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BACKGROUND PAPER

INDIGENOUS PEOPLES: SELF-GOVERNMENT AND INTERGOVERNMENTAL RELATIONS

David C. Hawkes
Adjunct Professor of Canadian Studies at Carleton University and
former Co-Director of Research, Royal Commission on Aboriginal Peoples

Introduction

Although perhaps unrelated, the growth of Indigenous nationalism has parallelled the increased pressures of internationalization and globalization on the world stage over the past thirty years. As "peoples" under international law, Aboriginal peoples assert a right to self-determination. But at the same time, except in the very harshest of circumstances (1), this right of self-determination must find expression within existing states. Since there are many more nations(2) than there are states upon this planet, this creates a challenge of accommodating Aboriginal self-determination within what we might term "multi-nation states". Examples include Australia, Canada, Mexico, the United States of America, and Russia, among federal countries.

The right of self-determination of Aboriginal peoples within states often branches in two directions: (1) a drive for more autonomy for Indigenous nations (often in the form of Aboriginal self-government); and (2) a demand for greater participation in the decision-making institutions of the state (sometimes in the form of guaranteed representation for Indigenous peoples in legislatures, or in reforming the dispute resolution institutions of the state). These two branches of Aboriginal self-determination appear to fit very closely with the twin pillars of federalism - self-rule and shared-rule. This background paper seeks to explore how federalism can provide a context for accommodating the self-determination of Indigenous peoples within federal states.

Federalism and Indigenous Peoples

Several characteristics of federalism suggest that it may be promising in developing a framework for accommodating the aspirations of Indigenous peoples within states. First, federalism provides a fundamental respect for diversity - perhaps even the "deep diversity" which Canadian philosopher Charles Taylor describes as different ways of citizens belonging to the state (for example, some mediated through their national community, others unmediated).(3) Federalism has the potential to demonstrate respect for the cultures, languages, laws, and ways of life of Indigenous peoples. The institutions of federal states can also embody this diversity in their public symbols and practices, and thereby demonstrate respect for Indigenous peoples in their political cultures.(4) As Aboriginal scholar Taiaiake Alfred has concluded in his examination of the position of Indigenous peoples in Canada, the relationship between peoples should be founded on the principles of autonomy and interdependence:

> To accommodate indigenous notions of nationhood and cease its interference in indigenous communities, the state need only refer to the federal principle.(5)

Second, federalism can accommodate multiple identities and loyalties within a state, as well as different "levels" of government, some with shared sovereignty. In Australia, for example, both the commonwealth and state governments are sovereign within their respective spheres of jurisdiction. In the United States of America, in addition to federal and state sovereignty, American Indian tribes assert their sovereignty, recognized by the federal government and based upon the principle that they are "domestic, dependent

nations", a doctrine which emerged from a landmark decision of the US Supreme Court in Cherokee Nation v. Georgia in 1831 (6). In Canada, the Royal Commission on Aboriginal Peoples has concluded that:

> ... the inherent right of Aboriginal self-government is recognized and affirmed in section 35(1) of the Constitution Act, 1982 as an Aboriginal and treaty-protected right. The inherent right is thus entrenched in the Canadian constitution, providing a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.(7)

The government of Canada recognizes that the inherent right of self-government is protected in section 35(1) of the Constitution Act, 1982. It can be argued, therefore, that federalism can accommodate a pooling of sovereignties - federal, state and Indigenous. Although the basis may be there in Canadian law, few concrete examples exist to demonstrate how this approach might work in practice. This matter will be addressed later in this background paper.

Intergovernmental relations in federations have proved to be highly adaptive to changing circumstance and capable of great innovation, a third trait which suggests that federalism might provide a promising framework. For example, between 1983 and 1987, four federal-provincial First Ministers Conferences were held with national Aboriginal leaders in Canada to address Aboriginal constitutional matters in an unprecedented, albeit unsuccessful, exercise in Canadian politics.(8)

A fourth reason for exploring concepts of federalism and their application to the aspirations of Indigenous peoples centres on mutual traditions. There are analogues to Western federalist concepts within the traditions of Indigenous peoples themselves. Long before the arrival of Europeans to their lands, Aboriginal nations in the Americas formed their own federal or confederal political organizations, from the Mi'kmaq confederacy of the Maritime region to the Haudenasaunee (Iroquois) confederacy of the Great Lakes to the Blackfoot confederacy of the West. The Indigenous peoples did this through treaties, another concept which has ancient origins in both Western and Aboriginal traditions, and which shall be described momentarily. The origins of federalism in the Western tradition can be traced to the works of Althusius in the 1600s, and this older thinking on federalism appears to be similar to Indigenous concepts, as it focuses on autonomy, mutual dependency, and the processes of communication and shared decision-making (e.g., participatory, inclusive) (9). Althusian federalism also requires institutional flexibility and a commitment of some form of shared union.

