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# Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition

## Introduction

It must be recognized that indigenous populations have their own identity rooted in historical factors which outweigh the phenomena of mere solidarity in the face of discrimination and exploitation, and that, by virtue of their very existence, they have a natural and original right to live freely on their own lands.<sup>1</sup>

The claims of indigenous<sup>2</sup> peoples have been vigorously advanced in the post-war era internationally and within nation states in key regions throughout the world, including the Americas, the Pacific, and Northern Europe. The unique character of these claims has challenged domestic and international legal and political regimes. Institutionally, the international trusteeship and decolonization process did not address indigenous claims. Indigenous peoples, especially in the Americas, have yet to witness political decolonization, and cultural decolonization is now nearly impossible. Moreover, politically, indigenous claims challenge a nation state's assertion of complete political and territorial

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1. Martinez Cobo, Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶578, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8.

2. I use the term "indigenous" throughout this paper. I prefer this term to "Indian" or "native," which have paternalistic and offensive connotations. In Canada, the expression "aboriginal" is employed in the Constitution Act, 1982 to refer to indigenous peoples including the Metis and the Inuit. Consequently, I use this expression when making particular references to Canadian texts.

sovereignty.<sup>3</sup>

Indigenous peoples are entrapped peoples—enclaves with distinct cultural, linguistic, political and spiritual attributes surrounded by the dominant society. Indigenous peoples find themselves caught in the confines of a subsuming, and frequently hostile, state political apparatus imposed by an immigrant or settler society following colonization. Moreover, indigenous peoples, particularly in the Americas, are surrounded by a dominant consumer culture that threatens their very way of life. Indigenous peoples are truly “nations within.”<sup>4</sup>

Indigenous claims are multifaceted because they bring together requests for land, requests for autonomy from the political structures and cultural hegemony of dominant “settler” societies, and pleas for respect for their distinct indigenous cultural and spiritual world views. The claims also seek redress for systemic discrimination against indigenous peoples in the legal (criminal justice) and political systems, the social services sector, and the workforce. Indigenous claims unite legal, historical, political, moral, and humanitarian arguments in a body of doctrine that may be viewed as a third generation of international human rights law focussing on the uniquely collective nature of indigenous claims. This new generation of human rights has been termed the rights of peoples.<sup>5</sup>

The work of the United Nations during the past two decades has significantly legitimized indigenous peoples’ claims.<sup>6</sup> Recent efforts of the United Nations Working Group on Indigenous Peoples in preparing a draft declaration of international principles on indigenous rights represents considerable advancement toward international acceptance of collective human rights and international recognition of the need for norms to respond to indigenous claims. In some states, there have also been rising efforts to respond to indigenous claims in the domestic context, often with terms of the debate set by international norms and developments. Canada is a state where growing concern for indigenous peoples’ treatment and a strong public desire to settle indigenous claims have made these issues central to the nation’s political and constitutional agendas.

In this regard, it is fair to report that Canada is now undergoing pronounced political strains. Debates regarding the future of the Province of Quebec in Canadian Confederation, regional and provincial disagreements over issues of language, the utility of certain political institutions and the viability or restructuring of economic federation

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3. For a collection of essays addressing this theme, see *INDIGENOUS PEOPLES AND THE NATION-STATE: FOURTH WORLD POLITICS IN CANADA, AUSTRALIA AND NORWAY* (Noel Dyck ed., 1985).

4. It is important to remember that they are the *first* nations. Indeed the largest organization of indigenous peoples in Canada is called the Assembly of First Nations.

5. See *THE RIGHTS OF PEOPLES* (James Crawford ed., 1988).

6. For an overview, see Ashjborn Eide, *Indigenous Populations and Human Rights: The United Nations Efforts at Midway*, in *NATIVE POWER: THE QUEST FOR AUTONOMY AND NATIONHOOD OF INDIGENOUS PEOPLES* 196 (Jens Brosted et al. eds., 1985).

have thrown the country into a veritable constitutional crisis. With the recent ultimatum issued by the Province of Quebec to the rest of Canada demanding an attractive constitutional reform package or separation from the state, it is clear that the next few years of debate will have both profound implications and possibilities for indigenous peoples. The possibilities include nothing less than a reconceptualization of the Canadian nation to accommodate the first nations within.

In the midst of this crisis, demands for justice and recognition of the inherent right of self-government for indigenous peoples are reaching a crescendo. Indigenous claims are more prominent now than ever before in Canada's history. Violent confrontations between indigenous peoples and the police and army over land claims, as occurred at Oka, Quebec, during the summer of 1990,<sup>7</sup> have catapulted indigenous issues onto the national political agenda. Constitutional efforts at rapprochement with Quebec have been unsuccessful, at least in part because indigenous people have protested their exclusion from the process of nation-building.<sup>8</sup> The appointment by the Prime Minister in 1991 of a Royal Commission on Indigenous Affairs to inquire into a variety of social, economic and legal problems and the commitment to include aboriginal concerns "as a key element of the coming round of constitutional discussions"<sup>9</sup> all signal an historic moment for the resolution of indigenous claims in Canada. How this moment will unfold in the next two years remains to be seen. Nevertheless, Canada now has an exciting opportunity to resolve indigenous claims—if genuine political will can be harnessed in the endeavor.

Even so, several notes of caution are in order. First, until now the extent to which indigenous peoples have been active participants in Canadian constitutional renovation, or national policy formulation, has been severely circumscribed by both opportunity and will. Indigenous peoples, as groups or distinct collectivities, have not been given the opportunity to participate in national political affairs. In the early post-contact era indigenous peoples were viewed as inferior, as "les sauvage." Since the 1960s, indigenous peoples have been seen principally as enfranchised individuals with the same right to participate as other Canadian citizens—namely to vote.<sup>10</sup>

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7. See The Summer of 1990, The Fifth Report of the Parliamentary Standing Committee on Aboriginal Affairs, 34th Parliament, 2nd Session (tabled in the House of Commons in May 1991). Violent confrontations over land are not limited to the Mohawk situation, although this was the most explosive. Conflicts in Temagami, Ontario, with the Nishnabe, and in British Columbia with the Lil'luwat people are two other of many examples.

8. See M. E. Turpel & P. A. (Trisha) Monture, *Ode to Elijah: Reflections of Two First Nations Women at the Wake for the Meech Lake Accord*, 15 QUEEN'S L.J. 345 (1990).

9. Notes for an address by Prime Minister Brian Mulroney, First Nations Congress, Victoria, B.C. 2 (April 23, 1991) (unpublished notes available upon request from the author).

10. The federal Indian Act, R.S.C., ch. I-5 (1985) (Can.) was amended in 1960 to permit "Indians," a fictitious legal category applied to indigenous people, to vote in Canadian elections.

