AUTONOMY OF INDIGENOUS PEOPLES IN CANADA

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I. Introduction

If we are concerned with the survival of indigenous people, and recognize, as Professor Maureen Davies has pointed out, that the way to survival for indigenous peoples is self-determination rather than state patronage and protection, then the degree of autonomy of indigenous peoples within states becomes an indicator of the probability of their survival.

If we follow Dr. Gudmundur Alfredsson's example and conceptualize a continuum of powers of self-determination ranging from the nonself-governing territory at one pole to the fully independent state at the other, a wide range of forms of autonomy are possible between the extremes. In order to talk about the autonomy of an indigenous group in concrete terms, we must have criteria according to which autonomy can be assessed. For purposes of this paper, we will use the following four criteria in assessing the status of indigenous peoples in Canada with respect to autonomy:

1. If the indigenous group is a minority within the state, does the state acknowledge its existence?
2. Does the indigenous group have the capacity to determine its membership?
3. Does the indigenous group have some measure of self-government, as a group?
4. Does the indigenous group have access to, and control of, their lands and resources?

The first question is one of power relationships. Clearly, if an indigenous group exists within the boundaries of a state, that state does not have the right to say that they do not exist, or that they are not indigenous. However, state practices appear to deviate on occasion. The recognition of an indigenous group by the state is a prerequisite to the emergence of some form of autonomy.

The remaining three criteria of autonomy bear a strong resemblance to the characteristics of independent states: if each could be answered unequivocally in the affirmative absolute we would be considering autonomy of the order of external self-determination and independence. However, given that indigenous peoples in Canada constitute a minority which does not control the state, we must consider indigenous autonomy in the Canadian context in the sense of internal self-determination or self-government, rather than independence.

II. The Indigenous Peoples of Canada

In Canada three indigenous peoples are recognized constitutionally:

In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.¹

The Indian peoples live throughout Canada mainly south of the tree-line. The State divides them into two groups: status and non-status, according to criteria in the Indian Act.² Status Indians are subject to the Act and non-status Indians are not.

²
The Inuit or Eskimo peoples live north of the treeline in the Canada Arctic and have never entered into treaties with the Crown.

The Metis people are primarily descendents of Indian peoples and French fur traders living in the prairie provinces of Manitoba, Saskatchewan and Alberta, and the Northwest Territories, some of whom received scrip for their lands, rather than treaties, and whose recognition as indigenous peoples is recent.

There are four national native organizations which determine their own membership: the Assembly of First Nations, representing some 350,000 Status Indians; the Native Council of Canada, representing some 200,000 non-status Indians and Metis; the Metis Association representing 600,000 Metis and non-status Indians; and the Inuit Tapirisat of Canada representing some 25,000 Inuit.

The indigenous peoples of Canada are diverse, with regional and tribal distinctions which are frequently underestimated by the non-native, multicultural communities of Canada. Understandably, while aspirations of indigenous peoples in Canada are similar in some respects, they are far from homogeneous. This diversity has frequently been termed "lack of agreement" and viewed as an obstacle to consensus and an excuse for inaction by government, rather than as a vital aspect of self-determination.

Each national organization is composed of subunits whose boundaries frequently correspond to state jurisdictional boundaries, and which are in turn composed of regional subunits, which may be tribal in origin.

III. Legal Relations Between Indigenous Peoples and Canada

Relationships between indigenous peoples and the governments, both federal and provincial, which form the Canadian federal system are affected by three principal legal documents: the Canada Act 1867,3 the Indian Act, and most recently, the Constitution Act, 1982. The Canada Act 1867 gives jurisdiction over "Indians and lands reserved for Indians" to the federal government under section 91 (24). The Inuit are held to be Indians within the meaning of 91 (24),4 but are excluded from the operation of the Indian Act.5 The Indian Act defines who is an "Indian" for purposes of this Act, and those falling within its ambit are identified as "Status Indians". Those who are not caught by the legal definition of Indian under the Indian Act, or who become enfranchised, are referred to as "non-Status Indians", and the provisions of the Indian Act do not apply. In general, Indians who fall within the ambit of the Indian Act are those whose forebears had entered into treaties with the Crown and who had not become enfranchised. Enfranchisement occurred for example, when Status Indians acquired a university education, and so, from an assimilist, ethnocentric viewpoint ceased to be "Indians". The term "enfranchisement" was used because the Indian person "acquired" the "right" to vote during this process, but in fact was dis-enfranchised of his Indian Status. While this example no longer occurs, dis-enfranchisement of Status Indian women through marriage to non-status Indians is still practised.6

The third legal source of definition of the relationship between the Canadian state and indigenous peoples within it, is the Constitution Act, 1982 which states in section 35:

1. The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.