Treaty-making has ancient roots in both Indigenous and Western history as well. In the Western tradition, treaty-making can be traced at least as far back as Roman times and the fundamental principle of pacta sunt servanda - "treaties shall be honoured in good faith". Treaty-making in the Old World was developed to serve a number of purposes - to secure recognition of the independence and boundaries of states, to achieve military alliance, to promote peace, to foster trade, to provide for safe conduct, and to determine the terms of surrender following a war, among other reasons. Before contact, the Indigenous peoples of the Americas had their own well-established diplomatic protocols. Alliances among nations were often modelled on the family unit and solidified and maintained through adoption, the exchange of gifts and arranged marriages, methods similar to those used by the monarchies of Europe. These alliances enabled the free flow of trade, resource-sharing, safe passage, military alliance and economic assistance in time of need. When new people came into their territory, be they Indigenous or European, new alliances or treaties were required.(10)

This led to the development of a theory on "treaty federalism" by Indigenous scholars, in which treaties are seen as the fundamental political relationship between Aboriginal peoples and the Canadian state, existing alongside the "provincial federalism" of the Constitution Act, 1867, which established relations between the federal and provincial governments.(11) Treaty federalism involves a process of co-ordination and compromise

based on consensus, and creates an open-ended, horizontal and renewable partnership aimed at autonomy and reciprocity of all participants.(12) Non-Indigenous scholars such as James Tully have explored the same history and developed the concept of "treaty constitutionalism", in which treaties give rise to constitutional association of interdependence and protection.(13) The idea of treaties with Indigenous peoples as federative instruments is one which may hold promise for accommodating the self-determination of Indigenous peoples within federal states.(14)

Indigenous Public Government and Self-Government

Indigenous peoples within federal states retain their right of self-determination, and seek to exercise their autonomy through arrangements that will enable them to be self-governing. Some seek the exercise of jurisdiction pursuant to the inherent right of self-government; others seek to exercise their right of self-determination through a public form of government. This aspiration is fuelled by the desire of Indigenous people to govern themselves in order that they may retain their Indigenous values and traditions, their ways of life, and their languages and cultures, and to do so in a contemporary context.

The options for Indigenous people in this regard are greatest where they are geographically concentrated and constitute a majority of the residents of a region. A current example in Canada in that of the Inuit of the eastern arctic, who have chosen to exercise their right of self-determination through a public form of government. In addition to recently settling their land claim, the Inuit have opted to form a new territorial government in the eastern arctic, called Nunavut (meaning "our land" in the Inuit language, Inuktitut), in their traditional lands. Since the Inuit constitute well over 80 per cent of the population in this region, they can pursue self-determination through a public form of government because of their overwhelming demographic majority. Inuktitut is one of three official languages in the newly-formed territory of Nunavut (in addition to English and French), which came into being on April 1, 1999 pursuant to legislation passed by the Canadian Parliament. The Inuit were no doubt influenced to pursue a public form of government in part because of the experience of their close neighbours, the Inuit of Greenland, who have a home rule arrangement with Denmark.

Federalism has demonstrated, in the Nunavut example, how it can accommodate the Inuit aspirations for self-determination within a state. Nunavut recognizes and respects the Inuit people's aspirations and their language and culture, and enables them to be autonomous in their traditional lands. If conditions should ever arise which place the Inuit of Nunavut in a demographic minority in their traditional lands, they would retain the right of choosing to exercise their right of self-determination through another means, such as self-government.

To the author's knowledge, there is no word or phrase for "self-government" in Aboriginal languages. The closest phrase in most Indigenous languages in Canada translates roughly into English as "we take care of ourselves".(15) This is not a far stretch from the concept of "self-rule" in federalism. The Royal Commission summarizes the constitutional position of the inherent right of self-government for Indigenous peoples in Canadian law:

> At the time of European contact, Aboriginal peoples were sovereign and independent peoples, possessing their own territories, political systems and customary laws. Although colonial rule modified this situation, it did not deprive Aboriginal peoples of their inherent right of self-government, which formed an integral part of their cultures. This right continues to exist, in the absence of clear and plain legislation to the contrary. Although in many cases the right was curtailed and tightly regulated, it was never completely extinguished.(16)