Furthermore, in terms of will, the desire to participate in national affairs has been limited by an indigenous political agenda geared toward autonomy, self-determination, and, less frequently but nevertheless significantly, secession from the Canadian state. As a result, political participation in national affairs is seen as an acceptance of alien state structures. Some indigenous peoples don't want to engage in existing structures without the promise of special political accommodation of indigenous peoples' autonomy or the creation of space for cultural plurality within state structures. If the opportunity to participate as groups was opened and the options for accommodation of indigenous governments and cultures creatively explored, this would truly be an historic moment for Canada.

This paper examines the notion of indigenous political participation rights in light of recent international developments of interest in Canada and arguably beyond. I will examine international human rights protections of indigenous peoples' political participation rights and the potential impact these emerging concepts could have in Canada. The paper will address political participation rights as articulated in international fora and as they are currently developing in Canada within this framework: first, a recent communication by the Mikmaq Tribal Society to the United Nations Human Rights Committee under the Optional Protocol to the Covenant on Civil and Political Rights;<sup>11</sup> second, the relationship between political participation rights and the notion of self-determination; and finally, the domestic implications of the recognition of indigenous peoples' political participation rights in Canada. In particular, the final part will consider indigenous participation in renewed constitutional reform discussions in Canada and regional initiatives aimed at including special representatives of indigenous peoples in elected legislative bodies.

### I. *Mikmaq Tribal Society v. Canada*<sup>12</sup>

In January 1986, the Mikmaq Tribal Society complaint was communicated to the United Nations Human Rights Committee by Grand Chief Donald Marshall, Grand Captain Alexander Denny and Advisor Simon

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11. *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), Dec. 16, 1966, 21 U.N. GAOR, Supp. No. 16, at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302, entered into force March 23, 1976. In force for Canada March 23, 1976, in accordance with Article 9, which provides that the Protocol enters into force three months after the date of the deposit with the Secretary-General of the tenth instrument of ratification or instrument of accession. As of December 1990, 92 states have ratified the Covenant and 51 have acceded to the Optional Protocol. *Multilateral Treaties Deposited with the Secretary-General*, U.N. Doc. ST/LEG/SER.E/9 (1990).

12. *Mikmaq Tribal Society v. Canada*, (No. 205/1986), U.N. Doc. CCPR/C/39/D/205/1986 (1990) (Human Rights Committee admissibility decision released July 20, 1990) [hereinafter *Mikmaq Admissibility Decision*]; *Mikmaq Tribal Society v. Canada*, U.N. Doc. CCPR/C/43/D/205/1986 (1991) (Human Rights Committee final decision released Dec. 3, 1991) [hereinafter *Mikmaq Tribal Society v. Canada*].

Marshall, the officers of the Mikmaq Tribal Society in Canada.<sup>13</sup> The final decision of the Committee was released in December 1991, almost six years after the submission of the initial complaint.<sup>14</sup>

The Mikmaq are an indigenous people with a traditional "Grand Council" governing the seven territorial districts in the Mikmaq alliance. The word "Mikmaq" means the allied people and the Mikmaq nation is a friendly alliance of indigenous peoples who occupy what is called "Mikmakik," or the land of friendships. This territory includes what are now known as Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, the Gaspé peninsula, Magdalene archipelago, and St. Pierre and Michelon of both Canada and France.<sup>15</sup>

The communication from the Mikmaq Tribal Society to the U.N. Human Rights Commission was not the first brought against Canada by indigenous peoples pursuant to the machinery established under the Optional Protocol to the International Covenant on Civil and Political Rights. Two other complaints have progressed through the Human Rights Committee's meandering review process: *Lovelace v. Canada*<sup>16</sup> and *Ominayak v. Canada*.<sup>17</sup> The Mikmaq's recent communication illustrates the limitations of the U.N.'s individual petition mechanism as a method of scrutinizing indigenous peoples' human rights violations. The process is curiously slow and it suffers procedural and substantive limitations.

Mikmaq leaders submitted the communication in two capacities—as individuals claiming to be victims of human rights violations and as trustees protecting the welfare and the rights of the Mikmaq people: "The authors are members of the traditional national council of

13. An initial Mikmaq communication to the Human Rights Committee in 1980, *A.D. v. Canada* (No. 78/1988), was denied admission on the grounds that the author was unable to provide documentation supporting his claim to represent the Mikmaq people.

14. This delay, in itself, speaks volumes about the efficacy of the United Nations in the area of human rights and indigenous peoples.

15. For further information on Mikmaq people, history, and political aspirations, see Mi'kmaw Chiefs, *The Covenant Chain*, in *DRUMBEAT: ANGER AND RENEWAL IN INDIAN COUNTRY* 106 (Boyce Richardson ed., 1989).

16. *Lovelace v. Canada*, (No. 24/1977) *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 (1981). This communication concerned state-imposed gender discrimination in the determination of membership in indigenous communities. Canada was found to be in violation of its obligations to protect minority rights under Article 27 of the Covenant. For further analysis, see Anne F. Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, 20 *CANADIAN YEARBOOK OF INTERNATIONAL LAW* 244 (1982).

17. *Ominayak v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision released March 28, 1990). This complaint focussed on an unresolved longstanding land claim by the Lubicon Cree in Alberta. The author of the communication was the Chief of the Lubicon Cree band. Canada was found to be in violation of the Covenant, but the Committee found that efforts had been taken to correct the situation. *Id.* ¶ 33. There has also been a successful complaint brought against Sweden by an indigenous person with respect to violations of traditional hunting rights. See *Kitok v. Sweden*, U.N. Doc. CCPR/C/33/D/197/1985 (Human Rights Committee decision released August 10, 1988).

Mikmakik, and their interest in this matter is twofold: as victims themselves, and as trustees for the welfare and rights of the people as a whole."<sup>18</sup> The communication is novel in this regard because the Optional Protocol complaint procedure emphasizes individual petitions to the Human Rights Committee. The Optional Protocol mechanism enables the Human Rights Committee to monitor domestic enforcement of a particular petitioner's human rights by a state party. Communications alleging violations of international human rights norms must be submitted by named individuals in order to be admitted by the Committee and reviewed on the merits.

This requirement presents a conundrum for indigenous peoples because the human rights violations they suffer are not simply individual in nature; they are typically collective and include deprivations of lands, culture and political status.<sup>19</sup> Although indigenous people are individually affected by the denial of collective human rights, the source of their suffering is generally inseparable from the oppression experienced by the people as a group. The extent to which the complaint process can be adapted to address indigenous peoples communications will shape the capability (and illustrate the willingness) of United Nations human rights institutions to deal with these unique claims. The dual nature (individual and collective) of the authorship and representativity in the communication from the Mikmaq Tribal Society was pivotal to the types of violations that were alleged to have been committed by Canada. Process and substance were interrelated in this regard in the complaint.

