

# Indigenous Peoples and the Struggle for Self-Determination: A Relational Strategy<sup>†</sup>

*Michael Murphy<sup>‡</sup>*

*This article argues for a relational approach to advance Indigenous claims for self-determination. Resurgence theorists strongly oppose negotiating self-determination within the state's existing legal, political and economic structures, favouring instead direct action in support of independent, Indigenous-led processes of community revitalization and political empowerment. A relational strategy recommends gaining multiple access points to political power, working both inside and outside state institutions at various geopolitical scales, as well as in cooperation and in direct confrontation with state institutions. This approach further emphasizes the importance of tailoring the institutional machinery of self-determination to the distinctive aspirations, circumstances and political structures of various Indigenous peoples. Indigenous peoples themselves have been the true pioneers of this relational strategy, demonstrating in practice its advantages in confronting the realities of Indigenous diversity, complex state-Indigenous interdependence and the preponderance of state power in settler states around the globe.*

<sup>†</sup> My thanks to the anonymous referees and to the *CJHR* editorial staff for helpful comments and suggestions on earlier drafts of this article. Financial assistance from the Canada Research Chairs Program of the Social Sciences and Humanities Research Council of Canada is gratefully acknowledged.

<sup>‡</sup> Dr. Michael Murphy, Professor, Political Science Department, University of Northern British Columbia, Prince George, BC, V2N 4Z9, [murphym@unbc.ca](mailto:murphym@unbc.ca).

*Cet article préconise l'approche relationnelle pour faire avancer les revendications autochtones en matière d'autodétermination. Les théoriciens de la résurgence s'opposent fermement à la négociation de l'autodétermination dans le cadre des structures juridiques, politiques et économiques existantes, et privilégient plutôt une action directe à l'appui de processus de revitalisation communautaire et d'émancipation politique indépendants et dirigés par des Autochtones. Selon la stratégie relationnelle, il faudrait établir de nombreux points d'accès au pouvoir politique et travailler à la fois à l'intérieur et à l'extérieur d'institutions étatiques à différentes échelles géopolitiques, ainsi qu'en coopération et en confrontation directe avec ces institutions. Cette approche souligne en outre l'importance d'adapter les mécanismes institutionnels d'autodétermination aux aspirations, aux situations et aux structures politiques distinctes des divers peuples autochtones. Les peuples autochtones eux-mêmes ont été les véritables pionniers de cette stratégie relationnelle et ont démontré dans la pratique ses avantages pour faire face aux réalités de la diversité autochtone, à l'interdépendance complexe entre les Autochtones et l'État, ainsi qu'à la prépondérance du pouvoir étatique dans les États coloniaux.*

## I. Introduction

Moving into the third decade of the twenty-first century, Indigenous peoples worldwide continue to struggle for the recognition and implementation of their right to self-determination – one of the most basic and fundamental human rights.<sup>1</sup> In this struggle, Indigenous peoples are pitted against colonial settler states whose own claims to legitimacy and self-determination are founded in an international legal architecture. This architecture has long assumed that the assimilation of Indigenous peoples and other minorities is a basic requirement of a peaceful and stable global order.<sup>2</sup>

Indigenous leaders, activists and community members have persistently challenged and gradually reoriented the international legal architecture towards a greater recognition and accommodation of their collective aspirations as peoples. The most visible sign of this shift was the ratification of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, which embraced a broad spectrum of Indigenous rights, including a robust collective right to self-determination.<sup>3</sup> In commanding the support of 148 nations worldwide, UNDRIP marked a new willingness by the global community to break the post-WWII international orthodoxy that self-determination was a right reserved exclusively for states.<sup>4</sup> In concert with this shift in international law, Indigenous peoples in North, Central and South America, Europe and the South Pacific have achieved real advances in their domestic campaigns for self-determination. These advances include the constitutional recognition of their collective rights and identities, the inclusion of Indigenous representatives in regional and national legislative bodies, the transfer of political and economic power to Indigenous governance bodies and increased jurisdiction over their own territories and resources.<sup>5</sup>

<sup>1</sup> See e.g. Cindy Holder, “Self-Determination as a Universal Human Right” (2006) 7:4 Hum Rts Rev 5.

<sup>2</sup> S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (New York: Oxford University Press, 2004) at 6–7, 15–56 [Anaya, *Indigenous Peoples in International Law*].

<sup>3</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, UNGAOR, 61st Sess (2007) 1 [UNDRIP].

<sup>4</sup> S James Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen Publishers, 2009) at 55–132 [Anaya, *International Human Rights*]; Claire Charters, “A Self-Determination Approach to Justifying Indigenous Peoples Participation in International Law and Policy Making” (2010) 17 Intl J on Minority & Group Rights 215 at 219–21 [Charters]; Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (New York: Routledge, 2016) at 33–71 [Lightfoot].

<sup>5</sup> Roger Maaka & Augie Fleras, “Engaging With Indigeneity: Tino Rangatiratanga in Aotearoa” in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 89 [Maaka & Fleras]; Donna Lee Van Cott, “Latin America’s Indigenous Peoples” (2007) 18:4 J Democracy 127 [Van Cott, “Latin America’s Indigenous Peoples”]; Helena Catt & Michael Murphy, *Sub-State Nationalism: A Comparative Analysis of Institutional Design* (London: Routledge, 2002) [Catt & Murphy]; Michael Murphy, “Representing Indigenous Self-Determination” (2008) 58 UTLJ 185 [Murphy, “Indigenous Self-Determination”]; Yale D Belanger, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed (Saskatoon: Purich Publishing, 2008) [Belanger]; Miriam Jorgensen, ed, *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007) [Jorgensen]; Else G Broderstad, “Implementing Indigenous Self-Determination: The Case of the Sámi

Despite the progress that has been made, in most countries there remains a stubborn gap between the ideal and the reality of Indigenous self-determination.<sup>6</sup> Moreover, in this new era of Indigenous self-determination, colonial settler states are no less committed to the preservation of their national sovereignty, no less resistant to Indigenous claims on their territory, resources or jurisdictional authority and no less willing to utilize their dominant position to limit the concessions they are required to make in the face of Indigenous demands. As a result, Indigenous people are confronted with a basic question: how do they continue to translate the promise of self-determination into more tangible and meaningful forms of political, economic and socio-cultural empowerment?

To address this basic question, I consider two very different strategies that could be followed. The first strategy is connected to the idea of Indigenous resurgence. This strategy is strongly opposed to negotiating self-determination within the state's existing legal, political and economic structures. Instead, direct action in support of independent, Indigenous-led processes of community revitalization and political empowerment is favoured. While this strategy has strengths, it is inadequate to deal with the realities of Indigenous diversity, complex Indigenous-state interdependence and the preponderance of state power in settler states around the globe.

These realities can be more effectively addressed by adopting an alternative strategy that is anchored in a relational conception of self-determination. This relational strategy emphasizes the advantages of gaining multiple access points to political power, working both inside and outside state institutions at various geopolitical scales (e.g. regional, national, international), sometimes in co-operation, and at other times in direct confrontation with, state agents. This strategy emphasizes that the institutional means used to advance self-determination be capable of navigating the distinctive interdependencies, power relations and political opportunity structures of the various and distinct groups of Indigenous peoples worldwide.

This article makes several distinctive contributions to the political theory of Indigenous self-determination. First, it provides a novel conceptual framework that enhances our capacity to understand the nature and potential

---

in Norway" in Marc Woons, ed, *Restoring Indigenous Self-Determination: Theoretical and Practical Approaches* (Bristol: E-International Relations, 2015) 72 [Broderstad, "The Case of the Sami"]; Pascal Lupien, "The Incorporation of Indigenous Concepts of Plurinationality into the New Constitutions of Ecuador and Bolivia" (2011) 18:3 *Democratization* 774 [Lupien]; Brian Slattery, "A Taxonomy of Aboriginal Rights" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007) 111 [Slattery].

<sup>6</sup> UNDRIP itself embodies significant compromises on Indigenous rights, including the right to self-determination. See Charters, *supra* note 4 at 219; Anaya, *International Human Rights*, *supra* note 4 at 56–57, 65–67; Lightfoot, *supra* note 4 at 34–35, 64–65. For a more skeptical view of UNDRIP, see Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22:1 *Eur J Intl L* 141.

impact of Indigenous peoples' struggles for freedom and well-being in colonial settler states. In a related fashion, this article provides a clearer picture of how Indigenous relational self-determination, as an abstract theory, can be translated into a political strategy that achieves concrete institutional outcomes in different countries, continents and hemispheres. Lastly, this article provides a useful foundation for future empirical research into the comparative successes and failures of relational, and alternative, strategies that have been used to advance Indigenous self-determination around the globe.