Key to the self-government approach is the question of where the right of self-government is vested. It is not vested in small local communities of Indigenous people, such as in individual Indian bands in Canada (17). Rather, the right of self-government is vested in Aboriginal nations, in all of the communities which make up a nation. A fundamental challenge, then, to the success of the self-government approach is the reconstitution of

Indigenous nations from their existing, disaggregated situations, disaggregations largely forced upon them by colonial governments. The government of Canada has formally acknowledged its role in this regard:

> Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregared, disrupted or even destroyed by the dispossession of their traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.(18)

Exercising the inherent right of self-government requires Aboriginal nations to negotiate self-government agreements with federal and provincial governments. These agreements define the jurisdictions to be exercisable by Indigenous governments, including paramountcy in the event of actual conflicts of law with federal and state laws, and are accompanied by concurrent fiscal arrangements. In Canada, self-government agreements can be given legislative force by the federal and Aboriginal governments, or by all three parties (that is, including the provincial government as well), and the rights defined in these agreements and this legislation may be constitutionally protected if the parties so desire.

Greater Indigenous Participation in the Decision-Making Institutions of the State

The second branch of Indigenous peoples' drive for self-determination focuses on achieving greater participation in the decision-making processes of the state, often in existing federal institutions and intergovernmental relations. This relates to the shared-rule pillar of federalism.

One form which this takes is a demand for greater Indigenous representation in legislatures. Historically, Indigenous peoples have been woefully under represented in federal and state legislatures. In Canada, for example, almost 11,000 members of Parliament had been elected to the House of Commons between Confederation in 1867 and the 1993 federal election. Of these, only 13 members have self-identified as Indigenous people.(19) This situation was no doubt influenced by the fact that the franchise was denied to most Indian persons until 1960. However, Indigenous people have also resisted participating in the Canadian electoral system, viewing this as a "settler" institution which they played no part in creating. By voting, for example, some believe that they would undermine their nation-to-nation relationship with the state.

There are several examples of guaranteed representation for Indigenous peoples in legislatures. Perhaps the most well-known is that of New Zealand, where four seats are reserved for the Maori people. Each Maori voter may register on the Maori roll for their region or on the general electoral list for the constituency in which they live. The major political parties and the Maori party contest the Maori seats. In a less-known example in the US, the Penobscot and Passamaquoddy tribes each elect a representative to sit in the legislature in the state of Maine. These representatives do not vote on bills before the legislature, a decision which was made by the Indigenous people themselves, but they do possess all other rights and privileges, such as sitting on legislative committees, speaking in the legislature on any issue, and receiving the normal benefits of an elected representative.(20)

A related alternative is that of an Aboriginal Parliament. This innovation was introduced by the Scandinavian states, and there are now three Sammi (formerly Lapp) Parliaments in Sweden, Norway and Finland. The Sammi Codicil of 1751, an addendum to a treaty between Sweden and former Denmark-Norway, recognized some of the Indigenous rights

of the Sammi, including their customary law, the recognition of the Sammi nation, and the free movement of Sammi reindeer herders. The Sammi Parliament of Norway was created following the passage of the Sammi Act by the Norwegian assembly in 1987. Sammi voters are enrolled on a Sammi electoral register, and elect three members from each of the 13 Sammi constituencies. The powers of the Parliament, the Samediggi, are limited to consultation and advice. The Finnish Sammi Parliament, The Delegation for Sammi Affairs, was established in the early 1970s, and has 20 elected members. Like the other two Sammi Parliaments, it has no legislative function.(21)

In Canada, the Royal Commission on Aboriginal Peoples thought that a third chamber of Parliament would be a logical extension of three orders of government, and that an Aboriginal Parliament (and eventually a constitutionally entrenched House of First Peoples) should be established alongside the existing House of Commons and the Senate. It would give Aboriginal peoples a permanent voice in processes of national decision-making in "shared-rule" decisions. The Commission saw the limitations of an advisory body, and argued for the Aboriginal Parliament to have the power to initiate legislation, to advise on legislation and constitutional matters relating to Aboriginal peoples, in addition to review and oversight, and fact finding and investigation functions.(22)

In addition to legislative reform, Indigenous peoples have either sought greater participation in state institutions of dispute resolution, or endeavoured to create dispute resolution processes and institutions - often joint in character - particular to their needs. Experience here is not peculiar to federal states. One of the earliest and most successful examples is the Waitangi Tribunal in New Zealand, established in 1975. Designed to put into practice the Treaty of Waitangi, signed in 1840, the tribunal is a quasi-judicial advisory body which inquires into and makes recommendations to the Crown for Maori land and resource claims relating to sections of the Treaty (which has both an English and a Maori language legal version). The tribunal is limited, however, both by its advisory nature (except on Crown lands, where its decisions are binding), and by its inability to address disputed land under private ownership.(23)