The Mikmaq Tribal Society communication alleged violations by Canada of rights protected in Article I of the Covenant—the right of self-determination. Article I guarantees that "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."<sup>20</sup> In recognizing the right of all peoples to self-determination, Article I confirms a principle widely accepted in many international human rights instruments.<sup>21</sup>

The Mikmaq Tribal Society communication alleged that Canada's aboriginal constitutional reform discussion process, held from March 1984 to 1987, violated international human rights standards because Mikmaq people were excluded from the discussions regarding future

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18. *Mikmaq Tribal Society Communication*, submitted January 1986, ¶ 48 [hereinafter *Mikmaq Communication*].

19. For further development, see Russel Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986), and Douglas Sanders, *The Re-Emergence of Indigenous Questions in International Law*, 1 CANADIAN HUMAN RIGHTS YEARBOOK 3 (1983).

20. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 entered into force March 23, 1976.

21. See, e.g., UNITED NATIONS CHARTER art. 1(2); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force on Jan. 3, 1976, Art. 1(1).

relationships between the Crown and indigenous peoples. The Mikmaq Tribal Society pointed to section 37(1) of the Constitution Act, 1982, the provision establishing the process, to argue that Canada had abridged their right to self-determination:

37(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, *including the identification and definition of the rights* of these peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.<sup>22</sup>

The Mikmaq Tribal Society argued that the meetings, convened by the Prime Minister according to this section of the Canadian Constitution, excluded them despite their specific written requests to participate in discussions of importance to their future.<sup>23</sup> Canada responded that direct discussions with the Mikmaq Tribal Society were not practical at the constitutional table and that national indigenous umbrella organizations, such as the Assembly of First Nations, could adequately negotiate future political arrangements on behalf of the Mikmaq.<sup>24</sup> This position was challenged by the Mikmaq Tribal Society as racist since the government's stance rested on the premise: "that any members of the 'Indian' race can exercise the Mikmaq people's right to self-determination."<sup>25</sup> The Mikmaq claimed that this denied their collective rights to make representations about their political status and desired forms of affiliation with the state. The Assembly of First Nations, the national indigenous organization in Canada, supported the Mikmaq in their efforts to secure representation at the constitutional table.

The Human Rights Committee has demonstrated an unwillingness to consider allegations of denial of the right to self-determination because this area is politically charged. States, whose participation in the process is optional, might withdraw support for the Committee's complaints process. Moreover, consideration of self-determination questions involves a determination of whether the complainant consti-

22. Constitution Act, 1982, § 37(1) (Can.) (emphasis added).

23. The Grand Captain of the Mikmaq Grand Council wrote to the Prime Minister on February 2, 1985, requesting that the Council be invited to participate in the conferences on constitutional issues. On April 27, 1985, the Prime Minister responded by suggesting "I regret that we cannot invite all aboriginal groups . . . I have no doubt that the interests of all aboriginal peoples will continue to be adequately represented." *Mikmaq Communication, supra* note 18, Enclosure H.

24. The four indigenous organizations invited to the constitutional table during the discussions convened pursuant to section 37(1) were: the Assembly of First Nations, representing so-called "status Indians"; the Native Council of Canada, representing non-status people; the Metis National Council, representing the Metis; and the Inuit Committee on National Issues, representing the Inuit (formerly called "Eskimo").

25. *Mikmaq Communication, supra* note 18, at 2.



tutes a "people" under international law, a determination that involves controversial (and necessarily subjective) questions of politics, anthropology, and law. The Committee's reluctance in this area may explain its procedural reticence to consider anything other than individual complaints. The more group complaints that are admitted, the more self-determination arguments will undoubtedly be made.

However, as noted earlier, indigenous peoples have no forum in which to advance self-determination claims. The decolonization and trusteeship process has passed them by, and self-determination claims are virtually impossible to advance concretely in any other United Nations fora because states—not peoples—have access to and shape United Nations institutions. Obviously, any opening for recognition of peoples at the Human Rights Committee level would represent a breakthrough of enormous psychological significance in the international system. With regard to a previous indigenous complaint, *Ominayak v. Canada*, the Committee adopted the view that:

With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such.<sup>26</sup>

Nevertheless, while the Committee appears to reinforce the importance of self-determination, it would not resolve a complaint alleging violations of Article 1 of the Covenant using, in *Ominayak*, the excuse that its process was only open to individuals and self-determination is a collectively-asserted right. Because of this approach, indigenous peoples, like the Mikmaq, lack an international review procedure to monitor state violation of collective human rights.

It is important in this context to consider the differences between collective and individual human rights complaints. While an abstract distinction between individual and collective human rights is often sustained in the literature, it is arguable that this distinction is unworkable. The collective enjoyment of human rights, such as self-determination, is a precondition for individual human rights protection; since individuals do not exist in isolation from a community, repression of the collective concretely affects individuals, particularly indigenous individuals whose identities are closely connected to their people. Moreover, the nature of

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26. *Ominayak v. Canada*, *supra* note 17, ¶ 13.3.

diplomacy and international advocacy is such that it is individuals who bring forward collective complaints/situations to U.N. fora.

While the Human Rights Committee has established a jurisprudence that considers human rights violations of minorities, it is not entirely relevant to the indigenous context where peoples' or group rights are in issue. In *Lovelace v. Canada*, the Human Rights Committee found that states have an obligation to protect minority rights and to ensure indigenous peoples are not deprived of access to their culture. However, this was not here helpful to the Mikmaq, who do not identify themselves as a minority. Instead, they asserted that they "were, and continue to be a separate and distinct people, and were long recognized as such. . . ." <sup>27</sup> The authors provided detailed historical evidence to support their argument that Canada was obliged under the Covenant to recognize the Mikmaq Tribal Society rights as peoples. They argued:

- (i) Mikmakik (the Mikmaq homelands) had long been recognized as an independent, federal state through the negotiation of Crown treaties and alliances with its national council, the Sante' Mawi'omi or Grand Council.
- (ii) In addition to commercial and defensive arrangements with France and the United Kingdom extending over two centuries, Mikmakik received Catholicism under concordat with the Holy See.
- (iii) Mikmakik was the first state to recognize the independence of the United States of America under a military-assistance treaty of 1776.
- (iv) A Halifax Treaty of Peace and Friendship of 1752, while acknowledging the Mikmaq as British subjects for certain purposes, confirmed the separate national identity and rights of hunting, fishing and trading of the Mikmaq throughout what was then Nova Scotia. <sup>28</sup>

The communication alleged that these historical relationships among the Mikmaq and the French, the British and the Holy See, reveal a pattern of independence and special political status, and support the assertion that Mikmakik was never considered as one of Europe's American colonies. Hence, they allege that the Mikmaq have enjoyed, by virtue of their history, the status of a separate and distinct commonwealth under the British Crown. These assertions in the Mikmaq complaint speak to a political history which has been disregarded in the institutional and normative shaping of the United Nations where states, not peoples, are the subjects and objects of international law.