This article is comprised of three sections. Section one (section II) outlines the broad contours of the resurgence and relational strategies and argues that the latter approach is better equipped to advance the goals of Indigenous self-determination. Section two (section III), divided into two sub-sections, illustrates how Indigenous peoples worldwide are already using a relational strategy to achieve concrete advances in their quest for self-determination. The first subsection explores five institutional means that Indigenous peoples have used to enhance their status and decision-making powers. They are: constitutional recognition, self-government, co-management, consultation and electoral empowerment. The second subsection takes a broader approach by examining how Indigenous peoples in various global regions have taken advantage of these institutional tools and supplemented them with more confrontational tactics to advance their overarching goal of self-determination. Finally, section three (section IV) addresses criticisms and limitations of a relational approach to Indigenous self-determination.

## II. Strategizing Self-Determination: Assessing Resurgence and Relational Approaches

It is important to acknowledge that there are many different understandings of Indigenous resurgence in the literature.<sup>7</sup> The following analysis is focused on one particular conception of resurgence that closely resembles what Borrows and Tully refer to as "separate resurgence".<sup>8</sup> Exponents of this

<sup>7</sup> For an excellent critical introduction to some of these different conceptions of resurgence, see Michael Asch, John Borrows & James Tully, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) [Asch, Borrows & Tully].

<sup>8</sup> On 'separate resurgence' see *ibid* at 4-5. My conception of separate resurgence differs from Borrows and Tully in that I am more firmly convinced that this form of resurgence does make room for positive relationships with colonizers (which is why I forego the term 'separate'), and because I do associate this form of resurgence with the work of Taiaiake Alfred. Some conceptions of resurgence also embrace the value of relationality. See especially Gina Starblanket & Heidi Kiiwetinepinesiiik Stark, "Toward a Relational Paradigm - Four Points for Consideration: Knowledge, Gender, Land, and Modernity" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 175. See also Michelle Daigle, "Awawanenitakik: The Spatial Politics of Recognition and Relational Geographies of Indigenous Self-Determination" (2016) 60:2 *Can Geographer* 259.

conception include Taiaiake Alfred, Jeff Corntassel, Glen Coulthard and Leanne Betasamosake Simpson, but their views have a wider resonance in the literature on Indigenous self-determination.<sup>9</sup> Recognizing that there are many distinct contributions to resurgence theory, I identify core features that are broadly shared. Such features include an emphasis on the goal of securing Indigenous political independence, economic self-reliance and territorial independence. While this may not require secession or independent statehood, it certainly entails a substantial restitution of Indigenous land, the re-establishment of traditional Indigenous governments with inherent and independent jurisdictional authority and the corresponding termination of state authority over Indigenous people, territories and governments. The assertion of Indigenous independence coincides with the rejection of common citizenship, Indigenous participation in state institutions, non-Indigenous models of governance and capitalist modes of economic development.<sup>10</sup>

Another common feature of the resurgence approach is a profound skepticism concerning efforts to accommodate Indigenous self-determination within existing state institutions and constitutional structures. Resurgence theorists like Alfred and Coulthard are not inherently opposed to negotiating political relationships with states. Rather, their point is that given things as they currently stand, most Indigenous peoples are negotiating with extraordinarily powerful and well-resourced state actors from a position of profound weakness. An inevitable consequence of this power imbalance is that Indigenous peoples are compelled to accept agreements that require a significant alienation of their territories and resources. As a result, Indigenous peoples are assigned a limited and circumscribed set of rights and decision-making powers which ultimately fail to displace the jurisdictional authority of states over Indigenous peoples and governments. Such arrangements not

<sup>9</sup> See Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 *Contemporary Political Theory* 437 [Coulthard, "Subjects of Empire"]; Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) [Coulthard, *Red Skin*]; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999); Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 20 [Alfred, *Wasáse*]; Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" (2005) 40:4 *Government & Opposition* 597 [Alfred & Corntassel]; Jeff Corntassel, "Re-Envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination" (2012) 1:1 *Decolonization* 86 [Corntassel]; Leanne Betasamosake Simpson, "Indigenous Resurgence and Co-resistance" (2016) 2:2 *Critical Ethnic Studies* 19 [Simpson]; Michael Elliott, "Indigenous Resurgence: The Drive for Renewed Engagement and Reciprocity in the Turn Away from the State" (2018) 51:1 *Can J Political Science* 61 [Elliott]; Melinda Hinkson & Eve Vincent, "Shifting Indigenous Australian Realities: Dispersal, Damage, and Resurgence" (2018) 88:3 *Oceania* 240 at 242; Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot: Ashgate, 2008) [Short]; Jane Kelsey, "Maori, Te Tiriti, and Globalisation: The Invisible Hand of the Colonial State" in Michael Belgrave et al, eds, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005) 81 [Kelsey].

<sup>10</sup> Alfred, *Wasáse*, *supra* note 9 at 19–45; Coulthard, "Subjects of Empire", *supra* note 9 at 446–47; Simpson, *supra* note 9 at 21–23; Short, *supra* note 9 at 20–23, 174–75; Corntassel, *supra* note 9 at 91–97; Kelsey, *supra* note 9 at 84–88, 98–99.

only fail to deliver on the promise of self-determination, but they reproduce the very colonial relations of power that they are intended to replace, ultimately aiding in the goal of assimilation.<sup>11</sup>

As an alternative to these methods of negotiating recognition, two interlinked courses of action are recommended. First, Indigenous peoples must strategically turn away from the state and embark on a path of self-decolonization and self-empowerment. This path involves foregoing state-mandated processes for negotiating and accommodating Indigenous rights and redirecting energy towards other goals. These goals include reconnecting with Indigenous lands, languages, traditions and identities, repairing the torn social fabric of Indigenous communities by restoring the mental and physical well-being of community members and working to revitalize Indigenous institutions, modes of governance and socio-economic development. The process of individual and communal self-decolonization is a valuable end in itself and a vital means of reducing material and ideological dependency on the state. The ultimate goal is to generate a greater sense of solidarity and purpose, and to foster the qualities of resilience and determination that will sustain Indigenous individuals and communities as they struggle to force the retreat of the colonial state and expand the capacity for self-determination in the daily lives of Indigenous peoples.<sup>12</sup> As Alfred and Corntassel state:

Indigenous pathways of authentic action and freedom struggle start with people transcending colonialism on an individual basis – a strength that soon reverberates outward from the self to family, clan, community and into all of the broader relationships that form an Indigenous existence. In this way, Indigenousness is reconstructed, reshaped and actively lived as resurgence against the dispossessing and demeaning processes of annihilation that are inherent to colonialism.<sup>13</sup>

The second prong of the resurgence strategy is direct action, which has many, varied manifestations. These include unilateral assertions of Indigenous political and territorial jurisdiction, the use of “word warriors” to attack and undermine the ideological foundations of colonial laws and institutions as well as protests, occupations, blockades and other more intense forms of confrontation with state authorities and powerful economic actors.<sup>14</sup> As a communication strategy, direct action serves as a means of energizing and building solidarity within and across Indigenous communities. Additionally,

<sup>11</sup> Alfred, *Wasáse*, *supra* note 9 at 29–38, 133–35; Alfred & Corntassel, *supra* note 9 at 598–600, 603–04; Kelsey, *supra* note 9 at 81–83, 98–99; Coulthard, “Subjects of Empire”, *supra* note 9 at 438–39; Simpson, *supra* note 9 at 24; Short, *supra* note 9 at 159–68.

<sup>12</sup> Alfred, *Wasáse*, *supra* note 9 at 19–38; Alfred & Corntassel *supra* note 9 at 611–14; Coulthard, “Subjects of Empire”, *supra* note 9 at 456; Coulthard, *Red Skin*, *supra* note 9 at 25–49, 151–9; Simpson, *supra* note 9 at 21–22, 24, 28, 31–32;

<sup>13</sup> Alfred & Corntassel, *supra* note 9 at 612.

