Office of the United Nations High Commissioner for Human Rights
Expert Mechanism on the Rights of Indigenous Peoples

Report on Self-Determination under the UN Declaration on the Rights of Indigenous Peoples

British Columbia Treaty Commission (BC Treaty Commission) submission to EMRIP's report on self-determination.

Introduction

BC Treaty Commission's submission for this study will focus on the following from the EMRIP January 2021 concept note for the UN Expert Virtual Seminar on Indigenous Peoples and the Right to Self-Determination:

- The evolving international legal framework related to the right to self-determination of Indigenous peoples, particularly post-2007 adoption of the UN Declaration;
- Examples of the current exercise of jurisdiction by Indigenous peoples, including de jure and de facto self-determination as well as in decisions about lands, territories and resources; economic, social and cultural rights; and civil and political rights;
- Integration of Indigenous legal orders, protocols and traditions into self-government functions;
- Recognition and cooperation with Indigenous self-determination from Nation states and sub-national governments, including legislative and constitutional recognition;

Background on the BC Treaty Commission

The BC Treaty Commission advocates and facilitates for the recognition and protection of Indigenous title and rights through modern treaties in the province of British Columbia (BC), Canada.

Since 1991, the Treaty Commission's mandate is to facilitate negotiations, provide funding allocations to First Nations to participate in negotiations with the governments of Canada and British Columbia, and provide public education and information. Recently, the BC Treaty Commission's mandate was further strengthened to support the implementation of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration).

Policy Framework for Self-Determination

In September 2019, the governments of Canada, British Columbia and the First Nations Summit endorsed a new *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (Rights Recognition

Policy)(http://www.bctreaty.ca/sites/default/files/RecognitionandReconciliationofRightsPolicyforTreatyNegotiations.pdf). This Rights Recognition Policy explicitly details how negotiations will be grounded in the recognition of Indigenous rights and ownership of Indigenous lands and resources. This policy is ground-breaking and the first tripartite public policy recognizing and protecting Indigenous rights in British Columbia. It is also recognized as a framework to implement the UN Declaration, including the right to "free, prior and informed consent" (FPIC).

The Rights Recognition Policy, in addition to provisions on Indigenous rights recognition, contains statements on self-determination:

Rights Recognition Policy

> 36. Recognition of the inherent right of self-determination of Participating Indigenous Nations[1] in British Columbia is the starting point of negotiations to reconcile and achieve the co-existence of federal, provincial and Indigenous jurisdictions, laws and legal systems.
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> 37. The inherent right of self-determination of Participating Indigenous Nations in British Columbia is recognized and affirmed in section 35 of the *Constitution Act, 1982* and expressed in the *United Nations Declaration on the Rights of Indigenous Peoples.* (2007).
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> 38. Canada and British Columbia recognize that Participating Indigenous Nations in British Columbia have the inherent right of self-determination, which includes:
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> a. an inextricable link to the lands, territories and resources traditionally owned, occupied or otherwise used or acquired by Participating Indigenous Nations;
> b. rights to determine their own identity and membership in accordance with their customs, traditions and laws;
> c. inherent rights of jurisdiction and self-government;
> d. laws, law-making authority and legal systems;
> e. rights to determine, maintain, develop and strengthen their distinct political systems, institutional structures and representative institutions, through representatives chosen by themselves in accordance with their own procedures; and
> f. rights to freely pursue economic, political, social and cultural development.

Implementation of the UN Declaration and the right to FPIC is one of the most challenging commitments for treaty negotiations. *What is Indigenous consent? Who provides that consent? How to implement consent?* These questions are continuously asked — and often avoided — which creates uncertainty and at times conflict. Modern

[1] "Participating Indigenous Nation" means Indigenous peoples engaged in the negotiation of treaties, agreements and other constructive arrangements within the British Columbia treaty negotiations framework, whose Statement of Intent has been accepted by the British Columbia Treaty Commission

treaties are an integral mechanism to address these questions and can be used to provide the necessary framework to implement the UN Declaration. Modern treaties are also a way for governments to live up to their commitments to implement the UN Declaration (see "The BC Treaty Negotiations Process and the Realization of Free, Prior and Informed Consent") (http://www.bctreaty.ca/sites/default/files/LegalOpinion-FPIC-BCTC-2018.pdf)

Indigenous sovereignty is a foundational principle of Indigenous rights, fundamental to reconciliation and one way to look at FPIC is that it is an aspect of sovereignty. Modern treaties are in fact a sharing of power — a sharing of sovereignty, between First Nations and the Crown (the governments of Canada and BC). In 2017, the Treaty Commission obtained an independent legal opinion from the late constitutional legal expert, Peter Hogg, C.C., Q.C., and Roy Millen *Treaties and the Sharing of Sovereignty in Canada* (http://www.bctreaty.ca/sites/default/files/LegalOpinionHoggMillenTreatiesandShareSovereigntyCanada.pdf) , on the status of modern treaties negotiated in the BC treaty negotiations process, and what a sharing of jurisdictions between the First Nations and governments means. Their conclusion is that a treaty represents a constitutionally protected sharing of sovereignty among the signatories to the treaty.

