NOTE

International Law in United States Courts: Why the Ninth Circuit Should Have Considered Self-Determination When Deciding *Guam v. Guerrero*

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INTRODUCTION

Iyah Ben Makahna, also known as Benny Guerrero, was arrested in a Guam airport for importing marijuana in violation of a Guam importation statute.[1] He has practiced Rastafarianism for the last twenty years, and he regards marijuana use as a religious sacrament.[2] His name reflects his devotion to his religion and his connection with his home land of Guam.[3] In Rastafarian, "Iyah" refers to Jah or God, and "Ben" refers to "son of." His chosen surname, "Makahna," is the Guamanian word for spiritual leader.[4] This Note will refer to Mr. Guerrero as Ras Makahna; the prefix "Ras" identifies him as a Rastafarian.[5]

In *Guam v. Guerrero*, the Guam Supreme Court invalidated the importation statute as applied to Ras Makahna.[6] It held that the statute was an impermissible burden on his religious practice.[7] By doing so, the Guam court acted as an agent of self-determination for the people of Guam.[8] The Ninth Circuit, however, overruled the Guam court and held that Guam had no authority to protect its citizens beyond the "ceiling" of protections provided by federal law.[9]

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[1] Guam v. Guerrero, 290 F.3d 1210, 1212 (9th Cir. 2002).

[2] Respondent's Brief at n.1, Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002) (No. 00-71247), *available at* http://www.aclu.org/Files/OpenFile.cfm?id=11210 (last visited Feb. 12, 2003).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Guam v. Guerrero, 2000 Guam 26, ¶ 27.

[7] *Id.*

[8] *See* discussion *infra* Parts II.A-B.

[9] Guam v. Guerrero, 290 F.3d 1210, 1210 (9th Cir. 2002).

The Organic Act, a federal statute, should protect Ras Makahna's religious freedom in Guam.[10] The Ninth Circuit found, however, that under the Organic Act, the Guam importation statute was a permissible burden on Ras Makahna's exercise of religion.[11] The Ninth Circuit reversed the Guam court decision and held that the importation law was constitutional.[12] It concluded that Guam does not have the right to govern itself.[13]

Under principles of international law, such as self-determination, the Guam court ought to be able to allow Ras Makahna to practice his religion without the burden of Guam's importation statute.[14] This Note offers reasons why the Ninth Circuit should have considered concepts from international law when deciding the *Guerrero* case.[15] Part I examines federal law in Guam and the protections that the Constitution and federal law give to U.S. citizens in Guam. Part II explores international law as it relates to non-self-governing territories and self-determination in customary international law. Part III examines the holding in *Guam v. Guerrero* in the Guam's court and the Ninth Circuit's subsequent reversal. This Part looks at sources of law the Ninth Circuit used to support its holding that Guam could not protect its citizens beyond the ceiling of federal law. Part IV suggests three alternative reasons why the Ninth Circuit had a duty to consider international law in its decision. First, the Ninth Circuit should have deferred to the territorial court. Second, Guam's status as a non-self-governing territory makes it necessary for the Ninth Circuit to consider international law. Third, the Ninth Circuit should have considered international law because Congress' plenary, or absolute, power over the territories is inconsistent with the U.S. Constitution.

I. FEDERAL LAW IN GUAM

U.S. territories, such as Guam, were acquired in a relatively short period of time at the turn of the century.[16] Courts defined the United States' relationship with these territories.[17] Often, the territorial

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[10] 48 U.S.C. §§ 1421-1424 (2000); *Guerrero*, 290 F.3d at 1212.

[11] *Guerrero*, 290 F.3d at 1223.

[12] *Id.* at 1214.

[13] *Id.*

[14] *See generally* discussion *infra* Parts II.A-B.

[15] *See* discussion *infra* Part IV.

[16] ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 314-15 (1989).

[17] *See infra* text accompanying notes 44-47.

relationship did not give citizens of territories complete protections under the United States Constitution.[18] This Part looks at the relationship between Guam and the United States and the impact that relationship has on Guam citizens' rights and religious freedoms.

A. Guam: History and Court Structure

Guam is the largest island in the Northern Pacific, even though it measures only 217 square miles.[19] It has a population of almost 155,000 persons.[20] It is located 8,000 miles from Washington, D.C.[21] Historically, politicians have valued Guam because of its geographic position and usefulness as an important military base.[22] Guam is under the plenary, or absolute, control of Congress according to the Property Clause of the U.S. Constitution.[23] Legally, it is an unincorporated, organized territory.[24] "Unincorporated" means that Guam has not been incorporated as a state into the United States.[25] The label suggests that the territory will remain a territory and not become a state.[26] "Organized" means that Congress has organized the territory under federal law, setting up the government of the territory under its Property

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[18] *Id.*

[19] LEIBOWITZ, *supra* note 16, at 314-15.

[20] UNITED NATIONS, GENERAL ASSEMBLY, SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, GUAM, WORKING PAPER PREPARED BY THE SECRETARIAT, at 3-5, U.N. Doc. A/AC.109/2002/8 (2002) [hereinafter U.N. SECRETARIAT, WORKING PAPER ON GUAM]. The Chamorros, the indigenous peoples on Guam, account for half of Guam's population. *Id.*

[21] LEIBOWITZ, *supra* note 16, at 314-15.

[22] *Id. See generally* Gov't of Guam *ex rel.* Guam Econ. Dev. Auth. v. United States, 179 F.3d 630, 631 (9th Cir. 1999) (holding that Guam is not entitled to own land currently occupied by United States military).

[23] U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . ."); *see also* Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1018 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (holding that Guam is under plenary control of Congress pursuant to Property Clause, and as such, Guam citizens do not have right to vote in presidential elections). However, Congress vested administrative responsibility in the Department of the Interior. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON RESOURCES, HOUSE OF REPRESENTATIVES, GAO/OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION 8 (1997).

[24] STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS § 6:5 (1995).

[25] *Id.*

[26] *Id.*

Clause powers.[27]

Like a state, Guam has a dual court system, comprised of federal and territorial courts.[28] Guam has a Superior Court, which is the territorial trial court, and a Supreme Court, created in 1993, which has appellate jurisdiction.[29] A federal district court also sits on the island.[30]

Unlike a state, the decisions of the Guam Supreme Court are appealed by writ of certiorari to the Ninth Circuit rather than to the U.S. Supreme Court.[31] Congress has the power to grant territorial courts plenary judicial power,[32] but Congress has yet to exercise this power in Guam.[33] However, both Guam and the federal government share the goal of an independent Guam Supreme Court.[34] Judicial autonomy would grant Guam a form of popular governance because judges are elected to both the trial court and the Guam Supreme Court.[35]

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[27] *Id.* More technically, "organized" simply means that the territory has an organic act. *Id.*

[28] *Id.* § 20:3.

[29] *Id.* The Guam legislature created the Guam Superior Court under the authority given in the Organic Act. 48 U.S.C. § 1424-1(a) (2000). In 1993, the Guam legislature established a Supreme Court of Guam by passing Guam Pub. Law 21-147, GUAM CODE ANN., TITLE VII, § 1101 (1993). LAUGHLIN, *supra* note 24, § 20:3 (Supp. 1997).

[30] *See* Guam Pub. Law 21-147, GUAM CODE ANN., TITLE VII, § 1101 (1993).

[31] 48 U.S.C. § 1424-2 (2000).

[32] U.N. SECRETARIAT, WORKING PAPER ON GUAM, *supra* note 20, at 3-5.

[33] Williams v. United States, 289 U.S. 553, 567 (1933); *see also* Guam v. Olsen, 540 F.2d 1011, 1012 (9th Cir. 1976) (holding that Congress did not intend to allow Guam to take power away from Guam's federal District Court when transferring jurisdiction to territorial courts).

[34] Brief of Amici Curiae Senators Vicente C. Pangelinan & Mark C. Chafaurous, Members of the Guam Legislature, at 8-9, Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002) (No. 00-71247), *available at* http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=11213&c=228 (last visited Feb. 15, 2003).