<sup>14</sup> “Word warriors” is a term coined by Dale Turner, whose overall approach is nevertheless more consistent with a relational strategy. See Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 7–8 [Turner].

direct action serves as a form of education and consciousness-raising that pushes the broader public to question the legitimacy and sustainability of a *status quo* that systematically subordinates and immiserates Indigenous peoples. Finally, direct action serves as a way for Indigenous peoples to signal the strength of their commitment to the goal of rolling-back the colonial state. Equally as important, direct action is a means of actively defending against further state incursions on Indigenous territories, resources and jurisdictional authority and of disrupting, and ultimately undermining, the will and capacity of state authorities to control and contain Indigenous peoples. The aim of direct action is to open up spaces for the exercise of Indigenous self-determination and to move Indigenous peoples into a position of strength where they can negotiate genuine nation-to-nation relationships with the state as political equals.<sup>15</sup>

There is much to admire in the resurgence approach. First and foremost, it highlights the fact that states do not generally live up to the principle that Indigenous peoples have an equal right to self-determination. Even the most progressive state accommodation policies fall short of what Indigenous peoples can legitimately lay claim to as a matter of fundamental justice.<sup>16</sup> Second, this approach offers both a sobering assessment of how the prevailing Indigenous-state power imbalance continues to limit the advancements that Indigenous peoples are able to make at the negotiating table and a concrete (if problematic) strategy for addressing this limitation. Third, it correctly characterizes the ongoing quest for Indigenous self-determination as a struggle that cannot succeed without invoking the power of assertion, disruption and confrontation. Despite these strengths, the viability of the resurgence strategy is compromised by its inability to cope with three interconnected challenges: Indigenous diversity, complex Indigenous-state interconnectivity and the Indigenous-state power imbalance.

For example, the emphasis on Indigenous economic and political independence, and the corresponding rejection of Indigenous inclusion in state institutions and citizenship regimes, is incompatible with the diversity of political demands articulated by Indigenous peoples worldwide. It also fails to capture the wide variations in socio-economic, political and geographical circumstances, which limit the options for self-determination that are practically feasible in each unique Indigenous-state relationship.<sup>17</sup> By way of illustration, the demand for independent and exclusive territorial

<sup>15</sup> Alfred, *Wasáse*, *supra* note 9 at 63–77, 226–33; Alfred & Cortassol, *supra* note 9 at 611–14; Coulthard, *Red Skin*, *supra* note 9 at 165. See also Elliott, *supra* note 9 at 62, 70–80.

<sup>16</sup> James Tully, *Public Philosophy in a New Key: Volume 1, Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) at 257–288.

<sup>17</sup> See Nancy G Postero, *Now We Are Citizens: Indigenous Politics in Postmulticultural Bolivia* (Stanford: Stanford University Press, 2007) at 50; Manuela Tomei, *Indigenous and Tribal Peoples: An Ethnic Audit of Selected Poverty Reduction Strategy Papers* (Geneva: ILO, 2005) [Tomei].



self-government is common among Indigenous peoples in Canada, the United States and some Latin American countries, such as Mexico, Chile and Nicaragua. In contrast, it is a far less common demand among Indigenous peoples in New Zealand, Scandinavia or other Latin American countries, including Guatemala and the highland regions of Bolivia.<sup>18</sup> Furthermore, the feasibility of exclusive territorial self-government often collides with the reality of Indigenous urbanization, or with the fact that Indigenous peoples now co-exist in their traditional homelands with non-Indigenous populations; this is the case for the Inuit of Nunavut and the Indigenous peoples of Nicaragua's Atlantic coast.<sup>19</sup>

Size and governing capacity is another issue that is problematic for political and economic independence, particularly in smaller, resource-deprived communities. Even large, territorially predominant Indigenous peoples with a significant governing capacity may struggle to assume all of the powers and policy functions of an independent polity. Moreover, there will be many areas, including the environment, economic development, education and health care, where the interests and competencies of Indigenous and non-Indigenous governments will inevitably overlap. Indigenous participation in shared or intergovernmental decision-making institutions could help govern these overlaps in a more effective and mutually beneficial manner.<sup>20</sup>

Additionally, not all Indigenous peoples are opposed to participating in state institutions. Some are, but many others maintain that participation is a crucial means of shaping or influencing state policies that impact their rights, interests and well-being.<sup>21</sup> Beyond this purely functional rationale for

<sup>18</sup> Belanger, *supra* note 5 at 1-19; Manley A Begay et al, "Development, Governance, Culture: What are They and What do They Have to do With Rebuilding Native Nations?" in Miriam Jorgensen, ed, *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007) 34 at 36-37 [Begay et al]; see Else G Broderstad, "The Finnmark Estate: Dilution of Indigenous Rights or a Robust Compromise?" (2015) 39 *Northern Rev* 8 [Broderstad, "Finnmark Estate"]; Mason Durie, *Nga Tau Matatu: Tides of Maori Endurance* (Melbourne: Oxford University Press, 2005) at 174-75, 183-84 [Durie, *Tides of Maori*]; Nancy G Postero & Leon Zamosc, "Indigenous Movements and the Indian Question in Latin America" in Nancy G Postero & Leon Zamosc, eds, *The Struggle for Indigenous Rights in Latin America* (Brighton, Sussex Academic Press, 2004) 1 at 16 [Postero & Zamosc]; Rachel Sieder, "Rethinking Democratisation and Citizenship: Legal Pluralism and Institutional Reform in Guatemala" (1999) 3:1 *Citizenship Studies* 103 at 105 [Siedler, "Rethinking Democratisation"].

<sup>19</sup> On Indigenous urbanization, see Carolyn Stephens, "The Indigenous Experience of Urbanization" in Peter Grant, ed, *State of World's Minorities and Indigenous Peoples 2015* (London: Minority Rights Group International, 2015) 55. On Nicaragua, see Juliet Hooker, *Race and the Politics of Solidarity* (New York: Oxford University Press, 2009) at 129-65.

<sup>20</sup> Melissa Williams, "Sharing the River: Aboriginal Representation in Canadian Political Institutions" in David Laycock, ed, *Representation and Democratic Theory* (Vancouver: University of British Columbia Press, 2004) 93 at 110-11 [Williams]; Murphy, "Indigenous Self-Determination", *supra* note 5 at 202-203.

<sup>21</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 140 [Borrows, *Recovering Canada*]; Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Sydney: The Federation Press, 2003) at 127-31, 174; Mason Durie, "Representation, Governance and the Goals of Maori Self Determination" (1997) 2:2 *He Pukenga Korero* 1 at 3-4; Peris Jones & Malcolm Langford, "Between Demos and Ethnos: The Nepal Constitution and Indigenous Rights" (2011) 18 *Intl J on Minority & Group Rights* 369; Deborah J Yashar, *Contesting Citizenship in Latin*

Indigenous participation, evidence from multiple jurisdictions, including Australia, New Zealand, Canada, the United States and Latin American countries suggests that many Indigenous people value their engagement with the political, social, and educational institutions of the wider society. These Indigenous peoples embrace their status as state citizens and as citizens of their own self-determining Indigenous communities. Similarly, there is no consensus among Indigenous peoples regarding the compatibility of Indigeneity and the pursuit of capitalist modes of economic development. Many Indigenous communities have adopted and modified capitalist economic development. As a result, they have reaped significant economic benefits, but also augmented their capacity to advance some of their key social, cultural and political objectives in the process.<sup>22</sup>

Perhaps the biggest weakness of a resurgence approach lies in its response to the power imbalance that profoundly shapes Indigenous-state relationships worldwide. While this approach accurately diagnoses the severity of this power imbalance – what Coulthard refers to as the “sheer magnitude of discursive and nondiscursive power we find ourselves up against in our struggles” – ultimately it fails to offer a convincing strategy for counteracting its effects, and for advancing an extraordinarily ambitious program of Indigenous economic and political independence.<sup>23</sup> A strategic withdrawal from the state may very well aid the process of self-decolonization, but it will not stop state judicial and legislative bodies from asserting their jurisdiction over Indigenous territories, governments and economies. Nor will it stop state policy governing activities (e.g. resource extraction, industrial development, environmental review) on lands adjacent to Indigenous communities from continuing to impact Indigenous territories, environments and well-being. Finally, it will not change the fact that many Indigenous communities will continue to be dependent on the state for economic support, programs and services and the building and maintenance of public infrastructure.<sup>24</sup>

---

*America: The Rise of Indigenous Movements and the Postliberal Challenge* (Cambridge: Cambridge University Press, 2005) at 285, 292–93, 299 [Yashar, *Contesting Citizenship*].

