties and customary

international human-rights law. The primary means of enforcement of international law has always been domestic legal systems.<sup>25</sup> The Supreme Court in the young American republic extensively relied upon international law “in its modern state and refinement” to develop judge-made law in the United States. *Ware v. Hylton*, 1 L. Ed. 569 (1796). Over the years, the Court applied international law and instructed lower courts on how to ascertain the nature and content of international law. Customary international law forms part of the federal common law and is enforceable as such;<sup>26</sup> and that is significant, because most federal Indian law principles are nothing more than federal common law. Modern international law continues to exert a strong influence on the development of the common law in western nations, especially when it “declares the existence of universal human rights.”<sup>27</sup>

From the beginning, international law shaped federal Indian law in the United States. The Supreme Court drew heavily from established international law norms and the practices of nations to establish the foundational principles of federal Indian law; to define tribal land and sovereignty rights; and to fix the Indian nations’ relationship with the United States. According to the leading treatise on federal Indian law, international law is applied by courts in three principal ways: “as part of a treaty ratified by the United States, as part of customary international law as federal common law, and as an interpretive aid in the construction of United States constitutional or statutory law.”<sup>28</sup>

The question arises: What is the legal status of the declaration and its provisions in the United States, and what is its enforceability by federal courts? The short answer is that declarations are not legally binding instruments that courts must enforce, except indirectly to the extent that their provisions amount to norms in customary international law or existing U.S. treaty obligations. Many provisions in the declaration reflect such norms, and others reflect obligations imposed by U.N. treaties ratified by the United States, though none are self-enforcing and must be domesticated through implementing legislation.<sup>29</sup>

Though the United Nations has its own international enforcement and oversight mechanisms, it recognizes that domestic legal systems are the primary enforcement engines. Rather than contemplating automatic enforcement by domestic courts, language in the declaration calls upon nations to develop and take effective measures to incorporate its provisions into law and policy in partnership with indigenous peoples. This is not an unusual situation. None of the principles of the Indian self-determination policy were legally binding on the courts in 1970 until incorporated into the law by the three branches. The same is true for the human-rights principles of the declaration: They must be incorporated into the law before they can be enforced. This is done by advocates through strategic law development, by acts of Congress, by executive orders and agency policies, and by court decisions that incorporate those principles into federal common law.

In the meantime, regardless of its enforceability as binding law, at the present moment the declaration is an authoritative statement of indigenous rights in the United States, with standards that build upon the U.N. treaty obligation of the United States to advance human rights under the U.N. charter. In addition, the declaration carries immediate power in five important respects: (1) it can be used by tribal litigants in carefully crafted test cases to influence courts in pending cases as persuasive authority when interpreting or reinterpreting federal Indian law doctrines and judge-made law; (2) it can guide and influence lawmakers and policy-makers when making new Indian laws and policies; (3) the widely approved international standards are a barometer for measuring U.S. conduct, laws, and practices and for judging that conduct

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in the court of world opinion and international forums; (4) the U.N. standards can guide Indian country in setting the agenda for social and legal reform in the 21st century; and (5) as mentioned above, courts can enforce those provisions that constitute customary international law norms or existing treaty obligations of the United States. At the end of the day, compliance with international standards hinges more on their moral power and growing acceptance in the usage and practices of affected nations than upon their binding character in international law. Just as modern nations have renounced torture, genocide, piracy, slavery, and cruel and unusual punishment in the world today, the human rights of indigenous peoples will be restored by nations primarily because it is the right thing to do in the post-colonial age.

For practitioners of federal Indian law, the chore of incorporating the declaration into domestic law and policy is one of strategic law development. Attorneys are adept at problem-solving. In the face of the incorporation chore, there is a need for advocates to find ways to strengthen the legal framework for indigenous rights in the United States. This daunting task calls upon advocates to look beyond our day-to-day work into a larger vision of our legal system in the 21st century. Thankfully, we are trained for this kind of challenge. Legal advocates continually search for the best forums, the best facts and legal theories, and the best strategies for meeting their clients' needs. Sometimes this search entails *changing the law* and *finding new and better forums for presenting claims*. This is a proactive process called strategic law development. It can be done on a discrete issue-by-issue or client-by-client scale, or it can be done on a larger, grander scale by advocates when systematic legal problems are at stake.