The Canadian Government vigorously opposed the Mikmaq Tribal Society communication on both procedural and substantive bases. Canada countered that the communication was inadmissible on the following grounds:

- (i) The Mikmaq Tribal Society's claim to the right of self-determination could not be "invoked in circumstances that would prejudice the national unity and territorial integrity of a sovereign state, such

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27. *Mikmaq Communication*, *supra* note 18, ¶ 37.

28. *Id.* ¶ 4Z.

as Canada. . . ."<sup>29</sup>

- (ii) "The Mikmaq tribal society does not constitute a 'people' within the meaning of article 1 of the Covenant," as the term "people" could not apply to a "thinly scattered minority dispersed among the majority" of the Canadian population.<sup>30</sup>
- (iii) The right of self-determination is collective in nature and is not available to individuals. Hence, "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked when the alleged violations concern a collective right," and the communication should be dismissed;<sup>31</sup> and
- (iv) The Halifax Treaty of Peace and Friendship of 1752 did not confirm the existence of the Mikmaq as a separate national entity as "international law and Canadian domestic law do not recognize Indian treaties as international documents confirming the existence of tribal societies to independent and sovereign states."<sup>32</sup>

The Mikmaq responded to the Government of Canada's submission with additional comments on their position.<sup>33</sup> In addition to dispelling the Government's characterization of their complaint as a threat to national unity,<sup>34</sup> the Mikmaq Grand Council submitted that independent of any violation of Article 1 of the Covenant, the actions of Canada also violated Article 25, the provision on political participation.

In response to these submissions, the Human Rights Committee charted a middle course in its admissibility decision. They concluded that allegations of violations of self-determination, Article 1, were not within the competence of the Committee to review given their mandate in the Optional Protocol. This leaves indigenous peoples with no recognized avenue of redress for their self-determination claims. Consequently, the focus of the legal review in the complaint was shifted to scrutinize the alleged violation of the Mikmaq Tribal Society's rights protected under Article 25 of the Covenant.

Article 25, an interesting provision, has not been considered in the context of indigenous peoples' claims until now. That Article reads:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without reasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guar-

29. *Mikmaq Admissibility Decision*, *supra* note 12, ¶ 4.2 (summarizing Canada's objections to admitting the Mikmaq Communication).

30. *Id.* ¶ 4.3.

31. *Id.* ¶ 4.4.

32. *Id.* ¶ 4.5.

33. Submitted March 10, 1987, just weeks before the final round of Canadian-Aboriginal Constitutional discussions.

34. The Mikmaq suggested, "we are asserting our right to self-determination in a manner consistent with the national unity of Canada, and merely proposing an alternative of federalism . . . ." *Mikmaq Admissibility Decision*, *supra* note 12, at 1.

anteeing the free expression of the will of the electors. . . .<sup>35</sup>

The first part of this Article, the right to "take part in the conduct of public affairs," was squarely at issue in the Mikmaq communication, which claimed that the Mikmaq were excluded from constitutional discussions.

The ruling on admissibility by the Human Rights Committee was a limited victory for the Mikmaq on the arguments they advanced.<sup>36</sup> While the Committee refused to determine the issue of Article 1 violation, it did not wholly foreclose the submission of collective human rights violations so long as these were viewed as a kind of "class action" of similarly situated individuals:

Notwithstanding the observations in paragraph 14.2 above, the Optional Protocol does not preclude a group of individuals, who claim to be similarly affected, from together submitting a communication about alleged breaches of their rights as set out in Part III of the Covenant. Although initially drafted in terms of an alleged breach of the right of self-determination, the authors, subsequently, and after receiving the State party's objections to the admissibility of the communication as it then stood, asserted that the fact that the Mikmaqs were excluded from participating in the constitutional conferences also reveals a breach of article 25 of the Covenant.<sup>37</sup>

Consequently it admitted the communication to examine whether or not it disclosed breaches of Article 25.

The Committee suggested further that while Article 1 recognizes and protects in "the most resolute terms"<sup>38</sup> a people's right of self-determination as an essential condition for the effective guarantee, observance and promotion of individual human rights, this article can neither be invoked by individuals, nor by peoples under the Optional Protocol procedure. The Committee did not rule out the applicability of Article 1 to indigenous peoples at international law but simply ruled out its competence to address the matter. This is a significant distinction although hollow for the Mikmaq after an eleven year struggle through the Human Rights Committee process. Consequently, the Committee deemed the question of whether the Mikmaq Tribal Society constitutes a "people" as not relevant to its determination.

The Committee requested additional information from the parties, within six months, to enable it to determine first, whether the Mikmaqs

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35. *International Covenant on Civil and Political Rights*, *supra* note 20. Article 2 prohibits distinctions based on the following grounds: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.*

36. In response to the ruling, Mikmaq Grand Captain Alexander Denny stated, "this is a vindication, by the international community, of what we have been trying to tell Canada for a hundred years. In Ottawa, they are deaf, but not in Geneva." *See Mikmaq Communication on the Decision on Admissibility of the United Nations Human Rights Committee*, press release, August 21, 1990.

37. *Mikmaq Admissibility Decision*, *supra* note 12, ¶ 14.4.

38. *Id.* ¶ 14.2.

possessed a collective right as a distinct group to participate in the "conduct of public affairs" and second, whether Canada violated the right:

The Committee believes that there are certain questions of law and facts relating to article 25(a) of the Covenant that can only be determined on the merits. The Committee will have to address the issue whether or not the constitutional conferences constituted a "conduct of public affairs" and whether the right under article 25(a) is available only to individual citizens, or to groups or representatives of groups also. In this context, the Committee would wish to know, in particular, the precise legal nature and scope of competence given to the constitutional conferences, as well as the criteria for participation therein.<sup>39</sup>

Both parties submitted further documentation to the Committee and in December 1991, in its final views on the communication, the Committee did not find violations of the Covenant. The final decision actually bore little resemblance to the admissibility decision, leading the Mikmaq people to question the inconsistency in the Committee's reasoning and interpretation of the Covenant.<sup>40</sup> Before turning to the Committee's final decision, a brief analysis of political participation rights is useful given this new twist on indigenous peoples' strategies for human rights protection.

## II. Political Participation and Self-Determination

The admissibility decision in *Mikmaq Tribal Society v. Canada* focused attention directly on Article 25 of the Covenant. The literature on Article 25 of the Covenant emphasizes its second component, the right to vote, and has largely disregarded the first component, the right to take part in the conduct of public affairs through chosen representatives.<sup>41</sup> A provision similar to Article 25 is found in Article 21 of the Universal Declaration of Human Rights:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

....

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.<sup>42</sup>

39. *Id.* ¶ 14.6.