<sup>22</sup> Yashar, *Contesting Citizenship*, *supra* note 21 at 284–86; Siedler, “Rethinking Democratisation”, *supra* note 18 at 104–64; Durie, *Tides of Maori*, *supra* note 18 at 174–75; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 175–77 [Borrows, *Indigenous Constitutionalism*]; Dominic O’Sullivan, *Beyond Biculturalism: The Politics of an Indigenous Minority* (Wellington: Huia Publishers, 2007) at 1–8, 75–98, 196–203 [O’Sullivan]; Begay et al, *supra* note 18 at 36–37, 46–53; Duane Champagne, “The Crisis for Native American Governments in the Twenty-First Century” in Duane Champagne & Ismael Abu-Saad, eds, *The Future of Indigenous Peoples: Strategies for Survival and Development* (Los Angeles: UCLA American Indian Studies Center, 2003) at 209–16; Jacquelyn Thayer Scott, “‘Doing Business with the Devil’: Land, Sovereignty, and Corporate Partnerships in Membertou, Inc.” in Terry L Anderson et al, eds, *Self-Determination: The Other Path for Native Americans* (Stanford: Stanford University Press, 2006) 242.

<sup>23</sup> Coulthard, *Red Skin*, *supra* note 9 at 179.

<sup>24</sup> See Borrows, *Recovering Canada*, *supra* note 21 at 140–45; Turner, *supra* note 14 at 94–121; Williams, *supra* note 20 at 110–11; Fiona MacDonald, “Relational Group Autonomy: Ethics of Care and the Multiculturalism Paradigm” (2010) 25:1 *Hypatia* 196 at 201–02 [MacDonald, “Relational Group Autonomy”].

Indeed, a wholesale retreat from state institutions runs the risk of increasing the vulnerability of Indigenous communities. This would occur by ensuring that Indigenous people have no voice, and thus, no influence in those very same institutions (e.g. courts, legislatures, constitutional forums, resource consent and co-management bodies) that significantly impact their rights, interests and well-being. Although direct action can be an effective tool for advancing or defending Indigenous interests, past experience suggests that it is no magic bullet in the struggle for self-determination. Direct action campaigns are difficult to sustain over longer periods of time because they sometimes aggravate internal community divisions and alienate outside sources of support and solidarity, frequently achieve only limited objectives and in many cases, fail outright.<sup>25</sup> The limitations of direct action are even more apparent for smaller Indigenous communities that lack financial and organizational resources as well as external allies. However, even in countries like Bolivia and Ecuador where very large, well-organized and resourced Indigenous social movements have made significant advances towards self-determination, there is a perception that direct action on its own is inadequate to achieve the desired scale of reform. This perception led Indigenous activists to pursue parallel and complementary institutional routes to advance their goals – most notably, electoral politics.<sup>26</sup> Therefore, it is crucial to understand both the advantages and limitations of direct action, and to acknowledge that this approach is more effective as part of a broader, multi-pronged strategy of advancing Indigenous self-determination.

A relational approach to Indigenous self-determination recommends precisely this sort of strategy, and as a result, addresses the core weaknesses of a resurgence approach. The concept of relational self-determination has strong roots in feminist theories of relational autonomy. There are several distinct variations of this theory, but most find common ground in their rejection of excessive individualism and emphasis on the centrality of human interdependence, relationships and social connectivity in fostering and sustaining individual freedom and well-being.<sup>27</sup> Iris Young was perhaps the first theorist to adapt individual relational autonomy to a discussion of collective self-determination and Indigenous peoples. A number of other theorists have followed her lead, producing a relatively small, but vibrant,

<sup>25</sup> See Christopher Alcantara, "To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada" (2007) 38:2 *Publius* 343 at 355; Lightfoot, *supra* note 4 at 149–51; Yale D Belanger & P Whitney Lackenbauer, *Blockades or Breakthroughs? Aboriginal Peoples Confront the Canadian State* (Montreal: McGill-Queen's University Press, 2015); Borrows, *Indigenous Constitutionalism*, *supra* note 22 at 50–102. Resurgence theorists themselves acknowledge some of the limits of direct action. See Alfred, *Wasáse*, *supra* note 9 at 62–67, 226–31; Coulthard, *Red Skin*, *supra* note 9 at 164–65.

<sup>26</sup> Yashar, *Contesting Citizenship*, *supra* note 21 at 300–08.

<sup>27</sup> See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2012) [Nedelsky]; Catriona Mackenzie & Natalie Stoljar, *Relational Autonomy: Feminist Essays On Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000).

literature on relational approaches to Indigenous self-determination.<sup>28</sup>

There are a variety of different interpretations and applications of relational self-determination. This article uses a strategic-political conception of relational self-determination. At its core, this approach rests on the assumption that Indigenous peoples are bound together with non-Indigenous peoples in a dense and complex web of relationships. These relationships consist of interdependence and power and conflict, but also potential mutual interest and advantage. The existence of these relationships generates practical and ethical imperatives in the quest for self-determination. In practical terms, these relationships highlight the need for Indigenous peoples to rule themselves through their own institutions, laws and governance practices and to simultaneously increase their influence within, and over, state institutions. This influence is important as a means of defending against incursions on Indigenous peoples self-governing autonomy and securing state policies, programs and opportunities that better serve the interests of their community members. In ethical terms, these relationships suggest that Indigenous and non-Indigenous peoples have a reciprocal responsibility to address how their actions, decisions and aspirations impact each other's interests and well-being, which may require accepting limitations on their respective rights, power or jurisdiction.<sup>29</sup>

This strategic-political conception of relational self-determination builds upon this core assumption in several different ways. First, Indigenous peoples

---

<sup>28</sup> Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 231–35, 255–65 [Young]. See also Benedict Kingsbury, "Reconstructing Self-Determination: A Relational Approach" in Pekka Aikio & Martin Scheinin, eds, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo: Institute for Human Rights, 2000) 19; Murphy, "Indigenous Self-Determination," *supra* note 5; Michael Murphy, "Understanding Indigenous Nationalism" in Michel Seymour, ed, *The Fate of the Nation-State* (Montreal: McGill-Queen's University Press, 2004) 271; Michael Murphy, "Relational Self-Determination and Federal Reform" in Michael Murphy, ed, *Canada: The State of the Federation 2003. Re-Configuring Aboriginal-State Relations* (Montreal & Kingston: McGill-Queen's University Press, 2005) 3; Siobhan Harty & Michael Murphy, *In Defense of Multinational Citizenship* (Cardiff: University of Wales Press, 2005) at 83; Val Napoleon, "Aboriginal Self Determination: Individual Self and Collective Selves" (2005) 29:2 *Atlantis* 1; Rauna Kuokkanen, "Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights" (2012) 34 *Hum Rts Q* 225 [Kuokkanen, "Indigenous Women's Right"]; MacDonald, "Relational Group Autonomy", *supra* note 24; Broderstad, "The Case of the Sami", *supra* note 5 at 72–73. Others who employ a similar theoretical framework under a different name include, Anaya, *Indigenous Peoples in International Law*, *supra* note 2 at 129–84; Donna Lee Van Cott, "Constitutional Reform in the Andes: Redefining Indigenous-State Relations" in Rachel Sieder, ed, *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (New York: Palgrave MacMillan, 2002) 45 [Van Cott, "Constitutional Reform"]; Yashar, *Contesting Citizenship*, *supra* note 21 at 285–86; Borrows, *Recovering Canada*, *supra* note 21 at 140; Turner, *supra* note 14; Williams, *supra* note 20.

<sup>29</sup> Young, *supra* note 28 at 231–35, 257–65; Williams, *supra* note 20 at 104–11; Rauna Kuokkanen, "Self-Determination and Indigenous Women – "Whose Voice Is It We Hear in the Sámi Parliament?" (2011) 18 *Intl J on Minority & Group Rights* 39 at 56–57 [Kuokkanen, "Self-Determination"]; Kuokkanen, "Indigenous Women's Rights", *supra* note 28 at 229–30; MacDonald, "Relational Group Autonomy", *supra* note 24 at 199–207. Kuokkanen and Napoleon have also done valuable work on the individual dimension of relational autonomy, particularly in connection to issues of gender inequality and gender violence in Indigenous communities.

should address the circumstances of their interdependence and seek to mitigate their disadvantage by exercising their influence through a multiplicity of institutional channels and at multiple spatial levels, representing different scales of Indigenous identity, including the local, regional, national and international. For example, Indigenous peoples seeking greater control over their environment can realize this goal by acquiring self-governance over their traditional lands and waters, but this will not allow them to control the environmental impacts created by actors outside of their territory. To manage these external impacts, Indigenous peoples may also need to participate in local or regional environmental consultations and co-management regimes, elect regional or national Indigenous legislators who can influence environmental legislation or regulatory regimes or band together with other Indigenous communities to influence international institutions that govern global environmental standards.

