

NATIONS UNIES
HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandate of the Special Rapporteur on the rights of indigenous peoples.

REFERENCE: AL G/SO 214 (56-23) Indigenous (2001-8)
USA 7/2013

5 June 2013

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on freedom of religion or belief and Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolution 22/20 and 15/14.

In this connection, we would like to bring to the attention of your Excellency's Government allegations received concerning the alleged **increasing number of state-level regulations that restrict the religious freedoms of Native American prisoners, including their participation in religious ceremonies and possession of religious items.**

According to the information received:

Indigenous peoples in the United States face high rates of imprisonment with an approximate 29,700 Native Americans incarcerated in prisons across the country as of 2011. According to a 1999 Bureau of Justice Statistics report, Native Americans are incarcerated at a rate that is reportedly 38 percent above the national rate. Data from 2009 indicates that Native Americans account for less than 1 per cent of the general population but make up 4 per cent of the population under correctional supervision. Approximately 50 per cent of Native American prisoners are housed in state correctional facilities while 12 per cent of incarcerated Native Americans are held in federal prisons. The remaining Native American inmates are housed in local jails or correctional facilities in Indian jurisdictions.

Many Native American inmates have maintained close links to tribal cultural traditions and communities incarcerated and often return to Indian reservations or similar Indian areas upon their release. Reportedly, while in prison, a significant number of Native Americans rely upon their freedom to carry out traditional religious practices for rehabilitation purposes and as a means to maintain their identity as members of indigenous peoples. Equally, Native American

communities value traditional cultural and religious practices as a means to assist indigenous prisoners so that they may be culturally viable community members and able to contribute to the overall well-being of the tribe or nation upon their release from correctional or detention facilities.

However, numerous recent regulations in state correctional facilities have allegedly restricted Native American prisoners from engaging in traditional religious practices and possessing religious items. It is further alleged that the majority of these regulations are modified or created without meaningful consultation with Native Americans beyond processes for general public comment.

By way of example, on 21 February 2013, the California Department of Corrections issued an “emergency” regulation that denies prisoners access to items that are considered to be sacred medicines for many Native Americans, including kinninnick, copal, and osha root. Other traditional items prohibited under the emergency measure reportedly include cloth for prayer ties, pipes and pipe bags. In addition, the emergency regulation allegedly makes the approval process for religious items more burdensome. These emergency restrictions have also reportedly been incorporated into proposed regulations currently considered to amend Section 3190(b) of the California Code of Regulations, Title 15, concerning prisoners’ religious property. The proposed regulations have been subject to public comment and Native American groups have recently voiced opposition to the permanent implementation of the proposed restrictive regulations.

It has also been alleged that some California Department of Corrections and Rehabilitation facilities have significantly curtailed indigenous sweat lodge ceremonies. It is reported that Native American prisoners were previously able to carry out sweat lodge ceremonies on a weekly basis in facilities throughout the state. However, new restrictions in certain facilities have limited these ceremonies to once or twice per month, which severely undermines Native American prisoners’ ability to use this practice for spiritual rehabilitation purposes.

According to the information received, the Texas Department of Criminal Justice has recently amended its policies regarding religious practices within a unit dedicated to housing Native American inmates. Allegedly, the policy modifications have resulted in burdensome restrictions now applying to the Sacred Pipe Ceremony, which many indigenous peoples consider a form of prayer, and the Wiping Away the Tears ceremony, which involves Native American adherents congregating together to worship on holy days. It is also reported that “smudging” – a practice that involves passing smoke over one’s body or a prayer site for cleansing and purifying purposes – was previously allowed indoors but is now prohibited. Additionally, the modifications in the policies implemented by the Texas Department of Criminal Justice allegedly

restrict Native American prisoners from possessing locks of hair from deceased relatives, a ritual related to the mourning of loved ones.

In the state of South Dakota, in 2009, the state Department of Corrections extended a general ban on tobacco to include Native American religious practices. This allegedly resulted in Native Americans not being able to use tobacco for important religious ceremonies or in connection with prayer ties and flags. In 2012, the United States District Court of South Dakota, Southern Division, held that the South Dakota tobacco ban infringed on indigenous prisoners' religious rights. Specifically, the tobacco ban was found to be in violation of the Religious Land Use and Institutionalized Persons Act, a federal law that protects confined persons against Government imposed substantial burdens on their religious exercise unless the Government is furthering a compelling governmental interest and uses the least restrictive means to do so. However, it is reported that the state of South Dakota has appealed the case to the United States Eighth Court of Appeals.

Allegations received regarding Native Americans incarcerated in Montana suggest that indigenous inmates in that state have been subject to strip searches prior to sweat lodge ceremonies. Additionally, items essential to Native American religious exercise including herbs, antlers, and smudge tobacco have been confiscated or prohibited in Montana correctional facilities.

On the other hand, information has also been received regarding the positive effects of consultation procedures with indigenous peoples concerning restrictions that affect the religious practices of Native American inmates in Washington State. After several tribes petitioned the state governor, consultations with indigenous peoples were carried out that resulted in accommodation by the Department of Corrections to help reverse course on restrictions placed by the Washington State Department of Corrections in 2010 that allegedly restricted Native Americans' prisoners' religious rights. The restrictions that were reversed reportedly banned nearly all Native American prisoners' religious practices and the use of tobacco; reclassified various sacred items as non-religious; prohibited traditional foods; and restricted children from attending prison pow wows.

In light of the above, we would like to draw the attention of your Excellency's Government to article 12 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007 and endorsed by the United States on 16 December 2010. Article 12 establishes that "[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies" as well as "the right to the use and control of their ceremonial objects ...". In this connection, article 31 of the Declaration affirms that "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ...". Similarly, we would like to also draw your Excellency's Government's attention to article 18 of the

Declaration that establishes that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights ...”

It also bears mention that on 8 June 1992 the United States ratified the International Covenant on Civil and Political Rights, which in its article 18 protects the right to freedom of religion. More specifically, article 18(3) affirms that a person’s “religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Moreover, article 27 states that ethnic and religious minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion”. Of particular relevance to the situation of Native American prisoners is the Human Rights Committee General Comment No. 22, paragraph 8, which states that “[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.”

In light of this information, we would be grateful if your Excellency’s Government could inform us if the above allegations are accurate and provide any additional information it deems relevant to the situation described in this communication. Specifically, we would be grateful if you could provide responses to the following questions:

1. What measures exist to ensure the protection of the religious freedoms of Native American prisoners in state and local prisons? Specifically, what legal, policy or programmatic actions, if any, have federal and state Government authorities taken to ensure that Native American prisoners are able to engage in religious ceremonies and traditional practices as well as have access to religious items in state and local prisons?

2. What measures, if any, have been taken to ensure that Native American religious practices, and items used in those practices, are fairly considered in the development of institutional policies and regulations related to the operation, safety and security of state and local correctional facilities?

3. Do regulations exist at the federal or state level that require consultation with Native American peoples, and prisoners specifically, regarding possible restrictions on their religious practices in correctional facilities? If such policies exist, what measures are being taken to ensure that they are being implemented?

We would appreciate a response within 60 days. We undertake to ensure that your Excellency’s Government’s response is duly taken into account in our evaluation of this situation and that it is accurately reflected in the report we will submit to the Human Rights Council for consideration or in any other public statement we may make in relation to this situation.

Please accept, Excellency, the assurances of our highest consideration.

Heiner Bielefeldt
Special Rapporteur on freedom of religion or belief

James Anaya
Special Rapporteur on the rights of indigenous peoples