[35] Anthony (T.J.) F. Quan, *"Respeta I TaoTao Tano": The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 ASIAN-PAC. L. & POL'Y J. 3, *56, *73-*74 (2002). Guam does have other forms of popular governance. U.N. SECRETARIAT, WORKING PAPER ON GUAM, *supra* note 20, at 3-5. Currently, Guam citizens elect a governor and fifteen senators to a unicameral legislature. *Id.* The process of granting judicial autonomy is underway: in April 2001, the Circuit Judicial Council's Pacific Island Committee recognized that the Guam Court had achieved a level of significant independence in a short amount of time. Brief of Amici Curiae Members of the Guam Legislature at 8-9, *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002) (No. 00-71247), *available at* http://www.aclu.org/Files/OpenFile.cfm?id=11212. It recommended to Congress that the Guam Court be subject to direct review by the Supreme Court of the United States. *Id.*

B. Federal Rule of Territories: Limited Protections and Exceptions

In the meantime, citizens of Guam must rely on Congress and case law to protect their most important rights. In some instances, the citizens of territories do not enjoy the same rights as citizens of states. However, in other situations, citizens of territories have rights that extend beyond the protections of the Constitution.

The United States acquired Guam as a U.S. possession in 1898.[36] The island was under complete U.S. military rule for over fifty years.[37] In 1950, Congress passed the Organic Act of the Territory of Guam, which declared Guam a territory and established its local government.[38] It created a Bill of Rights, which is analogous, but not identical, to its federal counterpart.[39] The Guam Bill of Rights gave Guam citizens American citizenship.[40] In 1962, an amendment to the Organic Act applied the protections of the first nine amendments of the U.S. Constitution, the Privileges and Immunities Clauses, and the Equal Protection Clause of the Fourteenth Amendment to Guam.[41] In 1972, Congress granted Guam a non-voting delegate in Congress.[42] The delegate cannot participate in votes on the House floor, but serves on various committees and has a vote in the Committee of the Whole.[43] Guam has struggled to achieve autonomy and to preserve its local customs and culture through this limited representation.[44]

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[36] LEIBOWITZ, *supra* note 16, at 313.

[37] *Id.*

[38] 64 Stat. 384 (codified as amended at 48 U.S.C. §§ 1421-1424 (1976 & Supp. V 1981)). The Organic Act has been described as, "sophisticated colonialism guised in the form of limited freedom." Quan, *supra* note 35, at *71-*72.

[39] *See* LEIBOWITZ, *supra* note 16, at 342-43; *see also* Quan, *supra* note 35, at *71-*72 (acknowledging that only certain provisions of Constitution apply to Chamorros, indigenous peoples of Guam).

[40] 8 U.S.C. § 1407 (2000). *See generally* P. CARANO & P. SANCHEZ, A COMPLETE HISTORY OF GUAM 365-98 (1964).

[41] 48 U.S.C. § 1421b(n), (u) (2000). This amendment is called the Mink Amendment in the Ninth Circuit's opinion. Guam v. Guerrero, 390 F.3d 1210, 1214 (9th Cir. 2002).

[42] *See* LEIBOWITZ, *supra* note 16, at 342. The representative has no real power. Michel v. Anderson, 817 Supp. 126, 147-48 (D.D.C. 1993) (upholding constitutionality of territorial representatives in Congress because territorial representatives do not have any power).

[43] 48 U.S.C. § 1711 (2000); *see* LEIBOWITZ, *supra* note 16, at 342; Peter Ruffatto, *United States Action in Micronesia as a Norm of Customary International Law: The Effectuation of the Right to Self-Determination for Guam and Other Non-Self-Governing Territories*, 2 PAC. RIM L. & POL'Y J. 377, 386 (1993). The entire House of Representatives meets as the Committee of the Whole on issues such as the State of the Union or appropriations. U.S. HOUSE OF REPRESENTATIVE, COMMITTEE ON RULES, RULES OF THE 108TH CONGRESS, RULE XVIII.

[44] *See* Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1019-20 (9th Cir. 1984) (holding that United States citizens in Guam do not have right to vote in Presidential

Despite these concessions to the citizens of Guam, the U.S. Constitution does not necessarily "follow the flag."[45] Guam citizens do not have the same protection under the U.S. Constitution, as do citizens in the states.[46] This question of whether "the Constitution follows the flag" was addressed in a series of cases, named the Insular Cases, during the U.S. Supreme Court's 1900 term.[47] In the Insular Cases, the U.S. Supreme Court ruled that citizens of unincorporated, organized territories, like Guam, are entitled only to fundamental constitutional rights.[48]

In *Downes v. Bidwell*, one of the most influential of the Insular Cases, the U.S. Supreme Court reiterated that Congress has plenary power over the territories.[49] In *Downes*, a plaintiff sought to recover duties incurred when shipping goods from Puerto Rico to New York.[50] If Puerto Rico had been part of the United States, then the tariffs would not have applied under the Uniformity Clause of the Constitution.[51] However, because Puerto Rico was a territory, the Court held that Congress had no such constitutional restrictions.[52] As a result, the Supreme Court upheld the duties.[53] The decision in *Downes* widened the gap between the rights of citizens of the United States proper and citizens of U.S. territories.

Although many court decisions such as *Downes* may reduce the rights of territories, some decisions also permit courts to consider the needs of local cultures.[54] Because the U.S. Constitution is only presumed to apply in territories, local courts may more freely craft solutions to unique

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elections); *c.f.* Quan, *supra* note 35, at *73 (describing generally political struggles of Guam and Chamorro people).

[45] Official Proceedings of the Democratic National Convention held in Kansas City, Missouri, July 4th, 5th, and 6th, at 121 (1900). Commentators adopted this political slogan as the phrase to describe the Insular Cases. LAUGHLIN, *supra* note 24, § 7.1. The Insular Cases are: Huns v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); Goetze v. United States, 182 U.S. 221 (1901); and De Lima v. Bidwell, 182 U.S. 1 (1901). For a comprehensive analysis of the Insular Cases and their impact on application of U.S. laws in territories, see LAUGHLIN, *supra* note 24, § 7:2.

[46] *See* LAUGHLIN, *supra* note 24, § 7.1.

[47] *See* sources cited *supra* note 45.

[48] *See* sources cited *supra* note 45; LEIBOWITZ, *supra* note 16, at 17-21.

[49] Downes v. Bidwell, 182 U.S. 244 (1901).

[50] *Id.* at 311-12 (White, J., concurring). The case also created the "incorporated" and "unincorporated" terminology. *Id.*

[51] U.S. CONST. art. I, § 8, cl. 1.

[52] *Downes*, 182 U.S. at 289.

[53] *Id.*

[54] LAUGHLIN, *supra* note 24, § 15:4.

territorial problems.[55] Courts may disregard the U.S. Constitution upon a showing that a particular application of a law in a particular territory would be "impractical or anomalous."[56] The purpose of this rule is to allow territorial governments to adopt measures that are necessary to protect indigenous peoples and cultures.[57]

In *Wabol v. Villacrusis*, the Ninth Circuit found the Equal Protection Clause to be "impractical and anomalous" as applied to the Commonwealth of the Northern Marianas Islands (CNMI).[58] The Constitution of CNMI contains an article that restricts long-term interests in local land to persons who are of Northern Marianas descent.[59] Wabol brought an action to void a lease agreement against Villacrusis, who is of Filipino descent.[60] Wabol argued that the lease violated the CNMI Constitution.[61] In his defense, Villacrusis argued that the article violated the Equal Protection Clause of the U.S. Constitution.[62] Both lower CNMI courts held that the CNMI article was constitutional.[63] The Ninth Circuit upheld the lower courts' decisions, and determined that the Fourteenth Amendment's equal protection analysis did not apply to the CNMI provision.[64] In explaining the policy behind its ruling, the Ninth Circuit stated that, "analysis . . . must be undertaken with an eye toward preserving Congress' ability to accommodate the unique social and cultural conditions and values of the particular territory."[65] While Congress has plenary power to legislate in territories, the federal courts, as a matter of policy, may sustain statutes that are contrary to

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[55] *Id.*

[56] *Id.*; *see* King v. Morton, 520 F.3d 1140 (1975); *cf.* Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (finding that federal programs do not have to be extended to territories and Congress may treat Puerto Rico differently than states as long as treatment satisfies rational basis test). *But cf.* Harris, 446 U.S. at 654-55 (Marshall, J., dissenting) (expressing minority view that case calls for heightened scrutiny under Equal Protection Clause because Puerto Ricans are United States citizens).