Second, while a relational approach to self-determination should be attentive to the benefits of working co-operatively with non-Indigenous peoples and institutions towards mutually beneficial outcomes, it must also acknowledge the limits of co-operation in the face of hostile, indifferent or intransigent state actors. Thus, a relational approach to self-determination shares some ground with a resurgence strategy by maintaining that Indigenous peoples must sometimes choose the path of opposition, conflict and confrontation to achieve their ends. This can take many different forms. Continuing with the example above, this might include working within the framework of existing laws or institutions. Examples of that include launching a domestic or international media campaign that dramatizes environmentally destructive state policies, directing members of an Indigenous political party to withdraw their support from a minority government that is marginalizing Indigenous environmental concerns in proposed economic development legislation or seeking injunctions from domestic, regional or international courts to halt large scale development projects that either violate Indigenous rights or run afoul of state environmental obligations under domestic or international law. In more extreme circumstances, it may also require actively resisting existing laws and institutions. Examples of more active resistance are: establishing blockades to deny access to environmentally fragile territories or resources, engaging in mass mobilizations and protests to increase the cost of ignoring the environmental concerns of Indigenous peoples and pressuring governments to negotiate with Indigenous people.<sup>30</sup>

Third, a relational approach to self-determination must be guided by a sense of realism. It must acknowledge that the power imbalance at the core of most Indigenous-state relationships dictates that self-determination

<sup>30</sup> For examples, see Borrows, *Indigenous Constitutionalism*, *supra* note 22 at 50–102.

will continue to be an ongoing struggle. A struggle involving modest and incremental advances, failures and setbacks and outcomes that will very likely fall short of what Indigenous peoples may lay claim to as a matter of fundamental justice. Within this approach, the capacity for self-determination is not conceptualized in dichotomous terms (as something you either have or do not have), but as a power that can only ever be realized in degrees and which is always, to some extent, conditioned by the will and actions of others.<sup>31</sup>

A realist perspective also resists the assumption of *equal* moral reciprocity that is embedded in some alternative accounts of relational self-determination. This is the assumption that Indigenous and non-Indigenous peoples bear an equal responsibility to address the mutual consequences of their interdependence.<sup>32</sup> There are two reasons for rejecting this assumption. First, this interdependence, and its associated impacts, are largely the product of an unjust history of colonization that involved the subjugation, displacement and immiseration of Indigenous peoples around the globe. To assume that Indigenous peoples have an equal moral duty to redress this unjust legacy would, therefore, be absurd and unconscionable. The second reason is also connected to the legacy of colonization and relates to the imbalance that exists in the degree to which Indigenous and non-Indigenous communities have impacted each other, as well as their respective abilities to muster the resources to mitigate these impacts. Therefore, the question of moral reciprocity is more justly conceived on a sliding scale. Specifically, Indigenous peoples will incur minimal obligations when they lack the necessary resources and when states either remain indifferent or seek to aggressively undermine Indigenous self-determination. But, they will assume stronger obligations as their capacity and resources grow and the state chooses to respect their primary obligation to redress the legacies of colonialism.

Last, a realist approach requires that a viable self-determination strategy be capable of addressing the needs and demands of differently situated and distinctively constituted Indigenous peoples, each with their own unique relationships with non-Indigenous peoples and institutions. This requires a detailed consideration of how a relational approach to self-determination might take shape in concrete institutional and strategic terms – a task that the existing literature on relational self-determination has been slow to take up, especially in a comparative context. Thus, the next section of this article examines how Indigenous peoples have employed this relational approach to self-determination in both older and newer democracies around the globe. In the first subsection, I focus on five different institutional options

<sup>31</sup> I have adapted this point from Nedelsky, *supra* note 27 at 119, 135–36. Cf. Borrows, *Indigenous Constitutionalism*, *supra* note 22 at 10–12, 162–63.

<sup>32</sup> See e.g. Young, *supra* note 28 at 255–58, where the author assumes an equal moral reciprocity amongst self-determining peoples.

that Indigenous peoples have pursued to enhance their capacity for self-determination. They are: constitutional recognition of Indigenous nationhood, self-government, co-management, consultation and electoral empowerment. The second subsection illustrates how Indigenous peoples have used combinations of these institutional options in tandem with more oppositional and confrontational tactics to pursue their struggles for self-determination in a distinctively relational manner.

### III. Relational Self-Determination in Practice

#### A. Institutional Options

##### i. *Constitutional Recognition of Indigenous Nationhood*

Indigenous peoples frequently seek formal constitutional recognition *as nations* with the right to self-determination. Recognition of Indigenous nationhood has both symbolic and substantive dimensions. Symbolically, recognition calls for Indigenous peoples to be acknowledged as the political equals of other self-determining peoples. Simultaneously, it encourages the repudiation of colonial assumptions and policies of Indigenous inferiority, subordination and assimilation. Substantively, recognition is a call for Indigenous empowerment through a fundamental reconfiguration of democratic rights and institutions, and a redistribution of decision-making authority in democratic states.

Indigenous peoples have secured constitutional recognition in a number of states worldwide, but only in Bolivia and Ecuador have they been recognized explicitly as nations. Article 1 of the Ecuadorian Constitution (2008) recognizes the plurinational character of the state, and Indigenous nations are explicitly recognized in Articles 56 and 57.<sup>33</sup> Similarly, plurinationality and Indigenous nationhood are recognized in Articles 1 and 30 of the Bolivian Constitution (2009).<sup>34</sup> Other Latin American constitutions, including those of Brazil, Peru, Columbia, Paraguay, Mexico, Nicaragua and Venezuela, have accorded a more muted form of recognition to their Indigenous communities and to the multiethnic and pluricultural character of their societies.<sup>35</sup> Outside

<sup>33</sup> "Republic of Ecuador: Constitution of 2008" (31 January 2011) arts 1, 56, 57, online: *Georgetown University, Political Database of the Americas* <pdba.georgetown.edu/Constitutions/Ecuador/english08.html> [perma.cc/D9UQ-5X5H] [Ecuador, *Constitution of 2008*]. See Lupien, *supra* note 5 at 780.

<sup>34</sup> "Republic of Bolivia: Constitution of 2009" (5 July 2011) arts 1, 30, online: *Georgetown University, Political Database of the Americas* <pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html> [perma.cc/AYL3-X92C] [Bolivia, *Constitution of 2009*]. See Lupien, *supra* note 5 at 786.

<sup>35</sup> Rodolfo Stavenhagen, "Indigenous Peoples and the State in Latin America: An Ongoing Debate" in Rachel Sieder, ed, *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (New York: Palgrave MacMillan, 2002) 24 at 32–34 [Stavenhagen]; Donna Lee Van Cott, "Turning Crisis Into Opportunity: Achievements of Excluded Groups in the Andes" in Paul W Drake & Eric Hershberg, eds, *State and Society in Conflict: Comparative Perspectives on Andean Crises* (Pittsburgh: University of Pittsburgh

Latin America, the Sami have secured constitutional recognition as an Indigenous people of Norway.<sup>36</sup> In Canada, section 35 of the *Constitution Act, 1982* recognizes Indian, Inuit and Metis as Aboriginal peoples whose Aboriginal and treaty rights are constitutionally affirmed and protected.<sup>37</sup> The United States is somewhat unique in that the sovereignty and nationhood of Indigenous peoples is recognized as inherent, finding its source outside of the American Constitution. However, as a matter of constitutional practice, Indigenous peoples are recognized as domestic dependent nations, whose sovereignty is circumscribed and limited by federal and state legislative authority.<sup>38</sup> New Zealand is another interesting case. Although the country has no written constitution, the Maori enjoy a quasi-constitutional form of recognition through the *Treaty of Waitangi*, which is widely regarded as one of the nation's founding political documents.<sup>39</sup>

Constitutional recognition is sometimes dismissed as empty symbolism, or worse, as a form of cooptation, but there are several factors that count in its favour.<sup>40</sup> Many Indigenous peoples have attached significant value to the symbolic dimension of recognition, as evidenced by how long and hard they have struggled to secure it.<sup>41</sup> Even a brief look back in history can help us appreciate the significance of such an achievement. In Latin America, for example, Indigenous peoples who were systematically targeted by state policies that denied, denigrated and aggressively undermined their distinctive identities have now been recognized as nations with the right to self-determination.<sup>42</sup> Beyond its symbolic value, constitutional recognition has frequently been a catalyst for substantive measures that have enhanced the capacity for Indigenous self-determination. Such measures include self-government, linguistic and cultural rights, guaranteed forms of political representation, collective land rights and the operation of Indigenous

---

Press, 2006) 157 at 167–69.

<sup>36</sup> “The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in May 2018” (last visited 17 April 2019) art 108, online (pdf): *Stortinget* <[www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf](http://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf)> [perma.cc/4RYG-SD4E] [Norway, *Constitution*].