40. Letter to the United Nations Centre for Human Rights from Sante Mawi'omi wjit Mikmaq 3 (January 5, 1992) (on file with author).

41. There is a limited body of literature on this topic. See, e.g., the excellent overview of Henry J. Steiner, *Political Participation as a Human Right*, 1 HARVARD HUM. RTS. Y.B. 77, 86 (1988). Only passing reference is made to Article 25 in Canadian literature. See W. S. Tarnopolsky, *A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights*, 8 QUEEN'S L.J. 211, 215-216 (1982-83).

42. *Universal Declaration of Human Rights*, G.A. res. 217 A(III) Dec. 10, 1948, U.N. Doc. A/810, at 71. General principles expanding this norm can be found in the second draft declaration of indigenous rights being prepared by the United Nations Working Group on Indigenous Peoples. See *Discrimination Against Indigenous Peoples*,

Although the Universal Declaration provision uses the expression "take part in the government" rather than "take part in public affairs," the two provisions are largely identical.

What are political participation rights in the context of indigenous peoples? As nations within or as entrapped peoples, what rights do they have to participate in state decision-making and government? How do these rights relate to the more often voiced aspiration for self-determination?<sup>43</sup> An appreciation of some distinctions between the right of self-determination and rights to political participation was not lost on the authors of the Mikmaq Tribal Society communication:

It is likewise important to distinguish self-determination from the right to popular participation found in Article 25 of the Covenant. Self-determination is a people's choice of a state and a framework of government, and for this reason has been described as an essential condition or prerequisite, although not necessarily excluding other conditions, for the genuine existence of the other human rights and freedoms enumerated in the Covenant. Popular participation is the right of individuals, subsequent to

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*Report of the Working Group on Indigenous Populations on its Eighth Session*, U.N. Doc. E/CN.4/Sub.2/1990/42, at 49. Relevant provisions of the draft are as follows:

21.(a) The right to have their distinct political, social, cultural and economic characteristics duly reflected in the institutions of the government under which they live.

(b) The right to full recognition and proper regard to indigenous laws, customs and practices in the legal systems and political institutions of the State.

(c) The right of members of indigenous peoples to participate fully and without adverse discrimination in the political, economic and social life of the State. The exercise of this right shall in no way adversely affect the collective rights of the peoples concerned.

22.(a) The right to participate effectively at the State and international levels, through representatives freely selected by themselves and by means of their own choosing, in policy and decision-making and in implementation in all matters which they consider may affect their rights, lives, and futures.

(b) The right of indigenous peoples to be involved, through appropriate procedures, determined in conjunction with them, in devising any laws or administrative measures that may affect them directly, and to obtain their free and informed consent through implementing such measures. States have the duty to guarantee the full exercise of these rights.

23.(a) The right to determine, without interference, on matters pertaining to their own affairs, including, *inter alia*, control over lands and resources, social and political relations, dispute resolution, criminal jurisdiction, environmental protection and managements, economic activities, education, culture, traditional religious practices, health, taxation and entry by non-members.

(b) The right of indigenous peoples concerned to determine the nature and structures of their institutions and to select the membership of such institutions according to their own procedures. The duty of States, where the peoples concerned so desire, to recognize such institutions and their membership through the legal systems and political institutions of the State.

43. It is interesting to note that the discourse on self-determination is abstract and conceptual in nature while the material on political participation is more concrete and contextualized. Compare Gudmundur Alfredsson, *The Right to Self-Determination in Its Many Manifestations*, RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS ON SELF-DETERMINATION 53 (Ruth Thompson ed., 1987) with Steiner, *supra* note 41.

the exercise of self-determination, to participate freely and effectively in the state and form of government chosen.<sup>44</sup>

In a complex situation like Canada, where indigenous successionists are a small minority, the distinction may not be so sharp. Popular participation may require reshaping the framework of government (or federalism) to reconceive the "nation" itself. Nevertheless, even if the Human Rights Committee had found Canada in violation of its obligation to enable the Mikmaq to take part in public affairs, the outcome may still have fallen short of the Mikmaq peoples' aspiration for recognition of the right of self-determination, including the option of succession. Even so, it is important to note that political participation rights are not necessarily antithetical to indigenous aspirations for self-determination. Self-determination is central to the long-term goals of the Mikmaq and many indigenous peoples around the world. Self-determination is the most frequently discussed human rights notion at the United Nations Working Group on Indigenous Peoples.<sup>45</sup> Its significance has also been highlighted in the literature in this area.

The most dynamic issue in international law today is the right to self-determination. All other human rights are considered to flow from this one, because the protection of human rights against government abuses depends entirely on who governs. It follows that you can assure the protection of human rights and individual freedoms if you have your own government.<sup>46</sup>

Self-determination can be conceptualized as requiring that every culturally and historically distinct people have the right to choose its political status by democratic means, under international supervision, and with international support. The scope of the right to self-determination will necessarily differ from case to case depending upon the circumstances of the people claiming the right and the political context for the realization of the right. Self-determination would not inevitably cause indigenous peoples to secede from settler states.<sup>47</sup> The exact nature of the political

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44. *Mikmaq Communication*, *supra* note 18, at 14.

45. See, e.g., *Report of the Working Group on Indigenous Populations on its First Session*, U.N. Doc. E/CN.4/Sub.2/1982/33; *Report of the Working Group on Indigenous Populations on its Second Session*, U.N. Doc. E/CN.4/Sub.2/1983/22; *Report of the Working Group on Indigenous Populations Fifth Session*, U.N. Doc. E/CN.4/Sub.2/1987/22; *Report of the Working Group on Indigenous Populations on its Sixth Session*, U.N. Doc. E/CN.4/Sub.2/1988/24; and *Report of the Working Group on Indigenous Populations on its Seventh Session*, U.N. Doc. E/CN.4/Sub.2/1989/36.

46. Russel Barsh, *Indigenous Peoples and the Rights to Self-Determination in International Law*, in *INTERNATIONAL LAW AND ABORIGINAL RIGHTS* 68, 69 (Barbara Hocking ed., 1988).

47. As the Mikmaq pointed out in response to government submissions. See also the literature on this context: Thomas R. Berger, *Native Rights and Self-Determination: An Address to the Conference on the Voice of Native People*, 22 U.W. ONTARIO L. REV. 1 (1984); John H. Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669 (1978); and Eyassu Gayim, *The United Nations Law on Self-Determination of Indigenous Peoples*, 51 *NORDIC J. INT'L L.* 53 (1982).

arrangement will depend on the particular context of the people involved and their aspirations: it could involve autonomous regions within a federation, municipal-style government, or a variety of other arrangements. The essential significance of the concept for indigenous peoples is the right to autonomy over political, social and cultural development, free from state interference. Self-determination is considered synonymous with self-preservation for indigenous peoples. It would provide the freedom from state hegemony needed for their survival and for the transmission of their cultures to future generations.