Supporting self-determination requires more than recognizing self-determination. It requires the vacating of power by state governments to make space for Indigenous nations and restore indigenous jurisdictions and legal orders. In Canada this is possible through the permanent constitutional entrenchment of modern treaties. That being said, there will be a requirement to change state laws and institutions to support Indigenous laws and legal orders. While modern treaties provide a mechanism for sharing sovereignty with Indigenous peoples, the next stage of our collective work, the implementation of FPIC and the UN Declaration, will require governments to continue to vacate power, and trust Indigenous nations to govern and make sound decisions. As well, to ensure successful transitions of power and jurisdiction, there must be adequate funding/resources made available to support Indigenous nations in their pursuits of self-determination.

States vacating power leading to the true sharing of sovereignty goes to the heart of self-determination for Indigenous nations.

State government departments must assess whether old colonial-based authorities and ministerial discretion are still needed in a time of reconciliation with Indigenous nations and vacate jurisdictions to make greater space for Indigenous self-government and restore Indigenous jurisdiction, institutions, and legal orders. Failure to do so will impede Indigenous self-determination, and impede the negotiations of treaties, agreements and other constructive arrangements, ultimately impeding reconciliation. A continued sharing of sovereignty is possible and is consistent with government authorities needed for good public governance. By vacating powers and authorities through negotiations, the parties can achieve the goals and commitments to implement the UN Declaration.

Enforcement of Indigenous Laws Essential to Self-Determination

On February 17, 2021, the British Columbia Treaty Commission & K'ómoks First Nation co-hosted a forum on the issue of enforcement of Indigenous laws. The purpose of the forum was to discuss the struggles around enforcing, prosecuting, and adjudicating Indigenous laws, and explore new mechanisms needed to address these issues in order for Indigenous self-government and reconciliation to be meaningful. EMRIP Expert member Mr. Belkacem Lounes was able to participate for part of the forum.

Self-government requires some essential law-making elements: the ability to make laws; the ability to adjudicate laws; and the ability to enforce laws. The ability to enforce laws is an essential component to self-government and self-determination. Laws are only as good as they are enforced. Respect and authority for law is only through enforcement and this is the same for Indigenous laws and legal orders. Law making should come with the essential tools to enforce those laws, if not, Indigenous self-government is an empty promise.

In Canada, the state and local governments have courts, prosecutors, enforcement agencies, and the requisite funding attached to each of these services. These tools allow state governments to implement all aspects of enforcement, a requirement for the rule of law to be more than just a legal construct, but reality.

Under modern treaties in Canada, the Indigenous nations are responsible for the enforcement of their laws. While they have the authority to make laws, they lack the authority to adjudicate and enforce their laws, and there is no funding for enforcement. The enforcement paradigm in modern treaties in Canada needs some fundamental changes (as well as adjustments linked with the mechanics of enforcement) if self-government is to be realized.

Adjudication

Modern treaties, agreements and other constructive arrangements should do more than recognize the right of Indigenous nations to develop their own laws and legal orders. These agreements must ensure that Indigenous laws can be adjudicated under Indigenous tribunals and courts. This will also require funding and state support for Indigenous tribunals and courts.

Mechanics of Enforcement

States should clarify that indigenous laws are valid state laws in order to trigger state court enforcement mechanisms. There are numerous state and local enforcement mechanisms that are not available to Indigenous nations because Indigenous laws are not defined as "law." A judgement of an Indigenous tribunal or court must be recognized legally as a judgement the same as that of a state court.

There are many practical mechanisms beyond the courts that assist with the enforcement of laws, and with some adjustments to regulations and mechanisms to include Indigenous nations, could greatly assist in supporting self-determination.

For example, in British Columbia, Canada, speeding violation tickets are linked to the state auto insurance system, so that a person has to pay these tickets before renewing their insurance every year, or when renewing their drivers licence. This is a powerful mechanism to collect fines. It is only available to Indigenous governments upon payment of significant prohibitive fees to integrate the Indigenous nation's laws, leaving Indigenous nations without a simple effective mechanism for enforcement of speed safety laws through Indigenous lands.

Policing and Enforcement Agencies

States should direct state prosecutors to prosecute and police to enforce; or provisions should be included in treaties, agreements and other constructive arrangements confirming the authority of state agencies to enforce and prosecute Indigenous laws at their request.

States should enter into enforcement agreements (upon request of the Indigenous nations) to enforce Indigenous laws until capacity is developed in Indigenous nations to enforce their laws themselves. Under the enforcement agreements officers are acting as agents of the Indigenous nations.

States should allow for designation, delegation or cross-delegation of Indigenous nations to enforce state laws on Indigenous lands and for state enforcement officers to enforce Indigenous laws on or off Indigenous lands.