[57] LAUGHLIN, *supra* note 24, § 10:10.

[58] Wabol v. Villacrusis, 958 F.2d 1450, 1461 (9th Cir. 1992) (upholding provisions of CNMI Constitution that restricted long-term interests in land to indigenous persons).

[59] *Id.* at 1452. Article XII of the CMNI Constitution provides that, "notwithstanding federal law, the Commonwealth government shall regulate the alienation of local land to restrict the acquisition of long-term interests to persons of Northern Mariana Islands descent." *Id.* at 1455.

[60] *Id.*

[61] *Id.* at 1453-54.

[62] *Id.*

[63] *Id.* at 1451.

[64] *Id.*

[65] *Id.* at 1458.

constitutional norms.[66] Therefore, the courts are the guardians of the cultural traditions of the territories.[67]

Additionally, Congress has created allowances for territories. The Virgin Islands Organic Act of 1936 gives the U.S. Virgin Islands authority to determine the applicability of federal law when the federal law affects local law.[68] The Virgin Islands used this power to repeal an export duty on sugar from St. Croix and to interpret the Internal Revenue Code more favorably for citizens of the Virgin Islands.[69]

C. *Religious Freedom in the United States and Guam*

In addition to the policy explained in CNMI and the U.S. Virgin Islands, citizens of territories may also rely on federal statutes outside the Organic Act to protect their culture and religious freedoms.[70] Because Guam is a federal territory, it is important to examine federal religious freedom law.[71] Before 1990, the U.S. Supreme Court used the standard established in *Sherbert v. Verner* to evaluate claims that the government burdened a person's religious freedoms.[72] *Sherbert* held that religious practice may be subject to legislative restrictions, if the government can show a compelling interest in restricting the practice.[73] In *Department of Human Resources v. Smith*, however, the Court overturned the *Sherbert* standard.[74]

In *Smith*, the defendants were fired from their jobs because they ingested peyote during a sacramental ceremony of the Native American Church.[75] After their dismissal, they applied to the Employment Division for unemployment compensation.[76] They were denied because, under Oregon law, they had been discharged for work-related

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[66] *See id.*

[67] *Id.*

[68] Act of June 22, 1936, ch. 699, Sec. 18; 49 Stat. 1811 (codified as 48 U.S.C.S. § 1541 (2000)). The statute reads, in part: "The Municipal Council of Saint Croix and the Municipal Council of Saint Thomas and Saint John, and the legislative assembly, shall have power, when not inconsistent with this Act and within their respective jurisdictions, to amend, alter, modify, or repeal any law of the United States of local application only . . . ."

[69] LEIBOWITZ, *supra* note 16, at 115-16.

[70] *See id.*

[71] *See id.*

[72] Sherbert v. Verner, 374 U.S. 398, 402-03 (1963).

[73] *Id.*

[74] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 872 (1990).

[75] *Id.*

[76] *Id.*

"misconduct."[77]

The Court held that Oregon's law prohibiting the possession of a controlled substance, including peyote, proscribed the defendants' use of the drug, even as a religious sacrament.[78] The Court found that, under the Free Exercise Clause of the First Amendment, Oregon could restrict the use of controlled substances even in a religious context.[79] Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) to address the Court's decision in *Smith*.[80] The Act restored the compelling interest test as defined in *Sherbert*, and provided a cause of action against governments that substantially burden religious practice.[81]

Congress, however, could not force states to return to the *Sherbert* standard. In *City of Boerne v. Flores*, the Court found that Congress had exceeded its power under section five of the Fourteenth Amendment when it enacted RFRA.[82] As such, RFRA does not apply to states.[83] In Guam, however, RFRA is valid law because Guam is a federal instrumentality.[84]

II. INTERNATIONAL LAW

Because Guam is a territory, it has protections under international law in addition to the limited protections provided by U.S. case law and federal statutes.[85] The international community has created a body of

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[77] *Id.*

[78] *Id.*

[79] *Id.* at 890.

[80] P.L. No. 103-141 (codified as 42 U.S.C. § 2000bb (1994)); *see also* City of Boerne v. Flores, 521 U.S. 507, 544-45 (1997) (O'Connor, J., dissenting) (asserting that *Smith* should not be "yardstick" to measure constitutionality of RFRA because Congress enacted RFRA as reaction to *Smith*); Louis Fisher, *Nonjudicial Safeguards for Religious Liberties*, 70 U. CIN. L. REV. 31, 83-85 (2001) (detailing Congress' passage of RFRA).

[81] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (giving standard of constitutionality for laws of general applicability).

[82] *Flores*, 521 U.S. at 511.

[83] *Id.*

[84] Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002) (assuming that RFRA still applies to federal statutes); *see also* Kikumura v. Hurley, 242 F.3d 950, 950 (10th Cir. 2001) (holding that RFRA is constitutional as applied to federal government); *In re* Young, 141 F.3d 854, 856 (8th Cir. 1998) (holding same); Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 727-28 (1998) (asserting that Court's decision in *Flores* does not affect constitutionality of RFRA as applied in federal court).

[85] *See* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 30-31 (2000); Ruffatto, *supra* note 43, at 377-79; Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 623-24 (1996).

law relating to non-self-governing territories, such as Guam.[86] This section surveys international law that applies to non-self-governing territories, including customary international law and the right of self-determination.

A. Non-Self-Governing Territories

The birth of modern international law, with the end of World War II and the creation of the United Nations, signaled the end of imperialism.[87] Colonies, also known as non-self-governing territories, attained protected status within the international community.[88] The U.N. Charter recognized that Members of the United Nations have a responsibility to "promote . . . the well-being of the inhabitants of these territories."[89] Guam is a non-self-governing territory recognized by the U.N. General Assembly and the Security Council.[90]

In 1960, the U.N. General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (U.N. Declaration on Independence).[91] The U.N. Declaration on Independence states that colonialism is contrary to the U.N. Charter because it denies

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[86] *See infra* notes 87-95 and accompanying text.

[87] *See, e.g.*, CHEN, *supra* note 85, at 30-31 (explaining that self-determination led to creation of new states after World War II); Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT'L L.J. 297, 297 (2002).

[88] *See* U.N. CHARTER art. 73.

[89] *Id.* In addition, Chapter XII of the U.N. Charter establishes an "International Trusteeship System." U.N. CHARTER arts. 75-85. Guam is not a trustee territory but a non-self-governing territory. *Id.*

[90] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 57 (1992). In interpreting Article 73(e) of the U.N. Charter, the General Assembly noted that a non-self-governing territory is one that is culturally distanced and/or geographically separate from the country that controls it. *Id.* A further indication is whether another, more dominant country arbitrarily subordinates the territory. *Id.* According to the United Nations, there are 16 non-self-governing territories: American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St. Helena, Tokelau, Turks and Caicos Islands, U.S. Virgin Islands, and Western Sahara. UNITED NATIONS AND DECOLONIZATION, NON-SELF-GOVERNING TERRITORIES LISTED BY THE UNITED NATIONS IN 2002 (2002), *available at* http://www.un.org/Depts/dpi/decolonization/main.htm (last visited Feb. 15, 2003). These territories are administered by France, New Zealand, the United Kingdom and the United States. *Id.*

[91] *Declaration on Independence for Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., U.N. Doc. A/L.323 (1960) *reprinted in* 1960 U.N.Y.B. 49-50 [hereinafter *U.N. Declaration on Independence*]. The U.N. General Assembly adopted the U.N. Declaration on Independence by a vote of 89 to 0. *Id.* The United States and eight other Members that have colonies abstained. *Id.*

fundamental human rights.[92] It calls for member states to respect "all peoples and their territorial integrity."[93] From that resolution and U.N. Charter Article 73(e), the General Assembly created the Committee on the Situation with Regard to the Implementation of the Declaration of Independence.[94] This committee, also known as the Committee of Twenty-Four, monitors the decolonization progress.[95]

B. Self-Determination

The right to self-determination fueled the decolonization movement. The concept of self-determination is prevalent in international law.[96] It is recognized as a right in the Charter of the United Nations;[97] the U.N. Declaration on Independence;[98] the International Covenant on Civil and Political Rights (ICCPR);[99] the International Covenant on Economic,

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[92] *Id.*

[93] *Id.* The U.N. Declaration on Independence states:

> The General Assembly . . . declares that:
>
> 1. The subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
>
> 2. All 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.
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> . . . .
>
> 5. Immediate steps shall be taken . . . to transfer all powers to the peoples of those territories . . . .

