
SELF-DETERMINATION AS THE BASIS FOR RECONCILIATION: IMPLEMENTING THE UN *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

by Brenda L Gunn

INTRODUCTION

In Canada, the initial relationship between the Crown and First Nations was a nation-to-nation one. However, this relationship quickly deteriorated. Between 1857 and 1985, the Colonial and federal government passed various pieces of legislation with strong assimilation intentions.¹ Past attempts to rectify the colonialist basis for the current Aboriginal-Crown relationship have largely failed. Most notably, this is due to the limited interpretation of section 35(1) of the Constitution by Canadian courts² and the failed negotiations to flesh out the scope of self-government, as mandated by section 37.

In the wake of the 2006 settlement of the 'Indian Residential Schools' class action—a significant development in the relationship between the Crown and First Nations in Canada—Canada's Truth and Reconciliation Commission was given a mandate to be 'forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians'.³ In this paper I argue that to move forward and rebuild and renew these relationships, we must rectify the colonial legal history in Canada. In this sense, reconciliation must be about a process of working together to redefine the relationship between Aboriginal people and the Crown. Self-determination, as acknowledged in the *UN Declaration on the Rights of Indigenous Peoples* ('UN Declaration'), provides the best way to do this.⁴

THE RIGHT TO SELF-DETERMINATION IN THE UN *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

The UN Declaration represents a major turning point for the way in which the human rights of Indigenous peoples are recognised and protected. The UN Declaration is based on the principles of non-discrimination and equality,⁵ which means that Indigenous peoples have the same right to self-determination as other peoples as recognised in international law. While self-determination is specifically identified in Article 3, self-determination is a foundational right without which Indigenous peoples' rights cannot be fully realised.⁶

Self-determination may be exercised differently among Indigenous peoples around the world according to their own needs and aspirations. UN Special Rapporteur, James Anaya, provides one broad conception of self-determination:

Understood as a human right, the essential idea of self-determination is that human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly.⁷

Thus, as Claire Charters notes, self-determination has an important political element in that:

it relates to distributions of power and appropriate power-holders, and includes within it the right of peoples to choose how to express their own political aspirations, on the basis of equality, and to determine their collective destiny without outside interference.⁸

Essentially, self-determination for Indigenous peoples is about choice: it is the right of Indigenous peoples:

to negotiate freely their political status and representation in the states in which they live. This process may be described as a kind of belated state-building, through which Indigenous peoples are able to join with all the other peoples that comprise the state on mutually agreed-upon and just terms after many years of isolation and exclusion.⁹

If there are violations of the right to self-determination, international law and the UN Declaration recognise that Indigenous peoples are entitled to a remedy.¹⁰ In Canada there has been an ongoing violation of Indigenous peoples' right to self-determination because 'Indigenous peoples were never part of state-building'.¹¹ To remedy these violations, states have 'a duty to accommodate the aspirations of Indigenous peoples through constitutional reforms designed to share power democratically'.¹² While treaty making between Aboriginal people and the state initially may have contributed to nation-building in parts of Canada, by and large these treaties have not been respected or upheld resulting in the exclusion of Aboriginal people from the process of nation-building in Canada.

Self-determination is really about reconciliation: it 'must be understood, not simply in terms of end result, but in terms of process and of political legitimation'.¹³ It is through this process of implementing self-determination in Canada that we will be able to move past the colonial legacy and truly reconcile. We can look to the articulations of self-determination in the UN Declaration to help guide the reconciliation process. In the UN Declaration, self-determination starts with the recognition of Indigenous peoples' own customs, laws and traditions. Indigenous peoples' specific exercises of self-determination will be grounded in these laws and traditions.