Canada introduced comprehensive and specific claims policies and processes in the 1970s, following the federal government's original statement of claims policy in 1973. The comprehensive claims policy deals with land claims based upon unextinguished Aboriginal title. Specific claims policy is restricted to Indians, not all Indigenous peoples, and addresses grievances regarding past Crown administration of Indian lands and other assets, and the fulfilment of the provisions of existing treaties.(24) These policies, roundly criticized by many analysts (including the Royal Commission on Aboriginal Peoples), are now under a joint review process by the federal government and the Assembly of First Nations, an organization representing Canada's First Nations. More recently, the British Columbia Treaty Commission was established in 1992 in Canada's westernmost province. It was created jointly by the First Nations Summit and the federal and British Columbia governments. The federal and provincial governments nominate one commissioner each, while the First Nations Summit nominates two commissioners. The chief commissioner is nominated jointly by the parties.(25) Similarly, an agreement was made in 1996, between the government of Canada and the Federation of Saskatchewan Indian Nations, to renew the Office of the Treaty Commissioner in the province of Saskatchewan, in order to facilitate common understandings on treaty and jurisdictional issues.(26)

The desire for greater Indigenous participation in decision-making extends to intergovernmental relations as well. Indigenous peoples have been represented at First Ministers' Conferences, Annual Premiers' Conferences, and conferences of federal, provincial and territorial ministers responsible for Aboriginal affairs in Canada, although there is no "standing invitation" to national Indigenous leaders. An exception is Section 35(1) of the Constitution Act, 1982 (as amended), which calls for consultation with Aboriginal peoples in the event that their constitutional interests are to be affected.(27) Aside from this requirement, Indigenous leaders must renew their request to participate at each meeting, and they are frequently denied access. It is interesting to note, however,

that even in the absence of their direct participation, Aboriginal peoples' interests were at least partly reflected in the most recent intergovernmental negotiations on the new Social Union agreement. For example, in section one, principles include respect for diversity, fairness, mutual aid, and the principle that the agreement will not "... abrogate or derogate from any Aboriginal, treaty or other rights of Aboriginal peoples including self-government". Section four contains a commitment that "Governments will work with the Aboriginal peoples of Canada to find practical solutions to address their pressing needs."(28)

Summary

In summary, the right of self-determination of Aboriginal peoples within states often branches in two directions: (1) a drive for more autonomy for Indigenous nations; and (2) a demand for greater participation in the decision-making institutions of the state. These two branches of Aboriginal self-determination appear to fit very closely with the twin pillars of federalism - self-rule and shared-rule. There are many aspects of federalism that can provide a context for accommodating the self-determination of Indigenous peoples within federal states. Federalism can provide a fundamental respect for diversity, and the different cultures, languages, laws and ways of life of Indigenous peoples. It can accommodate multiple identities and loyalties within a state, as well as different "levels" or orders of government, some with shared sovereignty. Federal systems can adapt to change, and are capable of great innovation. Federalism has ancient roots in both Western and Indigenous traditions, as does treaty-making. Treaties between states and Aboriginal peoples should be considered as federative instruments, binding the parties together in an association of autonomy and interdependence.

The drive for greater autonomy, or self-rule, can be accommodated through a public form of government where Indigenous people are the demographic majority in a region, or through the exercise of the Aboriginal right of self-government and the negotiation of intergovernmental agreements. The demand for greater participation in the decision-making institutions of the state, or shared-rule, can be met by guaranteed representation for Indigenous peoples in the legislatures of federations, in the creation of Aboriginal Parliaments, in the creation of state dispute resolution mechanisms to address the needs of Indigenous peoples, in the development of treaty-making and treaty-renewal processes, and through Indigenous participation in the intergovernmental relations of federal states.

Endnotes

1 . Aboriginal peoples' right of self-determination can be justified as a right to independence in international law only in the most dire of circumstances, such as those of genocide, the systematic pillage of their lands and resources, and if basic human rights are denied. See Canada's Fiduciary Obligations to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Volume I, International Dimensions, by S. James Anaya, Richard Falk and Donat Pharand, and Volume II, Domestic Dimensions, by Renee Dupuis and Kent McNeil, Papers prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples, August, 1995. Also see the conclusion reached by the Royal Commission on Aboriginal Peoples that: The right of self-determination ... does not entitle Aboriginal peoples to secede or form independent states, except in the case of grave oppression or a total disintegration of the Canadian state. [Volume 2, Part One, Restructuring the Relationship, Canada Communications Group, 1996, p. 172.]