Examples of large-scale strategic law development can be seen in the NAACP Legal Defense Fund campaign to overturn *Plessy* in the landmark *Brown* decision. The stirring *Brown* decision changed the face of America by striking down the engrained separate-but-equal doctrine for segregating all walks of public life, and it paved the way for the election of Obama as the first African-American president of the United States. *Brown* was not an isolated legal incident but was the product of a sustained social and legal movement conducted on many fronts over many years. And the implementation of that historic decision took a national civil-rights movement over the course of a generation. Other examples can be seen in some of the campaigns mounted by the tribal sovereignty movement, such as the creation of a brand-new legal framework for protecting Native American graves and repatriating the dead when the existing framework proved inadequate or non-existent. The campaign to create a new framework for determining the best interests of Indian children that led to the Indian Child

Welfare Act is another example of strategic law development, and so is the systematic campaign of the Native American Rights Fund to change state and federal prisons and make them accountable to the rights of Indian inmates. To incorporate the full measure of human rights into federal Indian law and policy, Indian country leaders and advocates may have to mount a similar law-development campaign in the 21st century—and that is the challenge of this generation.

Implementation of the UNDRIP has begun in Canada, where First Nation leaders, activists, and legal counsel are more familiar with the law-reforming possibilities provided by that international law instrument. In that nation, judicial discourse about the UNDRIP is taking place in no less than 19 cases brought by First Nations, with mixed but generally positive results so far.

At first, in early litigation before Canada endorsed the UNDRIP on Nov. 12, 2010, the courts refused to consider the UNDRIP. *See, e.g., The Grand Council of the Crees et al. v. Director of Youth Protection et al.*, 2009 QCCA 1583, ¶ 58, n.24. After endorsement, that changed dramatically. In a 2011 decision, a British Columbia court suggested that the UNDRIP might offer a “parallel inherent right” to statutory rights. *Cameron v. Albrich*, 2011 BCSC 549. In *Canadian Human Rights Commission, et al v. First Nations Child and Family Caring Society, et al*, 2012 FC 445, ¶¶ 351, 353-354, the Supreme Court of British Columbia observed that “the Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation”; and it held that “international instruments such as the UNDRIP ... may also inform the contextual approach to statutory interpretation,” noting that “an interpretation that reflects these values and principles is preferred.” Under that decision, where more than one interpretation of a statute is possible, courts must avoid the interpretation that violates international obligations, and the preferred approach is one that reflects the values and principles of international law. In *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, ¶¶ 358-364, the Court upheld the rights of aboriginal children and their incarcerated mothers. It ruled that even though international law is not part of domestic law, international instruments like the UNDRIP should inform interpretation of Canadian human-rights statutes, which are presumed to provide at least as much protection as found in international instruments ratified by Canada. That principle was applied in another case where First Nations asserted that the UNDRIP principles must guide agency decision-makers. *Chief Jesse John et al. v. The Attorney General of Canada*, 2013 FC 1117, ¶¶ 53, 121. In *Director of Youth Protection v. Grand Council of Crees*, 2012 QCCQ 2873, ¶¶ 587-589, a case involving the role of culture in determining the best interests of aboriginal children, the court held that the UNDRIP “applies to the situation of Aboriginal children.” *See also, In The Matter of C.C-R.G et al.*, 2012 SKQB 306, ¶ 12 (culture and the UNDRIP must be considered in the placement of aboriginal boys).