<sup>37</sup> *Constitution Act, 1982*, RSC 1985, s 35 [*Constitution, 1982*].

<sup>38</sup> Francis Paul Prucha, *The Great Father: The United States Government and the American Indian* (Lincoln: University of Nebraska Press, 1986) at 390–92 [Prucha]; Charles F Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven: Yale University Press, 1987) at 53–86 [Wilkinson].

<sup>39</sup> For additional background on this treaty, see Matthew SR Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008) at 234–93 [Palmer].

<sup>40</sup> For a root and branch critique of recognition-based approaches to Indigenous self-determination, see Coulthard, *Red Skin*, *supra* note 9.

<sup>41</sup> See e.g. *R v Sparrow*, [1990] 1 S.C.R. 1075 at 1105, [1990] S.C.J. No. 49 [*Sparrow*].

<sup>42</sup> See e.g., Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (Pittsburgh: University of Pittsburgh Press, 2000) at 269 [Van Cott, “Friendly Liquidation”]; Lupien, *supra* note 5 at 791–92.



customary law.<sup>43</sup> Constitutional recognition may also serve as a focal point for progressive legislative and judicial remedies. In Canada, Colombia and the United States, for example, Indigenous peoples have used constitutional recognition to advance their rights via litigation. Alternatively, in countries like New Zealand, Finland, Ecuador and Bolivia, constitutional recognition has been paired with the legislative advancement of Indigenous territorial, linguistic, cultural and representation rights.<sup>44</sup>

Constitutional recognition may also serve as an effective constraint on state actions that adversely impact Indigenous status, rights and freedoms. For example, the Supreme Court of Canada held that while governments can regulate Aboriginal constitutional rights, their authority to do so is tightly circumscribed.<sup>45</sup> This contrasts sharply with countries like Australia, where the absence of constitutional recognition leaves governments with more room to regulate, or even extinguish, Indigenous rights.<sup>46</sup> All the same, one should not be too sanguine about the impact of constitutional recognition. Constitutions do not come with guarantees that their Indigenous provisions will be faithfully implemented, nor do they offer total immunity from state oversight and regulation, even when it relates to powers of self-government. Moreover, constitutions can be, and in the case of less robustly-consolidated democracies frequently are, rewritten, ignored or swept aside entirely with a change in government or regime, as past experience in Colombia, Ecuador and Bolivia attest.<sup>47</sup> Nevertheless, constitutional recognition is one effective option in the broader struggle for Indigenous self-determination.

## ii. *Self-Government*

Through self-government, Indigenous peoples seek the capacity to design and control a set of governing institutions that reflect their own distinctive identities and cultures – institutions that are directly accountable to their own citizens and more responsive to their local needs and priorities. Self-government is not about gaining advisory powers or the right to be consulted

<sup>43</sup> See Broderstad, “The Case of the Sami”, *supra* note 5 at 74–78; Palmer, *supra* note 39 at 291–93; Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can Bar Rev 196; Van Cott, “Latin America’s Indigenous Peoples”, *supra* note 5 at 132.

<sup>44</sup> Slattery, *supra* note 5; Wilkinson, *supra* note 38; Lupien, *supra* note 5 at 791–93; Donna Lee Van Cott, “Multiculturalism Versus Neoliberalism in Latin America” in Will Kymlicka & Keith Banting, eds, *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (New York: Oxford University Press, 2006) 272 at 285 [Van Cott, “Multiculturalism”].

<sup>45</sup> On the constitutional recognition of Aboriginal rights in Canada, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). The Supreme Court of Canada’s framework for limiting government infringements on Aboriginal rights was first articulated in *Sparrow*, *supra* note 41 at 1077–180.

<sup>46</sup> Peter H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005) at 279–334.

<sup>47</sup> Gabriel L Negretto, “Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America” (2012) 46:4 L & Soc’y Rev 749 at 749–779.

by state policy-makers. It is about Indigenous authorities gaining the right to set their own policy agendas and make decisions for their communities that are substantially shielded from external scrutiny or interference. Not surprisingly, states generally resist demands for self-government, and even when these powers are granted, they tend to be limited and tightly circumscribed.<sup>48</sup> Nevertheless, there are a number of examples of self-government arrangements that have transferred significant decision-making authority to Indigenous peoples. For example, in the United States, tribal nations have the authority to draft their own constitutions, design their own governing institutions, exercise a wide variety of legislative powers, including powers of taxation, and establish their own courts of law. Many tribes have utilized these powers to generate impressive advances in the area of economic and social development.<sup>49</sup> In Canada, similar, but less extensive, models of self-government have been negotiated by the First Nations in the Yukon, Inuit of Nunatsiavut and Nisga'a and Tsawwassen nations in British Columbia. Elsewhere in Canada, the James Bay Cree of northern Québec and the Sechelt of British Columbia exercise an enhanced municipal form of self-governance. Additionally, in Nunavut, the Inuit exercise a form of self-rule via institutions of public government that serve both Inuit and non-Inuit people in the region.<sup>50</sup>

In Latin America, the Kuna of Panama have enjoyed a considerable degree of territorial self-government since the 1930s, and two other groups, the Embera-Wounaan (1983) and Ngobe-Bugle (1997), were granted a similar form of autonomy.<sup>51</sup> Recognition of Indigenous self-government was also part of the most recent Bolivian and Ecuadorian constitutions.<sup>52</sup> The more robust Bolivian constitution included territorial autonomy, control over leadership selection and governing norms, jurisdiction over economic, social and cultural development and recognition of Indigenous authority in the area of dispute resolution and the administration of justice.<sup>53</sup> However, it is too early to tell

---

<sup>48</sup> Kiera Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalism" in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism* (Peterborough: Broadview Press, 2003) 167 at 184-87; Van Cott, "Multiculturalism", *supra* note 44 at 277-78; Stavenhagen, *supra* note 35 at 34-35.

<sup>49</sup> Jorgensen, *supra* note 5.

<sup>50</sup> On public government in Nunavut, see Natalia Loukacheva, *The Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut* (Toronto: University of Toronto Press, 2007). Information on existing self-government agreements in Canada be found on "Self-government" (12 July 2018), online: *Government of Canada* <[www.rcaanc-cirmac.gc.ca/eng/1100100032275/](http://www.rcaanc-cirmac.gc.ca/eng/1100100032275/)> [perma.cc/Z6ES-7LEV]. For details on other examples, see Catt & Murphy, *supra* note 5 at 53-105.

<sup>51</sup> Willem Assies, "Two Steps Forward, One Step Back: Indigenous Peoples and Autonomies in Latin America" in Marc Weller & Stefan Wolff, eds, *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (London: Routledge, 2005) 156 at 162-63 [Assies].

<sup>52</sup> Ecuador, *Constitution of 2008*, *supra* note 33 art 57; Bolivia, *Constitution of 2009*, *supra* note 34 arts 2, 289-290; see also Lupien, *supra* note 5 at 784-86.

<sup>53</sup> Raúl L Madrid, *The Rise of Ethnic Politics in Latin America* (New York: Cambridge University Press, 2012) at 176-77 [Madrid]; Lupien, *supra* note 5 at 785, 788-89.

whether these models of self-government will fully live up to their promise in practice.<sup>54</sup> In Nicaragua, a multi-ethnic model of regional autonomy was supposed to provide a measure of self-government to the Indigenous peoples of the Atlantic Coast. Unfortunately, as a result of implementation issues, inter-group conflict, unsympathetic central governments and mestizo demographic dominance in the autonomous regions combined with limited decision-making authority, many now consider this model a failure.<sup>55</sup>

Examples of self-government outside of the Americas and the circumpolar north are rare, and those that do exist generally come with an even more restricted range of powers. In Australia, Aboriginal and Torres Strait Islanders elect representatives to a regional body, the Torres Strait Regional Authority (TSRA). The powers of the TRSA are mainly limited to program design, delivery and monitoring and advising the Australian government on Indigenous policy issues in the region.<sup>56</sup> In New Zealand, there have been calls for greater Maori political autonomy,<sup>57</sup> but territorial self-government remains a remote possibility in a nation firmly committed to the principle of indivisible parliamentary sovereignty.<sup>58</sup> On the other hand, the ongoing settlement of Maori grievances under the *Treaty of Waitangi* has placed significant resources into the hands of Maori communities who elect councils (*runanga*) to manage these resources on their behalf. While these settlements are not without their critics, others characterize them as vehicles of a new “tribal economic sovereignty” that augment the capacity of the Maori to advance their interests and priorities at the local level while positioning them as significant and influential political players in the national and international economy.<sup>59</sup>

### iii. Co-Management

In co-management institutions, Indigenous representatives sit down

<sup>54</sup> See Jason Tockman, “The Hegemony of Representation: Democracy and Indigenous Self-government in Bolivia” (2017) 9:2 J Politics in Latin America 121. In this article, Tockman argues that the progress of self-government in Bolivia has been limited.