Some have argued that the UN Declaration provides a very limited scope for self-determination arguing that the reference in Article 4 to self-government and autonomy are the only ways in which Indigenous peoples can exercise the right to self-determination.¹⁴ However, this interpretation does not fit with the spirit of the UN Declaration and the requirements set out in Articles 1 and 2 of equality and non-discrimination. This limited interpretation of self-determination continues to discriminate against Indigenous peoples by arguing that Indigenous peoples do not have the same right to self-determination as other peoples. Therefore, such a limited understanding of self-determination cannot and should not be supported. Article 4 must be interpreted in the context of the entire UN Declaration and thus Indigenous peoples' right to self-determination includes, but is not limited to, the right to autonomy or self-government, as well as a means for financing these functions.

Article 5 of the UN Declaration continues to provide that self-determination includes Indigenous peoples' right to maintain their own political, legal, economic, social and cultural institutions. The right to self-determination is also connected to Articles 20, 33, 34 and 35: the right to pursue economic activities; the right to determine their own identity or membership in accordance with their own customs and traditions; and, the right to their own institutional structures which may include legal systems and determining the responsibilities of persons to their communities.¹⁵

However, self-determination is not limited to control over these internal affairs. Several provisions in the UN Declaration connect to international aspects of Indigenous peoples' right to self-determination. As set out in Articles 6 and 36 of the UN Declaration, Indigenous peoples have a right to a nationality and to maintain and

develop relationships with members of their community as well as other communities within or outside their respective country. These contacts may be for various activities and purposes, and need to be facilitated by the state with the cooperation of Indigenous people. Article 36 further recognises that Indigenous peoples have a right to have relations with other peoples across international borders. Article 41 requires governments to work with Indigenous peoples to establish ways of ensuring Indigenous peoples participate in making decisions on issues that affect them, which would include ongoing participation in international forums. A final aspect that supports a broader understanding of the right to self-determination is that the preamble also recognises that treaties between Indigenous peoples and the state are matters of international concern and have an international character in some circumstances.¹⁶

PROMOTING RECONCILIATION BY IMPLEMENTING SELF-DETERMINATION IN CANADA

Aboriginal peoples' right to self-determination has been continuously violated by Canada exercising power over Aboriginal people and setting the terms for Aboriginal peoples' participation in the Canadian state. There are many different options on how to rectify the ongoing violation of Aboriginal peoples' right to self-determination. Most likely, there will not be one solution that will work for all Aboriginal people. Each people (First Nation, nation, community, etc) will need to determine for themselves, in conjunction with the Canadian state, their relationship with the Canadian state. This section provides a brief overview of some possibilities to implement self-determination in Canada.

It must be remembered that in order for all Aboriginal people to benefit from the implementation of the right to self-determination, it will be critical for Aboriginal women to be included within any process of re-setting the terms of the relationship between Canada and Aboriginal people. Aboriginal people may need to re-examine gender dynamics within their own communities. Determining how self-determination will play out in any particular circumstance may also require specific attention to be paid to Aboriginal women's particular needs and rights. In Canada, self-determination will need to start with the full recognition and acceptance of Indigenous laws and traditions and their role in the legal infrastructure. For much of Canada, existing treaties are the starting place to define the relationship between Aboriginal peoples and the state.¹⁷ Treaties were originally negotiated on a nation-to-nation basis. These treaties set out the terms

for how Aboriginal people and Canadians were to live together and today can provide a framework for reconciliation.¹⁸

Self-determination in Canada may require a reshaping of federalism to explicitly include a level of autonomy for Aboriginal communities.¹⁹ While constitutional amendments may be difficult to achieve in Canada, a fulfillment of Aboriginal peoples' right to self-determination may require such an amendment to allow for Aboriginal people to have a better share of jurisdictional power.²⁰

Self-determination may require new processes for greater participation of Aboriginal people in the mainstream Canadian political process.²¹ Fulfilling Aboriginal peoples' right to self-determination may also mean creating a more meaningful way for Aboriginal people to participate in all decisions that affect them and their rights.²² This may mean reconsidering the content of the duty of consultation and accommodation as currently defined by the Supreme Court of Canada²³ to better meet international standards of free, prior and informed consent and the triggering of such requirements. Self-determination may also require an ongoing obligation and opportunities for Aboriginal peoples' participation in international law and policy-making.²⁴

In conclusion, for reconciliation to occur, we must address the ongoing violation of Aboriginal peoples' right to self-determination to ensure Aboriginal people finally have a fair and equal place in the Canadian national structure. The articulation of self-determination in the UN Declaration provides good directions on how to proceed with the process of reconciliation to attain harmonious and cooperative relations between Aboriginal people and the broader Canadian society.