The UNDRIP has been relied upon by First Nation litigation in a wide variety of cases involving: the duty to consult with First Nations before enacting environmental laws that affect their interests, *Hupacasath First Nation v. Minister of Foreign Affairs and Attorney General of Canada*, 2013 FC 900, ¶ 51; trust fund litigation, *Chief John Ear et al. v. Her Majesty the Queen*, 2013 FC 983, ¶ 17; cases asserting that UNDRIP principles must guide agency decision-makers, *Chief Jesse John et al. v. The Attorney General of Canada*, 2013 FC 1117, ¶ 53; treaty fishing rights litigation, *Acadia First Nation v. The Attorney General of Canada*, 2013 NSSC 284, ¶ 17; the duty to consult before enacting laws, *Sackaney v. Her Majesty the Queen*, 2013 TCC

303, ¶ 9; tax immunity litigation, *Laboucan v. Her Majesty the Queen*, 2013 TCC 357, ¶¶ 13-15; and education litigation asserting that the UNDRIP principles must guide agency decisions to close schools on tribal reserves, *Snuneymuxw First Nation v. Board of Education*, 2014 BCSC 1173, ¶ 59.

As seen by these examples, the First Nations have embarked upon the task of implementing UNDRIP principles into aboriginal law. This article encourages litigators to embark on the same task in the United States in carefully crafted cases using strategic law-development strategies. A good starting place is the findings and recommendations in *The Situation of Indigenous Peoples in the United States of America*, S. James Anaya, U.N. special rapporteur on the rights of indigenous peoples, U.N. Doc. A/HRC/21/54 (2012). It identifies barriers in the United States to the full realization of indigenous human rights and makes recommendations for all three branches of the federal government for bringing U.S. law and policy into compliance with the UNDRIP human rights standards. It recommends that the president issue a directive to all federal agencies to adhere to the declaration in all decision-making concerning indigenous peoples and asks the president to effectuate Congress's Native American apology with a national program of reconciliation developed in consultation with them. It suggests to Congress that any legislation pertaining to indigenous peoples should be adopted in consultation with them; that lawmakers should hold hearings to educate themselves about the UNDRIP and consider special measures needed to implement its standards; and that Congress curb the exercise of its power over indigenous peoples by refraining from unilaterally extinguishing their rights, based upon the understanding that such unfettered power is morally wrong and contrary to the U.S. international human rights obligations. Finally, the U.N. report addresses the judicial branch's role in defining indigenous rights. It expresses concern over the limitation of those rights in recent years based on "colonial era doctrines that [are] out of step with contemporary human rights values," and it urges the judiciary to discard such doctrines in favor of

[j]urisprudence infused with the contemporary human rights values that have been embraced by the United States, including those values reflected in the United Nations Declaration on the Rights of Indigenous Peoples. Furthermore, just as the Supreme Court looked to the law of nations of the colonial era to define bedrock principles concerning the rights and status of indigenous peoples, it should now look to contemporary international law, to which the Declaration is connected, for the same purposes.<sup>30</sup>

From where the sun now stands, let us turn our eyes toward the human-rights era in federal Indian law. ☺



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From 1973 to 2009, he was a staff attorney at the Native American Rights Fund. © 2015 Walter Echo-Hawk. All rights reserved.

## Endnotes

<sup>1</sup>Kristen A. Carpenter and Angela R. Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," 102 Cal. L.R. 173 (2014).

<sup>2</sup>Nixon Special Message to Congress, 213 Pub. Papers of the President: Richard Nixon 564 (July 8, 1970), 564-567.

<sup>3</sup>WALTER R. ECHO-HAWK, ROSA LUXEMBURG STIFTUNG NEW YORK OFFICE, SELF-DETERMINATION, NOT TERMINATION: PAST, PRESENT, AND FUTURE OF THE AMERICAN INDIAN MOVEMENT, (Jan. 2014) at 15-16 (hereinafter, "Echo-Hawk, 2014"), available at [www.rosalux.de/fileadmin/rls\\_uploads/pdfs/sonst\\_publicationen/echohawkfinal42.pdf](http://www.rosalux.de/fileadmin/rls_uploads/pdfs/sonst_publicationen/echohawkfinal42.pdf).