Id.

[94] U.N. CHARTER art. 73(e) (requiring Members who control non-self-governing territories to submit yearly reports on well-being of those territories); *Implementation on the Declaration on the Granting of Independence to Colonial Countries and Peoples*, 1979 U.N.Y.B. 1010, 1011, U.N. Doc. A/4684.

[95] *See* LEIBOWITZ, *supra* note 16, at 56-57. Each year, the United States reports on the status of Guam to the Committee. *Id.* In addition to annual reports, the Committee sends visiting missions, such as the one sent in 1979 to Guam to observe a referendum on the territory's draft constitution. *Id.* At that time, the peoples of Guam were not satisfied with the Organic Act. *Id.*

[96] *See supra* 94-95; *infra* 97-100.

[97] U.N. CHARTER art. 1, para. 2, art. 73 (describing tenets of self-determination: development of self-governance and respect for culture of peoples).

[98] *U.N. Declaration on Independence, supra* note 91.

[99] *International Covenant on Civil and Political Rights (ICCPR)*, Dec. 19, 1966, 999 U.N.T.S.

Social and Cultural Rights (ICESCR);[100] and many other international documents and resolutions.[101]

Self-determination is part of customary international law, a source of international law that develops out of the practice of states.[102] A practice becomes a norm of customary international law when states begin to believe that they are bound by the norm.[103] A state must consistently reject the practice when the custom is being formed if it does not want to be bound by the norm.[104] However, after the norm is formed, a state must comply with the law.[105] As part of customary international law, self-determination has a "legally binding effect on the international community."[106]

171, art. 1 (providing that, "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

[100] *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[101] Other U.N. documents that memorialize the universal right to self-determination include: *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, Nov. 9, 1995; *Vienna Declaration and Programme of Action*, A/Conf. 157/24, June 25, 1993 (adopted at U.N. World Conference on Human Rights) (reaffirming self-determination as a right under *ICCPR* and *ICESCR*); *Final Act of the Conference on Security and Co-operation in Europe*, 14 I.L.M. 1292, Part VIII (1975) (Helsinki Final Act); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), Oct. 24, 1970. *See also* Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 205 (June 30) (Weeramantry, J., dissenting) (claiming that self-determination is not only right, but also imparts on governing nation affirmative, corresponding duty to respect self-determination of territory); CHRISTOPHER O. QUAYE, LIBERATION STRUGGLES IN INTERNATIONAL LAW 213-14 (1991) (describing non-U.N. sources for evidence of self-determination).

[102] I.C.J. STATUTE art. 38(1); Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30) (stating that self-determination is *erga omnes* and recognizing that "it is one of the essential principles of contemporary international law"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987).

[103] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987).

[104] *Id.*

[105] *Id.*

[106] *See, e.g.*, Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?* 16 MICH. J. INT'L L. 733 (1995) (reviewing YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994)) (describing how self-determination became part of customary international law); Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 167-68 (2001) (saying that self-determination is part of collective law of human rights and international legal documents, such as United Nations charter, have incorporated it into customary international law); Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 39-40 (1998) (describing how self-determination became "a right").

Although many international documents reference it, self-determination lacks a clear definition.[107] Generally, it includes peoples' and non-self-governing territories' right to freedom from colonial domination and their right to freely pursue their own cultural development, including religion.[108] The concept is thought to recognize peoples' right to use democratic processes to determine their own future.[109]

Positivists have argued that the lack of a clear definition for self-determination has contributed to the underuse of its principles in international law.[110] However, because the parameters of self-determination are undefined, a continuum of self-determination claims exists.[111] It was thought in the past that the only way to achieve self-determination was through secession from the governing territory.[112] The principles that have developed over time suggest a less drastic form of self-determination aimed at democracy and autonomy.[113]

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[107] *See, e.g.*, Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U J. INT'L L. & POL'Y 189, 217 (2001) (calling self-determination "a conceptual morass in international law."). The I.C.J. defined self-determination as "the need to pay regard to the freely expressed will of peoples." Western Sahara, 1975 I.C.J. 12, 33 (Oct. 16).

[108] *ICCPR*, *supra* note 99, at art. 27 (stating that "ethnic, religious or linguistic minorities . . . shall not be denied of the right . . . to enjoy their own culture, to profess or practice their own religion, or to use their own language"). *See generally* Huang, *supra* note 106, at 168-69; Kingsbury, *supra* note 107, at 224-25 (defining self-determination as connoting political freedom); Frederic L. Kirgis, *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994) (naming right to be free from colonial domination as primary right under self-determination); Van Dyke et al., *supra* note 85, at 629-30 (defining self-determination).

[109] *See, e.g.*, Paul H. Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 WIS. INT'L L.J. 69, 110-113 (1995) (stating that self-determination is "process of self-identification or self-renewal"); Franck, *supra* note 90, at 58-59 (including right to participate in democratic governance as part of self-determination).

[110] QUAYE, *supra* note 101, at 217-18; Brietzke, *supra* note 109, at 100.

[111] Brietzke, *supra* note 109, at 121-23.

[112] *See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, *supra* note 101, at 121, 124.

[113] The concept of self-determination has evolved to prohibit lesser forms of "persecution" such as the "inability to affect national policy." Fox, *supra* note 106, at 752 (naming other forms of persecution struggles for self-determination). Professor Fox lays out three aspects of self-determination: 1) democratic elections; 2) protection of minority rights (including right to cultural autonomy found in *Guerrero* case); and 3) construction of autonomous regimes within states (which would include Supreme Court of Guam). *Id.* at 752-56. This type of self-determination is often called "internal self-determination" because it works within national boundaries towards democratic governance for a people, such as the Chamarro, or a non-self-governing territory such as Guam. *Id.* at 734-35.

Further, the lack of definition for self-determination and the variety of types of claims under that title call for a unique solution developed by a judicial body.[114] One scholar has suggested the International Court of Justice (I.C.J.) as the appropriate judicial body to hear claims of self-determination, despite its mandate to hear only cases from independent states.[115] In the United States, however, the federal court system seems better prepared to deal with a territory's claims.[116]

Regardless of the form it takes or the remedy that is crafted to accommodate it, self-determination is a right under international law. More importantly, the international community has recognized Guam citizens' right to self-determination. In 2002, the Committee of Twenty-Four" reaffirm[ed] the inalienable right of the peoples of the Territor[y] of . . . Guam . . . to selfdetermination [sic] and independence."[117]

The people of Guam have spoken on the issue as well. The Guam legislature created a Guam Commission on Self-Determination in 1980.[118] A representative of this Commission reports periodically to the Committee of Twenty-Four about Guam's progress toward self-determination.[119]

On December 10, 2001, the United States stated before the U.N. General Assembly that it supported a non-self-governing territory's choice of independence or self-governance.[120] Indeed, the United States honored Micronesia's request for self-determination in 1982.[121]

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[114] *Cf. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, *supra* note 101, at 126 (calling for "court-like institution," such as the I.C.J. to hear claims of self-determination).

[115] *See id.*

[116] *Cf.* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 11-14 (1997) (discussing U.S. judiciary as policy-making body).

[117] Vikram Sura, *Wiping Away Remnants of Colonialism*, U.N. CHRON., Mar. 1, 2002, at 53, *available at* http://www.un.org/Pubs/chronicle/2002/issue1/0102p53.html (last visited Mar. 15, 2004).