<sup>55</sup> Assies, *supra* note 51 at 167–69; Miguel Gonzales & Dolores Figueroa, “Regional Autonomy on the Caribbean Coast” in David Close, Salvador Marti i Puig & Shelley A McConnell, eds, *The Sandinistas and Nicaragua Since 1979* (London: Lynne Rienner Publishers, 2012) 161 at 175–81 [Gonzales & Figueroa].

<sup>56</sup> Catt & Murphy, *supra* note 5 at 55–57.

<sup>57</sup> Mason Durie, *Nga Kahui Pou: Launching Maori Futures* (Wellington, NZ: Huia Publishers, 2003) at 100–01; O’Sullivan, *supra* note 22 at 1–8, 75–98.

<sup>58</sup> Palmer, *supra* note 39 at 283–85.

<sup>59</sup> On tribal economic sovereignty see Professor Sir Robert Te Kotahi Mahuta, “Tribal Sovereignty: Fact or Fiction?” (Nation Building and Maori Development in the 21st Century delivered at the School of Maori and Pacific Development, University of Waikato, 2001); Manuka Henare, “Lasting Peace and Good Life: Economic Development and the ‘Ata noho’ Principle of Ti Tiriti o Waitangi” in Veronica MH Tawhai & Katarina Gray-Sharp, eds, *Always Speaking: The Treaty of Waitangi and Public Policy* (Wellington: Huia Publishers, 2013) 422. Critics include, Kelsey, *supra* note 9; Elizabeth M Rata, “The Theory of Neotribal Capitalism” (1999) 22:3 Rev 231; Elizabeth M Rata, *A Political Economy of Neotribal Capitalism* (Lanham: Lexington Books, 2000).

with government representatives on a management board with decision-making authority in a particular jurisdiction or policy area – for example, land-use planning or wildlife and natural resource development. Indigenous representation on these boards is generally guaranteed, and in many cases, equal to that of the government appointees. Co-management boards usually operate within a broader legislative framework that sets limits on their decision-making powers. Their authority tends to be restricted to devising management plans or offering policy advice to governments, who ultimately retain the final authority to accept, revise or reject the boards' decisions.<sup>60</sup> Leaving the final decision in the hands of the government raises an obvious concern that co-management is not a vehicle for self-determination, but another form of colonial control. While there is an element of truth to this concern, not all co-management bodies are created equally. Some of these institutions have placed real power in the hands of Indigenous decision-makers.

In Canada, co-management is employed extensively and is a common feature of negotiated land and self-government agreements. Co-management institutions are especially prominent in northern Canada, for example, in the Inuit territories of Nunavut, Nunavik and Nunatsiavut. Provinces like British Columbia have also negotiated these arrangements with a number of First Nations, including the Nuu-chah-nulth and Haida on the west coast, and the Nisga'a in the northwestern interior.<sup>61</sup> While Canada has had its share of co-management failures (the arrangements under the 1975 James Bay and Northern Quebec Agreement are a good example), there have also been successes.<sup>62</sup> For example, Graham White's research suggests that Indigenous peoples participating in co-management institutions in Canada's far north have gained significant influence over key issues, such as land-use planning, wildlife management and environmental protection.<sup>63</sup> Other successful examples include the Porcupine Caribou Management Board covering parts of the Yukon and Northwest Territories and the Whitefish Lake Cooperative Management Agreement in Alberta.<sup>64</sup>

Co-management institutions have also been used to facilitate the collaborative management of national parks and protected areas in countries

---

<sup>60</sup> See generally Javier Beltrán, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (Cambridge: The World Conservation Union, 2000) [Beltrán]; Catt & Murphy, *supra* note 5 at 89–94.

<sup>61</sup> David C Natcher, "Co-Management: An Aboriginal Response to Frontier Development" (2001) 23 *Northern Rev* 146 [Natcher]; Claudia Notzke, "A New Perspective in Aboriginal Natural Resource Management: Co-management" (1995) 26:2 *Geoforum* 187.

<sup>62</sup> Harvey Feit & Robert Beaulieu, "Voices from a Disappearing Forest: Government, Corporate, and Cree Participatory Forestry Management Practices" in Colin Scott, ed, *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: University of British Columbia Press, 2001) 119 at 119–48.

<sup>63</sup> Graham White, "Treaty Federalism in Northern Canada: Aboriginal-Government Land Claims Boards" (2003) 32:3 *Publius* 89 at 98–100, 108–10.

<sup>64</sup> See Natcher, *supra* note 61 at 151–57.

like Australia and New Zealand, a practice that seems to be increasing in parts of Latin America.<sup>65</sup> New Zealand is an interesting case. In the past, co-management in New Zealand tended to be relatively weak and state-centric, but recently negotiated institutions, such as the Waikato River Authority and the *Te Urewera* Board, have broken this trend in a number of ways. Perhaps the best example is the *Te Urewera* Board that was created in 2014 to provide for the co-management of the *Te Urewera* natural area between the Crown and the *Tuhoe* people in the country's central north island. Three significant features of this institution should be mentioned. First, the board has the final authority to develop and approve the *Te Urewera* conservation and management plan (in other words, no further government review or approval is required). Second, following a three-year transitional period with equal Crown-*Tuhoe* representation, the *Tuhoe* will gain the right to appoint two thirds of the board's members providing them with effective control of *Te Urewera* management. Finally, the legislation that created the board explicitly acknowledges the special historical, cultural and spiritual value of *Te Urewera* to the *Tuhoe* people, provides for the inclusion of *Tuhoe* conceptions of management in all board decisions and stipulates that *Tuhoe* culture and traditions are to be respected and accommodated in all board decision-making. In sum, the *Te Urewera* Board demonstrates that when properly configured, co-management can offer Indigenous peoples real and significant decision-making powers in an institution that is informed by, and respectful of, their distinctive histories, cultures and management priorities.<sup>66</sup>

#### iv. *Consultation*

Consultation refers to a process where decision-makers engage with Indigenous communities to gain their input on government action that has the potential to impact their rights or interests. Consultation comes in a variety of different forms that can be organized along a spectrum. At the weaker end of the spectrum, consultation may involve notifying a community about an upcoming development project or discussing its potential impacts without implementing suggestions as a result of the consultation. A stronger form of consultation might entail engaging a community in negotiations over the terms of a proposed project, actively seeking to accommodate their concerns, or in some cases, seeking their full consent before a project proceeds.<sup>67</sup>

<sup>65</sup> See H Ross et al, "Co-management and Indigenous Protected Areas in Australia: Achievements and Ways Forward" (2009) 16:4 *Australian J Environmental Management* 242; Beltrán, *supra* note 60.

<sup>66</sup> Jacinta Ruru, "Te Urewera Settlement Act" (October 2014) *Maori L Rev*, online: <maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/> [perma.cc/JF4Z-RW3H]. For discussion of the Waikato River Authority, see Jeremy Baker, "The Waikato-Tainui Settlement Act: A New High-Water Mark for Natural Resources Co-management" (2013) 24:1 *Colo J Intl Envtl L & Pol'y* 163 at 189-93.

<sup>67</sup> The idea of a spectrum of consultation is drawn from the Supreme Court of Canada's decision in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 43-49 [*Haida*].

Consultation differs from co-management in a number of ways. First, consultation tends to be much less rigorously institutionalized, proceeding on a more *ad hoc* and case-by case basis, and thus, is more easily bypassed in practice. Second, consultation tends to be more reactive than proactive in the sense that Indigenous peoples are placed in the position of responding to initiatives designed and driven by governments or other outside interests. For this reason, consultation usually offers Indigenous peoples less opportunity to set the agenda or play a direct role in deciding matters on which their input is being sought. While these differences generally appear across cases, there are exceptions to the rule. In certain cases, the similarities may be even greater than the differences, as illustrated in some of the examples below.