<sup>4</sup>*Worcester* lays out the foundational principles of federal Indian law, such as *inter alia*, the doctrine of inherent tribal sovereignty; the protectorate relationship between the United States and Indian tribes; the rule that treaties with Indian tribes must be enforced; and the rule that state laws have no force and effect within Indian reservations.

<sup>5</sup>*Id.* at 16.

<sup>6</sup>Richard Guest, *Tribal Supreme Court Project Ten Year Report*, 1 AM. IND. L. J. 28, 32 (Fall 2012).

<sup>7</sup>See RICHARD KLUGER, *SIMPLE JUSTICE* (New York: Vintage Books, 1975, 2004). See also, WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE*, 222-248 (Golden: Fulcrum Pub. 2013) (hereinafter, "Echo-Hawk, 2013") (comparing the NAACP legal campaign to the tribal sovereignty movement).

<sup>8</sup>Self-determination is a fundamental principle of the highest order in international law that adheres to every sovereign nation, and it is also a core human right for all peoples. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 75 (New York, Oxford: Oxford University Press, 1996). As a human right, self-determination means that all peoples are entitled to be in control of their own destinies and live within a political order that is devised accordingly. S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 187 (Claire Charters & Rodolfo Stavenhagen, eds.) (Copenhagen: International Work Group for Indigenous Affairs, 2009). This right is accorded to the entire human family by the U.N. Charter and international human-rights law. See authorities cited in Echo-Hawk (2013) at 302, n. 19 and accompanying text. Article 3 of UNDRIP applies that universal right to indigenous peoples in the same language employed by the U.N. charter:

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.

The foundation for the UNDRIP framework is a broadly defined self-determination principle because no other right enumerated in the declaration can be realized without it, and all other articles are linked to self-determination—they further define the contents of self-determination or provide tools for realizing it.

<sup>9</sup>See WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR* 431-436 (Golden: Fulcrum Pub., 2010) (hereinafter, "Echo-Hawk, 2010") for further discussion of the *Worcester* framework.

teaching and publishing. In fact, she serves as an associate judge for the White Earth Nation Court of Appeals and an associate justice for the Prairie Island Indian Community Court of Appeals. Appointed by Attorney General Eric Holder, Deer is the chairperson of a federal advisory committee to address sexual assault in Indian country. In addition, she co-coaches, with her colleague Colette Routel, the William Mitchell College of Law Native American Law Student Moot Court Team, which is currently one of the nation's top-placed Native law moot court teams.

Deer is also a student herself. "I'm always learning!" she said. She has been actively studying her own Muscogee language for five years. She acknowledges her teacher, Rosemary McCombs Maxey, as one of her personal mentors.

In fall 2014, Deer was awarded a MacArthur Fellowship (also known as a Genius Grant).<sup>4</sup> This award celebrated all of her efforts and influential work, including her publications and teaching. In addition, the MacArthur Foundation saw how influential Deer was in the passage of two landmark pieces of legislation, the Tribal Law and Order Act of 2010 and the 2013 Reauthorization of the Violence Against Women Act. The Tribal Law and Order Act of 2010 increased the sentencing power and support of tribal courts and required federal district attorneys to provide comprehensive and specific information about nonprosecuted cases to the respective tribal authorities. The 2013 Reauthorization of the Violence Against Women Act restored some of the authority that was stripped from tribal governments by *Oliphant v. Suquamish* (1978), giving tribal courts the power to prosecute non-Native Americans who assault Native spouses or dating partners or violate a protection order on tribal lands. Deer's work and advocacy improved the lives of countless women, children, and tribal communities.

Deer's work continues to flourish, and she has many plans for her future. When asked about what's next for her, she said, "I want my work to be aimed at ensuring Native women have access to repro-

ductive health care including emergency contraception. I also want to work on reversing the decision in *Oliphant* so we can restore criminal jurisdiction to tribes for crimes committed against Indians."

Lastly, she said, "I want to decrease gun violence in Indian country, especially keeping guns out of the hands of troubled children. Suicide and homicide greatly damage our communities, and decreasing gun violence through tribal law can help us change this."