[118] LEIBOWITZ, *supra* note 16, at 338. Some Chamorro activists claim the right to self-determination separately from Guam. Van Dyke, *supra* note 85, at 623. In the 1970s, a group of Chamorros petitioned the United Nations, advocating their right to self-determination. *Id.*

[119] *See* Press Release, U.N. Special Committee on Decolonization 7th Meeting, Special Committee Approves Draft Texts on Tokelau, United States Virgin Islands, Guam (June 17, 2002), U.N. Doc. GA/COL/3066 (recounting testimony by Debtralynne Quinata, a member of Guam's Commission, who described difficulty Guam experienced in exercising self-determination) [hereinafter U.N. Special Committee Press Release].

[120] *Id.*

[121] Ruffatto, *supra* note 43, at 402 (determining that United States crystallized custom of

Therefore, the United States has a history of recognizing self-determination.[122]

The United States, however, has yet to acknowledge Guam's right to self-determination.[123] Because Guam has few available avenues for expressing that right, this Note proceeds on the assumption that the Guam Supreme Court in *Guam v. Guerrero* exercised Guam's right to self-determination. This Note assumes, further, that the exercise was a valid expression of self-determination.[124]

III. THE CASE: *GUAM V. GUERRERO*

On January 2, 1991, Ras Makahna was returning to his home in Guam from Los Angeles, California.[125] At the Guam International Airport, Guam customs officers stopped him to search his backpack.[126] They discovered five ounces of marijuana and ten grams of marijuana seeds.[127] Ras Makahna was arrested and charged with importation of a controlled substance under a Guam statute, 9 G.C.A. section 67.89.[128]

A. Guam Court Decision

In the Superior Court of Guam, Ras Makahna filed a motion to dismiss the indictment.[129] He claimed that the importation statute violated his

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self-determination when United States allowed Micronesia to determine its political affiliation with United States, and United States acknowledged right to self-determination in international community of United Nations).

[122] *Id.* at 401-02; *see also* Orentlicher, *supra* note 106, at 52 (describing what "peoples" have self-determination right); Van Dyke et al., *supra* note 85, at 623, 632 (stating that people of Guam and indigenous Chamarro people have right to self-determination and self-governance under international law: "For the people of Guam, their right to self-determination is clear . . . .").

[123] *See* U.N. Special Committee Press Release, *supra* note 119.

[124] *Cf.* Ruffatto, *supra* note 43, at 402-05 (examining self-determination effectuated in Micronesia). Ruffatto examines four elements of Micronesia's self-determination that clarify its application in Guam: 1) self-determination requires democratic choice of government rather than a specific type of government; 2) self-determination needs to be a flexible process of negotiation between the territory and the United States and flexible solutions to the problem; 3) self-determination implicates the development of internal institutions to govern; and 4) self-determination requires that a territory have political autonomy. *Id.*

[125] Guam v. Guerrero, 2000 Guam 26, ¶ 2.

[126] *Id.* Under Guam law, customs officers are employees of the territory rather than federal employees. *Id.*

[127] Guam v. Guerrero, 290 F.3d 1210, 1212 (9th Cir. 2002).

[128] 9 GUAM CODE ANN. §§§ 67.23(d)(10), 67.89(a), 80.33.7 (2002); *Guerrero*, 2000 Guam 26, ¶ 2 (check ¶).

[129] *Guerrero*, 2000 Guam 26, ¶ 3.

right to exercise his religion under Guam's Organic Act and the First Amendment of the U.S. Constitution.[130] The Superior Court found that Ras Makahna was a practicing Rastafarian and that marijuana was a necessary sacrament in the practice of his religion.[131] Further, the court held that the importation statute burdened the practice of his religion.[132]

The Superior Court also held that RFRA was still applicable to Guam.[133] Specifically, the court found that RFRA was still valid under federal law, and Guam was "an instrumentality of federal government."[134] Guam presented no evidence to establish a compelling state interest as required under RFRA.[135] Therefore, the court overruled the statute, finding 9 G.C.A. section 67.89 to be "inorganic," or beyond the scope of the Organic Act.[136] The court based its decision on the Organic Act of Guam and RFRA.[137]

The Supreme Court of Guam reviewed the trial court's decision de novo because the trial court based its ruling on an interpretation of Guam law.[138] The court found that the Organic Act's free exercise clause was equivalent to the U.S. constitutional provision in the First Amendment.[139] The Supreme Court of Guam affirmed the lower court's holding that the Organic Act's free exercise clause afforded the same protection as RFRA.[140] In making its decision, the court relied solely on comparison of the Organic Act with the First Amendment of the Constitution and RFRA.[141]

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[130] The Organic Act, 48 U.S.C.A. § 1421b(a) (2000); *Guerrero*, 2000 Guam 26, ¶ 2.

[131] *Guerrero*, 2000 Guam 26, ¶ 3.

[132] *Id.*

[133] *Id.*

[134] *Id.* at ¶ 4.

[135] *Id.*

[136] A law is "inorganic" if it goes beyond the authority of the Organic Act. LEIBOWITZ, *supra* note 16, at 368.

[137] *Guerrero*, 2000 Guam 26, ¶ 1.

[138] The Supreme Court of Guam has jurisdiction under 8 Guam Code Ann. §§ 130.20(a)(5) and 130.60 (1993).

[139] *Guerrero*, 2000 Guam 26, ¶ 14. The court used the analysis found in *Sherbert* to affirm the trial court's decision that Guam's importation statute significantly burdened Guerrero's right to freely exercise his religion. *Id.*

[140] *Id.* at ¶ 28. The court noted, however, that regardless of RFRA's applicability to Guam, it would have decided in favor of *Guerrero*. *Id.* at ¶ 27. The court found that the statute did infringe on Ras Makahna's fundamental right to free exercise of his religion. *Id.* Further, the government did not justify that infringement by establishing that it had a compelling governmental interest or that the burdening statute was the least restrictive means of achieving that interest. *Id.* at ¶ 25-26.

[141] Guam v. Guerrero, 290 F.3d 1210, 1213 (9th Cir. 2002).

B. The Ninth Circuit Decision

The Ninth Circuit reviewed the Guam Supreme Court's decision.[142] At issue on appeal was whether the Organic Act was analogous to the free exercise provision in a state's constitution.[143] The Ninth Circuit held that RFRA was applicable in the *Guerrero* case. The Guam Court could not freely interpret Guam's Bill of Rights because it was a federal statute.[144] As a result, Ras Makahna and other Rastafarians on the island of Guam cannot import marijuana to use as a sacrament.[145]

The Ninth Circuit reviewed the case de novo.[146] Normally, when reviewing a territorial court decision, an appellate court must apply a deferential standard of review on matters of local concern.[147] To overrule, there must be a "clear" or "manifest" error or the territorial court must be "inescapably wrong."[148] The Ninth Circuit found that the Guam court interpreted a federal statute, which was not solely of local concern. As a result of this finding, it declined to use the deferential standard.[149] A state is free to interpret its own constitution to provide more protection than that given by the federal government.[150] However, the Ninth Circuit found that Guam's free exercise clause was not like a state's.[151]

The Ninth Circuit compared the case to *Department of Human Resources v. Smith*.[152] Under *Smith*, Guam may punish Ras Makahna even if the law substantially burdens the practice of his religion.[153] The court then

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[142] The Ninth Circuit has appellate jurisdiction over the Guam Supreme Court under 48 U.S.C. § 1424-2 (2000).

[143] *Guerrero*, 290 F.3d at 1215.

[144] *Id.* at 1221-23.

[145] *Id.*

[146] *Id.* at 1213-14.

[147] *See* De Castro v. Bd. of Comm'rs, 322 U.S. 451, 454 (1944); EIE Guam Corp. v. Sup. Ct. of Guam, 191 F.3d 1123, 1127 (9th Cir. 1999) (using deferential standard of review and holding that Guam court can construe Guam statute).

[148] Bonet v. Texas Co., 308 U.S. 463, 471 (1940) (discussing overruling Puerto Rican tribunal on local matter).

[149] *Guerrero*, 290 F.3d at 1214.

[150] *Id.*

[151] *Id.* at 1223.

[152] *Id.* at 1215-16.