While these concepts are more expansive than political participation rights and reflect the broad political aspirations of indigenous peoples, the two rights are not necessarily inconsistent. Having worked fairly extensively in the struggle for the recognition of indigenous peoples' rights in Canada, I see political participation as an essential element of a long-term strategy to achieve autonomy. This is because recognition of indigenous self-determination will require domestic public support as well as international debate and, ideally, international supervision. Political participation is necessary to educate both the state population and the international community about indigenous peoples' human rights problems and political goals. Without enormous resources to wage lobby efforts, media campaigns, and educational initiatives, some direct access to the state apparatus is required to get public attention and to mobilize public opinion effectively. Hence, participation rights may be useful or, more likely, essential on the road to the recognition of self-determination.

Moreover, for indigenous peoples who do not wish to become independent states, or who wish to retain an association or affiliation with larger settler states, rights of political participation are critical for maintaining a relationship of mutual support and respect. Without some political participation in national policy formulation, public decision-making, and public-opinion formation, the autonomy or self-government of indigenous peoples in affiliation with larger settler states will be structured without the input and consent of the indigenous peoples. Furthermore, their small numbers will mean exclusion from meaningful decisionmaking. This has been the case in Canada, where successive governments have felt that they know "what is best" for indigenous peoples and have sought to impose solutions without the consent of the indigenous peoples. Without participation in national decision-making, self-government is not meaningful because indigenous self-government is redefining the nation.

Indigenous participation in the constitutional discussion process in Canada illustrates the potential power of political participation rights. The First Nations lobbied extensively and won the right to participate in multilateral discussions on the reform of the Canadian Constitution with the federal and provincial governments.<sup>48</sup> This was an historic occasion

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48. This process was initiated on March 12, 1992 and ended on August 28, 1992.



for Canada and was the first time indigenous peoples were welcomed as full participants in discussions geared toward reshaping the Canadian federation. Indigenous peoples' governments were included as one of three orders of government in Canada (along with the federal and provincial orders). As a result of indigenous participation in these discussions, significant changes have been proposed to the Canadian Constitution to recognize the inherent right of self-government and to honor the Crown's treaty obligations to the First Nations. These dramatic developments represent very encouraging signs in Canada. However, they were only accomplished, in my view, because of the participation of indigenous peoples in all aspects of the discussion process. This is the reality of the indigenous movement in Canada. Doctrinaire distinctions do not work at the level of practice where one must be present and participate to protect rights.

Even if one accepts this pragmatic argument, in states with culturally diverse populations, such as Canada, the right of political participation rights must be articulated to encompass the meaningful participation of indigenous peoples as peoples. Where indigenous peoples are unrepresented in national political processes, either because of small numbers, systemic exclusion, or because indigenous peoples have no interest in those institutions, special processes and structures for political participation must be developed to respond to the spirit of Article 25(a) of the Covenant. Allowing the Mikmaqs to take part in constitutional conferences in the 1980s through freely chosen representatives would have fulfilled the obligations in the Covenant; excluding them would appear to violate it.

Effective political participation would require greater elaboration and, most likely, structural changes to national political institutions. This is because indigenous peoples may view participation rights as an unattractive political option if to exercise their rights they must integrate into a dominant nation state and relinquish their distinctiveness without hope of real influence in the national political processes because of their small numbers. As one author suggests of the imbalance in such arrangements: "There is a strong suspicion that a colonial power negotiating with a colonized people will enjoy greater bargaining power, and be able to exact whatever concessions it wishes."<sup>49</sup> This is probably accurate in most circumstances, however, the possibilities cannot be assessed without looking at the particular state context and indigenous objectives.

If any narrower interpretation of the right to take part in public affairs was adopted based on Article 25 (e.g., the right to vote in elections with other "citizens"), it would lend credence to the suggestion that human rights as articulated by instruments such as the Covenant on Civil and Political Rights are culturally relative and do not universally

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49. Barsh, *supra* note 46, at 71.

embrace the human experience.<sup>50</sup> Although it is important for indigenous people to be able to participate in public affairs with the same status as "citizens," this type of participation is clearly insufficient for several reasons. These include the historic lack of participation by indigenous peoples in alien political systems, the failure of the party-system to respond to indigenous concerns, and the Anglo-European political premise of one-person, one-vote, a view that is antithetical to the governing traditions of clan and family-based societies.

Self-determination, as a concept in international law, is broader and more encompassing than political participation rights, although both are vague, perhaps in a constructive sense. Self-determination recognizes not only the right simply to participate in political institutions developed by another state but also peoples' rights to establish their own governing institutions. However, there is a very practical dilemma here. It is very difficult for indigenous peoples to advocate for self-determination or self-government when they are effectively excluded from public affairs and do not have a forum in which to advance their aspirations or generate public support. Inclusion requires more than enfranchisement. As the Mikmaq suggest:

... a state that allows everyone to vote has not necessarily respected their right to self-determination, nor does it necessarily represent them all equally. A small people would not likely choose freely to integrate itself with a very large state, precisely because it would have no real influence on national-level democratic processes. They would more likely insist upon some measure of local autonomy. Hence the fact that a small people has in fact been absorbed by a large state, and enjoys the right to vote, scarcely settles whether they chose this status voluntarily.<sup>51</sup>

Moreover, it scarcely settles the question of whether or not the promise of participation in Article 25(a) has been met by a state party to the Covenant. The promise of participation in the context of indigenous peoples' experience would require special mechanisms to ensure they are not marginalized in public affairs, particularly when their futures are being discussed.

### III. Final Views of the Human Rights Committee

When the Human Rights Committee released its final views on the Mikmaq complaint, it found that Canada had not violated Article 25 of the Covenant by excluding the Mikmaq from the constitutional discussions in the 1980s. The Mikmaq were again uninvited to attend the round of constitutional discussions that began in the Spring of 1992 but did participate through and were represented by the Assembly of First Nations.

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50. See HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (Adamantia Pollis & Peter Schwab eds., 1979).

51. *Mikmaq Communication*, *supra* note 18, ¶ 42.

The Human Rights Committee found that while the constitutional discussions were part of the conduct of public affairs that require public participation according to Article 25,<sup>52</sup> they are normally attended only by elected representatives such as the elected leaders of the federal and provincial governments. The Committee found that an exception was made for the aboriginal constitutional discussions in the 1980s in order to invite representatives of the aboriginal peoples. Nevertheless, the Committee concluded that Article 25 does not require that any affected group, however large or small, be able to send a representative. This would be beyond the requirements of the international human rights obligations in the Covenant as Article 25 cannot be taken to mean that "every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation."<sup>53</sup>

The Human Rights Committee interpreted Article 25 in a negative way: it focussed on what it could not mean as opposed to what it does mean or require for a state with indigenous peoples living within the borders of that state. The Committee found that

[A]rticle 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).<sup>54</sup>

Sensibly, the government of Canada did not determine their political approach based on the Committee's position. Clearly, the Committee did not adequately address the status of indigenous peoples in a state such as Canada, nor did it distinguish between indigenous peoples and "groups," which presumably would include public interest groups as well as peoples.