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1 See for example, *An Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians*, 1857 (3rd Sess), 20 Victoria, c 26 (Province of Canada); *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act*, 31st Victoria, Chapter 42, SC 1869, c 6, s 13; *Indian Act*, SC 1876 and subsequent amendments.

2 See early s 35(1) jurisprudence such as *R v Sparrow* [1990] 1 SCR 1075, where the court allowed for the justifiable infringements of Aboriginal and treaty rights; *R v Van der Peet* [1996] 2 SCR 507, where Chief Justice Lamer set out a very limited purpose to s 35(1) and limited the scope of protection to activities that are central and integral to their distinctive cultures; *R v Pamajewon* [1996] 2 SCR 821, where claims to self-government were held to be no different than other rights claimed under s 35(1) and were therefore subjected to the same legal standard.

3 Truth and Reconciliation Commission, *Mandate* <<http://www.trc.ca/websites/trcinstitution/index.php?p=7>>.

4 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

5 *Ibid*, articles 1 and 2, also preamble [2] and [5].

6 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc A/HRC/12/34 (15 July 2009) [41].

7 S. James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work* (IWGIA, 2009) 184, 187.

8 Claire Charters, 'A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making' (2010) 17 *International Journal on Minority and Group Rights* 215, 226.

9 Erica-Irene A Daes, 'An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations' (2008) 21(1) *Cambridge Review of International Affairs* 1, 23.

10 See article 40; see also Anaya, above n 7, 189.

11 Daes, above n 9, 24.

12 *Ibid*.

13 Benedict Kingsbury, 'Self-determination and 'Indigenous Peoples'' (1992) 86 *American Society of International Law and Procedure* 383, 391.

14 Many states during the negotiations of the UN Declaration and afterwards have argued for self-determination to be limited to 'internal' self-determination; see also Timo Koivurova, 'From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (re)Gain Their Right to Self-Determination' (2008) 15 *International Journal on Minority and Group Rights* 1, 19 - where the author claims that 'the UN Declaration was ultimately adopted by the UN general Assembly but only after a guarantee was in place that self-determination for indigenous peoples meant only autonomy/self-governance.

15 A Kenneth Deer notes: 'All our rights either flow from or are linked to our right of self-determination. These include our right to land, our right to natural resources, our right to our language and culture, our right to our songs... 'Free, prior and informed consent' (FPIC) also flows from the right to self-determination', in 'Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples' in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realising the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Purich Publishing Ltd, 2010) 18, 27.

16 For a more detailed analysis of this argument, see Paul Joffe, 'UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation' (2010) 26 *National Journal of Constitutional Law* 121, 182-3.

17 See James (Sa'ke'j) Youngblood Henderson, 'Empowering Treaty Federalism' (1994) 58 *Saskatchewan Law Review* 241.

18 Human Rights Commission, *Report of the seminar on treaties, agreements and other constructive arrangements between*

States and indigenous peoples, UN Doc E/CN.4/Sub.2/AC.4/2004/7, Annex 1, (1 June 2004).

- 19 Mary Ellen Turpel, 'Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25 *Cornell International Law Journal* 579, 592.
- 20 Daes, above n 9, 24.
- 21 Turpel, above n 19, 593.

- 22 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/15/35, (23 August 2010).
- 23 See *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511.
- 24 Charters, above n 8.

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