[153] *Id.* at 1216. In *United States v. Bauer*, the Ninth Circuit established that Rastafarianism is a legitimate religion. 84 F.3d 1549, 1556 (9th Cir. 1996). Also, the use of marijuana is sacramental in the practice of that religion. *Id.*; *see also* Brief of Amici Curiae DKT Liberty Project et al., at 5-13, Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002) (No. 00-71247), *available at:* http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=11215&c=228 (last visited Feb. 15, 2003). Rastafarianism is a legitimate religion with particular beliefs

evaluated whether the Guam Court acted within its authority to interpret the free exercise clause in Guam's Organic Act.[154]

The court conceded that in the past it had treated the Organic Act like a constitution.[155] It then relied on the Insular Cases to support the conclusion that the Guam courts could not interpret their Bill of Rights differently from the U.S. Supreme Court's interpretation of analogous provisions.[156] Explaining this finding, the Ninth Circuit stated, "Guam has no inherent right to govern itself."[157] According to the Ninth Circuit, the Guam Bill of Rights cannot exceed the level of protections defined by the federal government under the federal constitution.[158]

Next, the court looked at whether RFRA was applicable to Guam. The court held that RFRA was still applicable because Guam is a federal instrumentality.[159] The Ninth Circuit joined other courts that have found that *City of Boerne* only invalidated RFRA as applied to states.[160] The RFRA analysis, therefore, was applicable to Guam.

Contrary to the Guam court's findings, however, the Ninth Circuit held that Guerrero did not establish a prima facie case of a violation of his right to freely practice his religion.[161] The Ninth Circuit held that the Supreme Court of Guam exceeded its authority in interpreting Guam's Bill of Rights. Under RFRA, which applies to federal instrumentalities such as Guam, laws against importation of controlled substances satisfy the compelling interest test.[162]

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and practices. *Id.* The Rastafari worldview includes a clear distinction between the sacred and the profane. *Id.* at 6. Rastafaris study and discuss sacred texts, including the Bible, and engage in regular worship. *Id.* at 7. Use of marijuana, also known as cannabis or "holy herbs," forms the basis of daily worship among small groups of Rastafaris. *Id.* at 8. Smoking cannabis serves as a way to know God, Jah Rastafari. *Id.* at 8-9. They also use cannabis to heal, pray, and for other spiritual purposes. *Id.* at 9. Smoking cannabis is a part of the Rastafari "livity" or "way of life." *Id.* Expressions of livity that are central to Rastafari life are: the wearing of dreadlocks, speech, dress, and devotional practices such as the use of cannabis. *Id.* at 10. In accord with this principle of livity, a Rastafari is conscious of the cannabis he puts into his body. *Id.*

[154] *Guerrero*, 290 F.3d at 1216.

[155] *Id.*; *see* Haeuser v. Dep't of Law, 97 F.3d 1152, 1156 (9th Cir. 1996) (holding that Organic Act functions as Constitution for Guam).

[156] *Guerrero*, 290 F.3d at 1216-17.

[157] *Id.* at 1214.

[158] *Id.* at 1218.

[159] *Id.* at 1221-22.

[160] *Id.* at 1221.

[161] *Id.* at 1222.

[162] *Id.*

IV. ANALYSIS

The Ninth Circuit had three compelling reasons to consider international law and self-determination in its decision in *Guerrero.* First, when the Guam Supreme Court asserted self-determination, the Ninth Circuit should have applied a more deferential standard of review. Second, self-determination, as customary international law, has a place in U.S. jurisprudence. Regardless of how international law is incorporated into U.S. law, Guam's status as a non-self-governing territory entitles it to special protections recognized by the international community. Third, by exercising plenary control over territories, Congress exceeds the power delegated to it by the U.S. Constitution. As a result, Guam citizens are denied essential rights and protections such as self-determination and religious freedom.

A. Giving Deference to Territorial Courts

Despite the fact that Guam's Bill of Rights is a federal statute, the Ninth Circuit should have deferred to the Guam Court's interpretation of the free exercise clause. The Ninth Circuit improperly declined to defer to the judgment of the territorial court when it reviewed *Guam v. Guerrero* de novo.[163] The Ninth Circuit had three reasons to defer to the Guam Supreme Court. First, the Ninth Circuit should have deferred to the Guam Supreme Court because the ruling dealt with a matter of local concern. Second, when dealing with non-self-governing territories, the United States has allowed for liberal interpretation of federal laws in the past.[164] Third, the importance of self-determination as a human right requires a deferential standard of review.[165]

1. Guam Supreme Court's Ruling Was of Local Concern

The Ninth Circuit normally must apply a deferential standard of review when reviewing a territorial court decision that involves matters of local concern.[166] Despite this precedent, the Ninth Circuit reviewed the *Guerrero* case de novo because it found that the Guam Supreme

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[163] *See generally* LAUGHLIN, *supra* note 24, § 10:10, at n.74 (Supp. 1997) (explaining cases where de novo review is appropriate).

[164] *See supra* Part I.B.

[165] *See infra* Part IV.A.

[166] De Castro v. Bd. of Comm'rs, 322 U.S. 451, 454 (1944); EIE Guam Corp. v. Sup. Ct. of Guam, 191 F.3d 1123, 1127 (9th Cir. 1999) (holding that Guam can construe Guam statute).

Court interpreted the Organic Act — a federal law passed by Congress.[167] However, because the free exercise clause of the Organic Act applies solely to Guam, the Guam Court's decision did not alter the interpretation of the First Amendment of the Constitution.[168] The Guam Supreme Court's decision would only affect the interpretation of the federal statute *within the territory*.[169] Therefore, because the free exercise clause of the Organic Act was solely a matter of local concern, the Ninth Circuit should have followed precedent and deferred to the Guam Supreme Court's findings.[170]

2. The United States Has Allowed Different Interpretations of Federal Laws in Territories

When dealing with territories, the United States has allowed for the territorial interpretation of federal laws that are contrary to constitutional norms. For example, the Virgin Islands Organic Act of 1936 grants the United States Virgin Islands the authority to determine the applicability of federal law when the federal law affects local law.[171] The Virgin Islands used this power to repeal an export duty on sugar from St. Croix and to interpret the Internal Revenue Code.[172] In this case, the exception was provided for by statute, but case law provides for exceptions as well.

In *Wabol v. Villacrusis*, the Ninth Circuit interpreted the Equal Protection Clause to preserve the cultural autonomy of the territory.[173] The Ninth Circuit held that the Equal Protection Clause was not applicable to CNMI's constitutional provision that restricted property rights to indigenous persons.[174] Thus, the court created an exception

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[167] *Guerrero*, 290 F.3d at 1213-14.

[168] *See* Guam v. Guerrero, 2000 Guam 26, ¶ 22.

[169] Amici Curiae of Members of Guam Legislature at 20, *Guerrero* (No. 00-71247) *supra* note 34.

[170] *See id.*

[171] Act of June 22, 1936, ch. 699, Sec. 18; 49 Stat. 1811. The statute reads, in part:

> [T]he Municipal Council of Saint Croix and the Municipal Council of Saint Thomas and Saint John, and the legislative assembly, shall have power, when not inconsistent with this Act and within their respective jurisdictions, to amend, alter, modify, or repeal any law of the United States of local application only . . . .

Id.

[172] LEIBOWITZ, *supra* note 16, at 115-16.

[173] Wabol v. Villacrusis, 958 F.2d 1450, 1451 (9th Cir. 1992) (upholding provisions of CNMI's Constitution that restricted long-term interests in land to indigenous persons).

[174] *Id.*

specifically designed to account for the local culture of the territory.[175] The Ninth Circuit had the power to allow Guam to interpret its own Bill of Rights to protect religious freedom, just as the court had permitted protecting indigenous property rights in CNMI.

The question remains, however, whether the Ninth Circuit should have created such an exception and allowed the Guam Supreme Court to exercise self-determination. At first glance, *Guerrero* seems like an odd case in which to create such an exception. First, the case involves the *importation* of marijuana for religious purposes rather than simple *use* of marijuana for religious purposes. Also, Ras Makahna imported marijuana to use as a sacrament in Rastafarianism, a religion that is not native to the island.[176] Yet, *Guerrero* was a good opportunity for the Guam Supreme Court to exercise self-determination for several reasons, and the Ninth Circuit should have permitted the exercise by deferring to the Guam courts.