Consequently, the decision of the Human Rights Committee was a profound disappointment to the Mikmaq, perhaps even a betrayal of sorts after the favorable admissibility decision. The Mikmaq were shocked to learn of the Committee's view that indigenous peoples have no greater rights to participation, public representation, or involvement, than individual citizens. This decision consequently appears to limit communications to the Human Rights Committee to questions of individual human rights violations alone. The door has been closed to self-determination complaints, and the door has been effectively closed to public participation complaints from indigenous groups. The Committee views decisions on participation as exclusively within the domain of the state based on the theory that the citizens can adequately participate by electing their political leaders. The future usefulness of the Human

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52. *Mikmaq Tribal Society v. Canada*, *supra* note 12, ¶ 6.3.

53. *Id.* ¶ 5.4.

54. *Id.* ¶ 5.5.

Rights Committee for indigenous peoples is clearly questionable after this jurisprudence. After many years of delay, this decision can only be seen as a disappointment and it reveals an unwillingness to look at the specific context for indigenous peoples' struggles and how their human rights situation can be addressed.

#### IV. Domestic Implications of Indigenous Political Participation Rights

Despite the Human Rights Committee rejection of the Mikmaq complaint, the struggle for political participation by indigenous peoples in Canada and elsewhere continues. Two recent developments in Canada are worthy of mention here. First, indigenous peoples have succeeded in gaining full participation rights in a new round of Canadian constitutional reform discussions. Second, the options for direct indigenous political representation in elected legislative assemblies in Canada are being discussed.

##### A. Renewed Canadian Constitutional Reform Discussions

*Mikmaq Tribal Society v. Canada* questioned Canada's method of selecting indigenous delegates to participate in constitutional discussions. Consequently, during the most recent round of constitutional discussions, the pivotal issue for indigenous peoples was their role in the reform process. Access to the process is vital for the indigenous political agenda because only indigenous leadership can advocate effectively for indigenous peoples.

Even though umbrella organizations cannot adequately represent indigenous peoples, unless this representation is freely chosen, only four national indigenous organizations participated in constitutional reform discussions. This led to some antagonism because indigenous peoples are not homogeneous; they have divergent histories, cultures, languages,<sup>55</sup> and treaty relationships with the Crown. Grouping indigenous peoples into artificial categories, based on supposed racial characteristics, is repugnant to basic human rights concepts. Nevertheless, the Human Rights Committee failed to analyze this dimension of the *Mikmaq* complaint.

Perhaps in the future political participation in Canada will be structured so that each indigenous people is represented at constitutional conferences according to cultural and historical factors (e.g., by tribe or treaty). This would be preferable to viewing indigenous peoples as members of the same "race." Indigenous peoples must be invited to take part so that their interests are represented by their own freely selected people. This may lead to alliances. Certainly, indigenous alliances, such as the Haudenosaunee or Iroquois Confederacy of the Six Nations, have been an integral part of Canadian history. However, the

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55. Just to give a sense of the diversity, there are 53 aboriginal languages spoken in Canada.

point is that indigenous peoples must freely choose their alliances and, in turn, their representatives.

Article 25 of the Covenant is of obviously limited assistance and also of little significance in Canada. The *Mikmaq* decision had little or no political influence on the demands for participation pressed for by indigenous peoples during the recent round of constitutional discussions. It is fair to say that the influence of international human rights jurisprudence pales in comparison to the influence of indigenous peoples taking to the streets and demonstrating to promote and protect their human rights.

The full involvement of indigenous peoples in the current discussions on constitutional reform has been facilitated by state support. Indigenous peoples, even in a wealthy country such as Canada, cannot meaningfully participate in politics without assistance from the state treasury. The state treasury has been willing to fund the participation of indigenous peoples because the Canadian government appears to realize that the public legitimacy of the Canadian constitutional structure requires full inclusion of indigenous peoples and the redress of their outstanding claims. Moreover, worthwhile political participation must include the rights to speak in national policy or constitutional discussions, to assist in defining the agenda, to promote ongoing community participation,<sup>56</sup> to vote on resolutions, and to enjoy the full privileges of participants in the process. At this point in Canada, indigenous people have exercised all of these rights. Nevertheless, the political power to stop constitutional reforms does not formally exist in the existing constitutional paradigm; the ultimate recourse for indigenous peoples is still public opinion.

The notion of equal participation by indigenous peoples in the constitutional reform process has been criticized by some in Canada as too generous. The argument has been raised that these representatives are not democratically elected as are Canadian politicians. But this argument can be challenged itself as anti-democratic. Truly representative forms of government, the hallmark of democracy, must include all constituent peoples living within the state and should respect their political and constitutional structures. Indigenous peoples have been historically excluded from the political institutions of the Canadian state and indeed only received the vote (which few exercise) thirty years ago. Canadian politicians, in representing primarily only two constituent peoples in Canada (the French and English settlers), do not represent indigenous interests and cannot replace indigenous participation. Only full and direct participation of indigenous peoples will lead to creative political arrangements able to reduce violent confrontations between indigenous peoples and the Canadian state and to protect the human rights of indigenous peoples.

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56. For example, to bring together advisors, support policy development, and permit regular community consultation.

## B. Indigenous Representatives in Elected Legislative Assemblies

There has been considerable recent discussion in Canada regarding special political participation rights for indigenous peoples in elected legislative assemblies in Canada. Most of this discussion has focused on Mikmaq representation in the legislature of the Province of Nova Scotia, although proposals are being actively considered for special representation by indigenous peoples in a refurbished elected Senate or Upper House of Parliament. The Mikmaq themselves suggested that the election of a Treaty Deputy would ensure that the Treaty of Peace and Friendship of 1752 would not be abrogated by acts of the provincial legislature.<sup>57</sup> The Premier of New Brunswick, a province with both Mikmaq and Maliseet peoples, has supported the proposal. Thus far it has been imagined that a Mikmaq Treaty Deputy present in the provincial legislature would ensure that matters of consequence for the treaty relationship with the Crown are adequately addressed. More generally, the Mikmaq representative could address general political matters of consequence to the Mikmaq people.

The Mikmaq Grand Council has suggested that a designated seat would not have to come with voting rights or a veto over legislation; the aim is not to interfere with the ability of Nova Scotians to govern themselves in matters not affected by the Treaty of 1752. However, the Premier of Nova Scotia has proposed that the representative be given voting privileges, and discussion regarding the privileges of a Mikmaq representative are underway. The Deputy could be elected by a special ballot issued only to Mikmaq people or through a traditional selection process and could enjoy the same privileges and immunities as regular members of the legislative assembly, including the rights to participate in committees and to maintain an office at public expense.