2. Nations is used here in the way described by the Royal Commission on Aboriginal Peoples: that is, as sizeable bodies of Aboriginal people with a shared sense of national identity that constitute the predominant population in a certain territory or collection of territories. National identity is usually grounded in a common heritage, which includes such elements as a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry, homeland or adherence to a particular treaty. See Report of the Royal Commission on Aboriginal Peoples, Volume 2, Part One, Restructuring the Relationship, Canada Communications Group, 1996, pp. 164 -

184.

3 . See Charles Taylor, "Shared and Divergent Values" in Ronald L Watts and Douglas M. Brown (eds.), Options for a New Canada, Toronto, University of Toronto Press, 1991, pp. 75 - 76.

4 . See, for example, the Report of the Royal Commission on Aboriginal Peoples, Volume 1, Looking Forward, Looking Back, pp. 682 -685.

5 . Taiaiake Alfred, Peace, Power, Righteousness: An Indigenous Manifesto, Toronto, Oxford University Press, 1999, p. 53.

6 . Reported in (1831) 5 Peters 1.

7 . Volume 2, Restructuring the Relationship, Part One, p. 213.

8 . See David C. Hawkes, Aboriginal People and Constitutional Reform: What Have We Learned?, Kingston, Ontario, Institute of Intergovernmental Relations, 1989.

9 . See Thomas O. Hueglin, "Exploring Concepts of Treaty Federalism: A Comparative Perspective", Paper prepared as part of the Research Program of the Royal Commission on Aboriginal Peoples, For Seven Generations, Libraxus CD-ROM, Ottawa, 1997.

10 . See Office of the Treaty Commission, Statement of Treaty Issues: Treaties as a Bridge to the Future, Saskatoon, Saskatchewan , Canada, October, 1998, pp. 14 -15 and Royal Commission on Aboriginal Peoples, Volume 1, Looking Forward, Looking Back, pp. 119 - 122.

11 . See, for example, James Youngblood Henderson, "Affirming Treaty Federalism", Submission to the Royal Commission on Aboriginal Peoples, 5 March 1993.

12 . This is the summary description of treaty federalism as provided by Thomas O. Hueglin in "Exploring Concepts of Treaty Federalism".

13 . James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity, Cambridge, Cambridge University Press, 1995, pp. 118 - 139.

14 . It should be noted that treaties with Indigenous peoples do not exist in every federal state. In Australia, for example, there is no treaty between the commonwealth government and the Aborigines.

15 . See, for example, Gerald A. Alfred, Heeding the Voices of our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism in Canada, Oxford, Oxford University Press, 1995.

16 . Volume 2, Restructuring the Relationship, Part One, p. 202.

17 . Indian bands exercise delegated authority pursuant to federal legislation in Canada, the Indian Act.

18 . "Gathering Strength - Canada's Aboriginal Action Plan", Minister of Indian Affairs and Northern Development, Ottawa, 1997, catalogue no. R32-189-1997E, p. 4.

19 . Based on data in Robert A. Milne, "Canadian Representation and Aboriginal Peoples: A Survey of the Issues", research study prepared for the Royal Commission on Aboriginal Peoples, 1994.

20 . See David C. Hawkes and Bradford W. Morse, "Alternative Methods for Aboriginal Participation in the Processes of Constitutional Reform", in Ronald L. Watts and Douglas M. Brown (eds.), Options for a New Canada, Toronto, University of Toronto Press, 1991, pp. 178 - 180.

21 . Ibid., pp. 180 - 182.

22 . Volume 2, Restructuring the Relationship, Part One, pp. 377 - 382.

23 . See Augie Fleras and Jean Leonard Elliot, The Nations Within: Aboriginal-State Relations in Canada, the United States, and New Zealand, Toronto: Oxford University

Press, 1992. Pp. 190 -191.

24 . Volume 2, Restructuring the Relationship, Part 2, p. 534.

25 . Ibid., p. 541.

26 . Office of the Treaty Commissioner, Statement of Treaty Issues: Treaties as a Bridge to the Future, pp. 3 - 4.

27 . Section 35(1) reads as follows: "The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867" (the federal head of power for "Indians and lands reserved for the Indians"), to section 25 of this Act or to this Part, (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item." (Phrase in italics added by the author.)

28 . From "A Framework to Improve the Social Union for Canadians, An agreement between the Government of Canada and the Governments of the Provinces and Territories", February 4, 1999.