With a star quilt given in her honor draped around her shoulders, Sarah Deer, an awe-inspiring woman, stands before us. The drumbeats come to a close, and one can feel the power of the moment lingering throughout the crowd. We erupt into applause, cheering for how much she has contributed to the world. As the people line up to congratulate her and shake her hand, I snake my way up to the front of the queue. When it's my turn to acknowledge my professor and mentor, I can't help but feel emotional.

"Thank you so much for everything," I say to her. Words could never express how grateful we truly are for all that she has done and will continue to do to fight for the rights and safety of Native women everywhere. ☺

## Endnotes

<sup>1</sup>PATRICIA TJADEN & NANCY THOENNES, DEPARTMENT OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, (2000).

<sup>2</sup>AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), [www.amnestyusa.org/women/maze/report.pdf](http://www.amnestyusa.org/women/maze/report.pdf) (last visited Jan. 23, 2015).

<sup>3</sup>24:2 *Wicazo Sa R.* (fall 2009).

<sup>4</sup>MACARTHUR FOUNDATION, MACARTHUR FELLOWS PROGRAM, SARAH DEER: LEGAL SCHOLAR AND ADVOCATE (Sept. 17, 2014), [www.macfound.org/fellows/912](http://www.macfound.org/fellows/912) (last visited Jan. 23, 2015).

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<sup>10</sup>COHEN'S HANDBOOK ON FEDERAL INDIAN LAW (2012 ed.), § 4.02[3][a] at 226-227 discusses the much-criticized "implicit divestiture" theory for limiting the inherent sovereign powers of Indian tribes.

<sup>11</sup>Echo-Hawk (2010) explores the dark side of federal Indian law identified by legal scholars.

<sup>12</sup>See Echo-Hawk (2013) at 105-125.

<sup>13</sup>Echo-Hawk (2010) at 55-84 contains a comprehensive analysis of *Johnson*.

<sup>14</sup>Echo-Hawk (2013) at 7. See also, BLACK'S LAW DICTIONARY (abridged 9th ed., 2010) ("Human rights" are "[t]he freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live.").

<sup>15</sup>Words of Alexander Hamilton, quoted in Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts In U.S. History And The Right To An Effective Remedy In Domestic Courts*, 10 MICH. J. INTL. L. 543 (1989).

<sup>16</sup>*Id.* 552-553.

<sup>17</sup>*Id.* 572-611.

<sup>18</sup>*Id.* 650.

<sup>19</sup>These end products are elaborated on in Echo-Hawk (2013).

<sup>20</sup>*Id.* 27-38.

<sup>21</sup>Preamble ¶ 4, UNDRIP.

<sup>22</sup>Preamble ¶¶ 11, 15, 18, UNDRIP.

<sup>23</sup>Echo-Hawk (2013) 157-181, 183-217.

<sup>24</sup>*Id.* at 71, 78-79.

<sup>25</sup>Siegfried Wiesner, *Rights and Status of Indigenous Peoples: A Global Comparison and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 125-126 (1999).

<sup>26</sup>Cohen's, § 5.07[1], [4][a]. See also, Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique Of The Modern Position*, 10 HARV. L. REV. 816, 822 (No. 4, 1997).

<sup>27</sup>*Mabo v. Queensland*, 174 FLR 1, 42 (Australia High Court, 1992). See also, *Canadian Human Rights Commission et al. v. First Nations Child and Family Caring Society et al.*, 2012 FC 445, ¶¶ 351, 353-354 ("[t]he Supreme Court of Canada has recognized the relevance of international human-rights law in interpreting domestic legislation.").

<sup>28</sup>Cohen's, supra n. 10, § 5.07[1] at 489.

<sup>29</sup>See Echo-Hawk (2013) at 63-94 for a legal analysis of the status of the declaration under domestic and international law.

<sup>30</sup>S. James Anaya, UN special rapporteur on the rights of indigenous peoples, *The Situation of Indigenous Peoples in the United States of America*, U.N. Doc. A/HRC/21/54 ¶ 104 (2012).