First, as the Ninth Circuit noted, Ras Makahna was importing marijuana rather than simply using it during a religious ceremony.[177] The Ninth Circuit found that Rastafarianism does not require a person to *import* marijuana.[178] The court found that although a statute proscribing simple possession of marijuana might be unconstitutional under the RFRA standard, Rastafarianism does not require the importation of marijuana.[179]

However, an amicus brief, submitted on behalf of Ras Makahna, explained Rastafarian religious practices.[180] Rastafarianism requires practicing Rastafari to carry and use marijuana that is of sacramental quality.[181] Cannabis of sacramental quality is not available on the island of Guam.[182] Ras Makahna had to import marijuana in order to practice his religion.[183] In addition, courts normally will not delve into the

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[175] *Id.*

[176] Guam v. Guerrero, 290 F.3d 1210, 1212 (9th Cir. 2002).

[177] *Id.* at 1222-23.

[178] *Id.*

[179] *Id.* at 1223.

[180] Brief of Amici Curiae DKT Liberty Project at 10-14, *Guerrero* (No. 00-71247).

[181] *Id.* (explaining requirement that marijuana Rastafarians use as sacrament must have "pedigree," that is, Rastafaris must know that it has not been contaminated by chemicals and Ras Makahna had to import marijuana because of these strict standards so would have marijuana while traveling).

[182] *Id.*

[183] *Id.* The quantity of marijuana also supports this fact: Guam custom officers caught Ras Makahna with only five ounces of marijuana, an amount for personal use. *Id.* Also, he carried seeds so that he could produce his sacramental herbs without having to import. *Id.*

propriety of certain religious practices.[184]

Second, although Rastafarianism is not a major religion on the island,[185] self-determination is something that the citizens of Guam must decide.[186] Guam's judges are locally elected.[187] By allowing the free practice of Rastafarianism, the Guam Supreme Court was speaking for its people.[188] Also, Guam does not have a voting representative in Congress, who could change or expand the laws that govern the island.[189]

Although a small percentage of Guamanians are Rastafarians, the concept of self-determination includes allowing a nation or state to define its own ideals.[190] Thus, Guam can choose to protect even the smallest minority group on the island, as it did in *Guam v. Guerrero*.[191] And by protecting Rastafarianism and Ras Makahna, all other major religions can be secure in their religious freedoms as well. Therefore, the Ninth Circuit should have recognized the Guam Supreme Court's act of self-determination and deferred to its judgment about religious practice on the island.

3. When a Human Right Such as Self-Determination Is Implicated, Federal Courts Should Consider the Effect of Recognizing That Right

Instead of reviewing the case de novo, the Ninth Circuit should have used a more deferential standard of review because Guam is a non-self-governing territory with rights under international law.[192] Self-

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The Guam Supreme Court noted that it would be inconsistent to allow a Rastafarian to use marijuana without providing a legal way for him to acquire it. Guam v. Guerrero, 2000 Guam 26, ¶ 24.

[184] Brief of Amici Curiae DKT Liberty Project at 10-14, *Guerrero* (No. 00-71247).

[185] *Cf.* LAUGHLIN, *supra* note 24, § 20.1 (listing different occupiers of Guam and religions they brought).

[186] *See* R.H.K. Lei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693, 725 (2002) ("'Self-determination' according to the conditions set by the colonizing government is hardly self-determination.").

[187] Brief of Amici Curiae Members of the Guam Legislature at 10, *Guerrero* (No. 00-71247).

[188] *Cf.* Brietzke, *supra* note 109, at 86 (stating that self-determination is "process of self-identification or self-renewal"); Franck, *supra* note 90, at 58-59 (describing self-determination as "right to participate" in democracy).

[189] *Cf.* Brief of Amici Curiae Members of the Guam Legislature at 12, *Guerrero* (No. 00-71247) (quoting Judge Anthony M. Kennedy, as representative for Ninth Circuit's Pacific Islands Committee, supporting Guam's "judicial link" to participation in government).

[190] Lindsey, *supra* note 186, at 725.

[191] *See id.*

[192] *See* discussion *supra* Part II.

determination is a fundamental right under international law.[193] When a case implicates a territory's right to self-determination, a court should perform a balancing test to decide whether to recognize that right.[194] On one side, the court should weigh the territory's interest and the degree of self-determination it requests. Against those interests, the court should weigh the national interest in territorial integrity and the destabilizing effect on the government produced by allowing the act of self-determination.[195]

In this case, Guam requests the authority to interpret its Bill of Rights, a document that is essential for local governance.[196] Allowing the Guam Supreme Court to expand Guam's Bill of Rights confers a great amount of self-governance.[197] Further, this act of self-determination would have a minimal impact on the United States' sovereignty because the decision is confined to federal law involving only Guam.[198] Therefore, the Guam Supreme Court's decision should be honored.[199] The Ninth Circuit should have deferred to the Guam Supreme Court's decision rather than reviewing the *Guerrero* case de novo.[200]

B. *Introducing Customary International Law Into United States Jurisprudence*

International law plays some part in U.S. domestic law. Under Article I, section 8, clause 10, the Constitution includes treaties as the highest law of the land, and "the law of nations" is commonly viewed as

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[193] *Id.*

[194] *See* CHEN, *supra* note 85, at 36 (describing generally evaluation of self-determination claims).

[195] *Id.* (describing necessity "to ascertain the intensity of demands" of self-determination claim); Kirgis, *supra* note 108, at 309. Professor Kirgis created a graph that charts the destabilizing effect of asserting a right to self-determination against the degree that the government is already representative. *Id.* He claims that if the self-determination claim has a low destabilizing effect and creates a great deal of self-governance, then the government should recognize the right. *Id.* at 309-10; *cf.* Brietzke, *supra* note 109, at 92-95 (recognizing that human rights such as self-determination naturally challenge states' sovereignty and comparing sovereignty to "the corporate veil").

[196] Kirgis, *supra* note 108, at 309.

[197] *See id.*

[198] *Id.* at 309-10 (analyzing destabilizing effects on sovereign nations that allow self-determination).

[199] *See* Supreme Court of Canada: Reference Re: Secession of Quebec, 37 I.L.M. 1340, 1348 (1998) (recognizing that self-determination allows colonies or peoples to secede from states in "exceptional circumstances" because secession is highly destabilizing for government and territorial integrity).

[200] *Id.*

customary international law.[201] Scholars have argued over how customary international law, a body of law comprised mostly of unwritten rules, should be incorporated into U.S. jurisprudence.[202] Guam's status as a non-self-governing territory may answer the question of whether customary international law is federal common law or not. This section will address the two dominant theories of incorporation.

The prevailing view is that customary international law is federal common law. The Restatement (Third) of Foreign Relations Law codifies this view.[203] Federal common law status means that customary international law is the supreme law of the land, at the same level as statutes and treaties.[204] Thus, it is binding in federal courts, and it can provide the basis for federal jurisdiction.[205] If customary international law is federal common law, then the Ninth Circuit should have accounted for Guam's self-determination in its decision.[206]

The second theory asserts that customary international law can only be used in federal courts when it is introduced by an act of Congress.[207] In *Erie Railroad Co. v. Tompkins*, the Court stated in dicta, "[t]here is no federal common law."[208] Scholars point to this citation to support the theory that customary international law is not federal common law.[209]

These scholars argue that the Constitution mandates that federal law must come from a sovereign source.[210] The international community creates customary international law through practice, so customary international law does not come from a sovereign source.[211] By this reasoning, *Erie* eliminated the possibility that customary international law can be incorporated in U.S. jurisprudence absent an act of

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[201] U.S. CONST. art. I, § 8, cl. 10.

[202] *See* Louis Henkin, *International Law As Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 513-15 (2002).

[203] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 (1987).

[204] Henkin, *supra* note 202, at 1561. Professor Henkin asserts that customary international law cannot *be* federal common law, but that it is *like* federal common law in that it has "the status of federal law for the purposes of supremacy over state law." *Id.*

[205] *Id.* at 1566; Meltzer, *supra* note 202, at 514.

[206] *See* Meltzer, *supra* note 202, at 514.