The idea of special indigenous representatives in elected legislative assemblies finds support in several jurisdictions outside Canada. In the State of Maine,<sup>58</sup> New Zealand,<sup>59</sup> Norway and Finland,<sup>60</sup> special arrangements have been made for indigenous representatives in elected legislative assemblies. Perhaps the closest parallel to the Nova Scotian situation is Maine. In the State of Maine, two Penobscot and Passamaquoddy legislative representatives are elected on a special ballot every two years. This arrangement was not explicitly created by statute or constitutional provision but was the longstanding practice in the colony

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57. Sante' Mawi'omi wjit Mikmaq, A Mikmaq Treaty Deputy in the Legislature Assembly: A Dynamic Approach to Implementation of the 1752 Treaty of Halifax, press release, October 15, 1990.

58. See ME. REV. STAT. ANN. tit. 3, §§ 1-2 (West 1964) (Including representatives of the Penobscot Indian Nation and the Passamaquoddy Tribe in the legislature).

59. New Zealand Electoral Act of 1956, No. 107, § 23, as amended by Electoral Amendment Act of 1975, § 8 (establishing Maori electoral districts), 26 R.S.N.Z. 173, 198 (1990); Kenneth A. Palmer, *Law, Land and Maori Issues*, 3 CANTERBURY L. REV. 322, 326 (1988).

60. See Douglas Sanders, *The Sami Parliament in Norway*, 1 CAN. NATIVE L. REP. 7 (1990).

of Massachusetts (which is now, in part, Maine) to send representatives to Boston to attend sessions of the legislature in order to protect treaty interests. The current arrangement recognizes this custom, although the seats are now expressly authorized under the rules of the House of Representatives and compensation is provided by statute. The representatives do not enjoy voting privileges and cannot introduce bills. Moreover, the representatives are outside the party system and consequently can preserve the independence and integrity of their representation.

In New Zealand, the federal House of Representatives has set aside four standing Maori representatives elected by a special Maori vote. These representatives address, among other things, matters affecting the Treaty of Waitangi. In Norway, a special Sami Parliament was established in 1987 and officially opened by the Norwegian King in 1989. This parliament is composed of thirty-nine members elected every four years on a special ballot. The parliament operates as an advisory body to the Norwegian Parliament, much like a similar institution in Finland. It is anticipated that authority for reindeer herding will be transferred to the Sami Parliament in the near future.<sup>61</sup>

Each of these special political arrangements is interesting and worthy of further exploration. However, they represent only a limited agenda. In many instances, the representation is *pro forma*, participation and authority are limited, and the arrangements have been structured to appear as gifts from the legislature instead of structures inherently required for democratic political processes. Moreover, a lack of access to the public purse tends to marginalize these special representatives. Consequently, these models illustrate methods of bringing regional or national political attention to indigenous peoples' concerns and not genuine power-sharing.

It may be helpful to conceptualize special indigenous representatives as ambassadors or international representatives of indigenous communities with a quasi-diplomatic function. This model helps to dispel the impression that indigenous peoples are seeking assimilation into dominant institutions. They are not. For example, in Canada at least, assimilation is antithetical to the movement for recognition of an inherent right of self-government. While special seats in elected legislative assemblies will not satisfy indigenous aspirations in Canada, they may be an effective means of articulating aspirations and securing gains made in the recent round of constitutional discussions. As one Mikmaq advisor speculates:

Treaty federalism offers a framework for managing this cooperation in a manner consistent with the greatest possible continued autonomy for both the Mi'kmaq and immigrant communities in Atlantic Canada. The goal should not be to give either community more power over the other. Instead, Treaty federalism should ensure that the more powerful commu-

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61. *Id.* at 8.

nity (the immigrants) takes due account of the Crown's obligations and duties to the Mi'kmaq people.<sup>62</sup>

This possibility of representatives reminding politicians of their obligations to indigenous peoples is understandably attractive and probably critical for long-term change. In the context of the recent constitutional proposals for an elected federal Senate with indigenous participation, a double-majority voting power is being considered for indigenous senators over matters materially affecting indigenous language and culture.

### Conclusion

While the right of self-determination continues to be the political focus of the international indigenous movement, the recent jurisprudence of the Human Rights Committee, particularly the *Mikmaq* decision, has done little to resolve the conflicts between indigenous peoples and states. Although constitutional reform in Canada has provided an opportunity to focus domestically on some of the human rights problems that indigenous peoples face, this opportunity was neither facilitated nor supported by international institutions or forums. Direct political action and the mobilization of public opinion by indigenous peoples in Canada provided the necessary impetus.

The decision in the *Mikmaq* case indicates that the Human Rights Committee and the United Nations is now out of touch with the struggles of indigenous peoples in Canada, and illustrates the insensitivity of these bodies to the political context of indigenous peoples' situations. The international system remains a system of states thoroughly controlled by state agendas and institutions. Indigenous peoples are outsiders at every turn. Even the little opening that has occurred at the United Nations, the Working Group on Indigenous Peoples, is still years away from developing a declaration on indigenous peoples' rights. Progress on such a declaration has been hindered by the conservatism and reticence of the state participants in the Working Group to recognize that indigenous peoples do have a right of self-determination.

In Canada, indigenous peoples will not wait for the United Nations to pronounce on rights that indigenous peoples understand as inherently theirs. The right to govern one's own people and to establish relationships of respect and mutual support with the larger settler state is a daunting political challenge but one which indigenous people in Canada are prepared to take on, with or without international assistance or supervision. Ideally, new pathways broken in Canada can assist other indigenous peoples beyond Canada who do not enjoy the public support and acceptance necessary to engage directly in constitutional reform discussions. It may also be the case that before effective changes are made in international fora, actual movement is required at a state level, such

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62. James Youngblood (Sakej) Henderson, *Treaty Federalism* 40 (unpublished paper, on file with author).



as in Canada, in order to promote the international recognition of indigenous peoples' status and rights.

From the Canadian perspective, the United Nations and the Human Rights Committee have been of virtually no assistance in indigenous struggles. With the outrageous delays in the consideration of communications, the Human Rights Committee is of use only to those who have years to wait for their rights to be considered. Even then, for indigenous peoples, the track record is disappointingly poor; Committee members are insensitive to indigenous peoples' predicament in the international system. As "nations within," indigenous peoples in Canada will define a political space and relationship with Canada that is appropriate from an indigenous perspective. Unfortunately, the United Nations will not be remembered as playing any significant role in the profound changes that are now underway in Canada which are nothing short of the beginning of the decolonization of indigenous peoples.