[207] Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 393-94 (2001).

[208] 304 U.S. 64, 78 (1938).

[209] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997).

[210] *Id.*

[211] *See generally id.* (describing sovereign sources of law).

Congress.[212] Thus, the United States as a nation cannot be bound by a custom unless Congress has enacted legislation permitting courts to follow that rule.[213]

Scholars who assert that federal courts cannot apply customary international law ignore three things: 1) that treaties ratified by Congress embrace principles of customary international law, 2) federal courts have jurisdiction to hear cases arising under customary international law, and 3) that Guam citizens, like all people, are entitled to human rights. First, treaties such as the U.N. Charter and the ICCPR recognize self-determination as a right.[214] Thus, while no specific cause of action is readily available, self-determination is recognized as a right by a "sovereign" source.[215] Second, federal courts have jurisdiction to hear claims arising under customary international law in Alien Tort Claims Act (ATCA) cases.[216] While the customary international law at issue in ATCA cases usually only involves the most fundamental rights, federal courts apply laws with no "sovereign" source.[217] Finally, Guam citizens, as a matter of policy, should not be denied human rights regardless of the source of that right.[218] As a human right and a norm in customary international law, self-determination applies to all peoples, including U.S. citizens in territories.[219] Therefore, the Ninth Circuit should have recognized the Guam court's act of self-determination and

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[212] *Id.* "Federal courts [must] identify the sovereign source for every rule of decision. Because the appropriate sovereigns under the United States Constitution are the federal government and the states, all law applied by federal courts must be either federal law or state law." *Id.* at 852; *cf.* Daniel H. Joyner, *A Normative Model for the Integration of Customary International Law Into United States Law*, 112 DUKE J. COMP. & INT'L L. 133, 135-36 (2001) (describing Bradley and Goldsmith's view: "[C]ustomary international law is not federal law unless enacted as such by the federal political branches.").

[213] *See* Bradley & Goldsmith, *supra* note 209, at 852.

[214] *See* discussion *supra* Parts II.A-B.

[215] *See id.*

[216] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350); Filartiga v. Pena-Irala, 630 F.2d 876, 877-78 (2d Cir. 1980).

[217] *See, e.g., Filartiga*, 630 F.2d at 879 (litigating prohibition of torture as issue of customary international law).

[218] *Cf.* Brietzke, *supra* note 109, at 92-95 (recognizing human rights, such as self-determination, limits sovereignty); Kingsbury, *supra* note 107, at 191. *But see* Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 455 (1989) (arguing that sovereign states must have authority to violate customary international law). Brietzke argues that the old view of absolute sovereignty, as articulated in Maier's article, is outdated. Brietzke, *supra* note 109, at 92-95.

[219] *See* U.N. SECRETARIAT, WORKING PAPER ON GUAM, *supra* note 20, at 13-14 (explaining political relationship between United States and Guam and Guam's right to self-determination).

upheld it because, ultimately, international law has a place in U.S. courts.

C. *Illegitimate Power of Congress? In the Absence of Legitimate Law, International Law Should Prevail*

Guam's position in the Pacific Ocean makes it prime land for a military base.[220] Because it viewed Guam as nothing more than well-positioned land, the U.S. Supreme Court gave Congress plenary power over U.S. territories and their people.[221] Thus, Congress exercises complete control over Guam, contrary to Congress' limited, enumerated powers.[222]

In the Insular Cases, however, the Court addressed the problem of how to deal with newly acquired territories.[223] Specifically, in *Downes v. Bidwell,* the Court conferred plenary power over a territory to Congress.[224] The change in doctrine that took place during the Insular Cases has been attributed to a territory's lack of commercial value, its high military value, and to some extent, racism.[225]

Justice Brown wrote the majority opinion in *Downes v. Bidwell* in a way that he believed would protect the integrity of the Constitution. Instead, he gave Congress power beyond the scope of the Constitution.[226] Justice Harlan dissented, saying that Congress has no power outside of the Constitution.[227] Harlan determined that Congress could not acquire the territory under powers given in the Constitution and simultaneously exclude the Constitution from operating in that territory.[228]

Thus, Congress, by a grant of authority by the judiciary in decisions made at the turn of the century, exceeded its mandate by exercising plenary power over territories.[229] This unfettered power is especially repugnant when its origins are steeped in racism, and it is exercised over

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[220] U.N. Special Committee Press Release, *supra* note 119.

[221] *See supra* notes 21-22 and accompanying text.

[222] *See* Natsu Taylor Saiko, *Asserting Power of the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 478-80 (2002).

[223] Downes v. Bidwell, 182 U.S. 244 (1901).

[224] *Id.*

[225] Saiko, *supra* note 222, at 458-59.

[226] *See id.* at 478-80.

[227] *Downes*, 182 U.S. at 260 (Harlan, J., dissenting).

[228] *Id. See generally* Jose D. Roman, *Trying to Fit an Oval Shaped Island into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1689 (2002) (discussing *Downes* case).

[229] *See* Saiko, *supra* note 222, at 428.

a minority group.[230] Further, the justifications for exercising plenary power are antiquated.[231]

As a result, the illegitimate exercise of power absent constitutional protections leaves the territories without any legitimate law.[232] In a recent article, Professor Saiko explains that for plenary power to be law, it must incorporate constitutional protections. Otherwise, plenary power is the exercise of "raw power" devoid of law.[233] Because the U.S. Constitution cannot reach territorial law, international law must.[234] Had the Ninth Circuit examined international law in this case, it would have applied the principles of self-determination and anti-colonialism to preserve Guam's autonomy.[235]

CONCLUSION

The right of self-determination constitutes a fundamental norm of contemporary international law, binding on all nations, including the United States.[236] In interpreting the free exercise clause of the Organic Act, the Guam Supreme Court was exercising Guam's right to self-determination under international law. The Guam Supreme Court interpreted Guam's Bill of Rights, a federal statute, to allow for more religious freedom than is allowed by the United States. In overruling the Guam Supreme Court's decision, the Ninth Circuit violated Guam's right to self-determination under international law.[237]

The Ninth Circuit should have deferred to the Guam Supreme Court when reviewing its decision in *Guerrero* because the decision was an act of self-determination. The *Guerrero* case may not seem a likely occasion

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[230] *Id.* at 428-29.

[231] Phillip P. Frikey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993). Philip Frikey described this anomoly: "In a country that prides itself on following the rule of law, the justifications for colonization . . . recognized by the Supreme Court itself — to impose Christianity upon the heathen, to make more productive use of natural resources, and so on — do not go down easily in the late-twentieth century." *Id.*

[232] Saiko, *supra* note 222, at 432-33.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *See supra* Part I.B. *See generally* Case Concerning East Timor (Port. v. Austl., 1995 I.C.J. 90, at 221 (June 30) (Weeramantry, J., dissenting) (describing East Timor's right to self-determination).

[237] Brief of Amici Curiae Members of the Guam Legislature at 20, *Guerrero* (No. 00-71247) (quoting Judge Anthony M. Kennedy, as representative for Ninth Circuit's Pacific Islands Committee, supporting Guam's "judicial link" to participation in government).

for the Guam Supreme Court's exercise of self-determination. Yet in doing so, the court was seeking to protect all religions in Guam. Also, the Ninth Circuit should have incorporated international law and the principle of self-determination into its decision because the United States recognizes international law as valid and binding. Finally, because Congress' plenary power exceeds the power allotted under the Constitution, it is an invalid exercise of power. As a result, the Ninth Circuit should have considered international law.

Interpreting its Bill of Rights in the Organic Act seems an obvious step for Guam courts to take when asserting the right to self-determination. The citizens of Guam should have the right to self-determination, particularly because they are more disenfranchised than other American citizens.[238] In *Guam v. Guerrero*, the Ninth Circuit mistakenly asserted that Guam has no inherent right to govern itself. If the Ninth Circuit had considered international law, as it had a duty to, then it would have found ample evidence that Guam has a fundamental right to self-governance and self-determination.

[238] *Cf.* U.N. SECRETARIAT, WORKING PAPER ON GUAM, *supra* note 20, at 13-14 (describing Guam citizens' rights).

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