Numerous countries have committed themselves to consulting with Indigenous peoples, and have even given that commitment the force of law, but there is considerable variation in how this commitment has been upheld in practice. In Latin America, for example, several jurisdictions have assumed an obligation to consult with Indigenous peoples by ratifying international legal instruments such as International Labour Organization (ILO) Convention 169 or UNDRIP.<sup>68</sup> Countries such as Columbia, Bolivia, Brazil, Ecuador and Peru have, in turn, enshrined this obligation in their domestic constitutions. However, while in some cases Indigenous peoples have used these legal obligations to defend their rights to land and self-determination, critics have reported significant shortcomings in the implementation of the duty to consult.<sup>69</sup> There are numerous examples of governments who have ignored or actively violated their commitments, especially in the context of lucrative development projects deemed essential to the national interest.<sup>70</sup> Similar criticisms have been levelled against Russia's *Act Relating to Guarantees of the Rights of Small Indigenous Peoples of the Russian Federation* (1999).<sup>71</sup> This act contains formal promises relating to consultation and control in relation to Indigenous land but, in practice, has yielded no real Indigenous influence over government activity.<sup>72</sup>

<sup>68</sup> International Labour Organization, *Indigenous and Tribal Peoples Convention*, UNILOOR, 76th ILC Sess (1989), online: <[www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169)> [perma.cc/74WQ-EN89]; UNDRIP, *supra* note 3.

<sup>69</sup> María Clara Galvis, *The Right of Indigenous Peoples to Prior Consultation: The Situation in Bolivia, Colombia, Ecuador, and Peru* (Washington: Oxfam, 2011) [Galvis]; Theodor Rathgeber, "Indigenous Struggles in Colombia: Historical Changes and Perspectives" in Nancy G Postero & Leon Zamosc, eds, *The Struggle for Indigenous Rights in Latin America* (Brighton, Sussex Academic Press, 2004) 105 at 107-10, 116-23 [Rathgeber]; Manuela Picq, "Self-Determination as Anti-Extractivism: How Indigenous Resistance Challenges World Politics" in Marc Woons, ed, *Restoring Indigenous Self-Determination: Theoretical and Practical Approaches* (Bristol: E-International Relations, 2015) 19 at 20-21 [Picq].

<sup>70</sup> Picq, *supra* note 69 at 20-21; Van Cott, "Friendly Liquidation", *supra* note 42 at 272; Galvis, *supra* note 69; Rathgeber, *supra* note 69 at 107-10, 116-23.

<sup>71</sup> Eva Josefsen, *The Saami and the National Parliaments: Channels for Political Influence* (New York: United Nations Development Programme, 2010) at 10.

<sup>72</sup> *Ibid.*

In contrast, a relatively robust regime of consultation exists in Canada. The Supreme Court of Canada has upheld a constitutional “duty to consult” whenever the Aboriginal or treaty rights of Indigenous peoples may be adversely impacted by government actions.<sup>73</sup> The nature and extent of the duty to consult depends on the strength of the Aboriginal rights claim and the severity of the potentially adverse effect of the proposed government activity.<sup>74</sup> Thus, governments will not always be required to accommodate Aboriginal concerns. But, in its stronger forms, the duty to consult may require negotiation, Aboriginal involvement in decision-making, substantive changes to the proposed policy or activity and possibly, the full consent of the Aboriginal community in question.<sup>75</sup> However, it is important to note that consultation has its limitations and governments in Canada frequently fail to live up to their constitutional responsibilities. Court decisions have, on the other hand, motivated governments across the country to develop specific policies for consulting with Aboriginal peoples and judges have been willing to stand in the way of government projects where the proper standard of consultation has not been met.<sup>76</sup>

Consultation is also one of the functions of the Sami Parliaments in Norway, Finland and Sweden, but these institutions differ in a number of ways from the examples described above. They are established institutions with formal legal status and the Sami directly elect their members in each country. They also enjoy some limited powers beyond consultation, for example, in funding allocation and policy implementation in the area of Sami language, culture and education. Moreover, the Sami Parliaments are authorized to initiate proposals or raise issues for discussion, rather than simply reacting to government initiatives. Evaluations of the actual influence of the Sami Parliament have been somewhat mixed. Some observers have suggested that their role has been limited, while others have made a convincing case that they have had a significant impact on government policy and are an effective means of advancing Sami goals through a broader relational strategy of self-determination.<sup>77</sup>

<sup>73</sup> Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009); Haida, *supra* note 67.

<sup>74</sup> Haida, *supra* note 67 at paras 39–51.

<sup>75</sup> *Ibid.*

<sup>76</sup> See e.g. *Tseil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153.

<sup>77</sup> Cf Broderstad, “The Case of the Sami”, *supra* note 5 at 78; Patrik Lantto & Ulf Mörkenstam, “Sami Rights and Sami Challenges” (2008) 33:1 *Scandinavian J History* 26 at 38–39, 41–42; Christian Jakob Burmeister Hicks & Andé Somy, “Sami Responses to Poverty in the Nordic Countries” in Robyn Eversole, John-Andrew McNeish & Alberto D Cimadamore, eds, *Indigenous Peoples and Poverty: An International Perspective* (London: Zed Books, 2005) 274 at 281.

## v. Electoral Empowerment

Electoral participation is not often associated with the goal of Indigenous self-determination. On the contrary, voting and collective self-determination tend to be regarded as mutually exclusive, if not entirely antithetical, modes of Indigenous political empowerment. Indigenous skepticism towards electoral participation has many sources, including the long history of state manipulation and outright denial of their democratic rights. Indigenous peoples have frequently been excluded from the electoral franchise, both as a matter of official state policy and through a host of unofficial measures. These include economic and educational barriers to registration, discriminatory electoral districting, unfavourable access to polling stations or a failure to provide ballot instructions in Indigenous languages. Together, these measures severely restricted Indigenous peoples capacity to participate.<sup>78</sup> In many countries, Indigenous access to the electoral franchise was conditional on the forfeiture of land and treaty rights. Access was granted with the aim of co-opting Indigenous leaders, thereby short-circuiting movements in favour of greater Indigenous autonomy.<sup>79</sup> This history of discriminatory enfranchisement feeds the impression that electoral inclusion is, at best, a distraction from the goal of self-determination and, at worst, a means of legitimizing colonial states that remain dedicated to the end of Indigenous assimilation.<sup>80</sup>

Indigenous disaffection with electoral politics is aggravated by the perception that mainstream political parties have done little to include Indigenous candidates or prioritize Indigenous concerns in their legislative platforms, and that electoral democracy has largely failed to produce significant improvements in Indigenous socioeconomic conditions.<sup>81</sup> A parallel concern, in countries where Indigenous peoples make up only a small fraction of the population, like in Canada, the United States and Australia, is that electoral

<sup>78</sup> Augie Fleras, "From Social Control towards Political Self-Determination? Maori Seats and the Politics of Separate Maori Representation in New Zealand" (1985) 18:3 Can J Political Science 551 at 554-55; Van Cott, "Latin America's Indigenous Peoples", *supra* note 5 at 129-30; Jeanette Wolfley, "Jim Crow, Indian Style: The Disenfranchisement of Native Americans" (1991) 16:1 Am Indian L Rev 167 [Wolfley]; Tomei, *supra* note 17 at 32; Yashar, *Contesting Citizenship*, *supra* note 21 at 37; José Antonio Lucero, *Struggles of Voice: The Politics of Indigenous Representation in the Andes* (Pittsburgh: University of Pittsburgh Press, 2008) at 38-41 [Lucero].

<sup>79</sup> Darlene Johnston, "First Nations and Canadian Citizenship" in William Kaplan, ed, *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 349 at 353-64; Wolfley, *supra* note 78 at 168-92.

<sup>80</sup> See e.g. Kiera Ladner, "The Alienation of Nation: Understanding Aboriginal Electoral Participation" (2003) 5:3 Electoral Insight 21 at 23-25; Mason Durie, *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (Auckland: Oxford University Press, 1998) at 98.

<sup>81</sup> Lucero, *supra* note 78 at 42; Madrid, *supra* note 53 at 165-66; Yashar, *Contesting Citizenship*, *supra* note 21 at 142-43; Deborah J Yashar, "Indigenous Politics in the Andes: Changing Patterns of Recognition, Reform, and Representation" in Scott Mainwaring, Ana Maria Bejarano & Eduardo Pizarro Leongomez, eds, *The Crisis of Democratic Representation in the Andes* (Stanford: Stanford University Press, 2006) 257 at 267-68 [Yashar, "Indigenous Politics"].



participation will yield no real political influence in institutions dominated by non-Indigenous representatives.<sup>82</sup>

Despite these concerns, Indigenous peoples around the world have been availing themselves of the electoral option, and in many cases, this has proven to be an effective means of advancing their interests. Some of the best examples come from Latin America, where the formation of Indigenous political parties has led to a dramatic increase in the number of Indigenous representatives at the local, regional and national levels. This, in turn, has produced a number of equally significant political outcomes. These outcomes include the insertion of previously neglected Indigenous demands onto national political agendas, the rewriting of national constitutions to recognize Indigenous rights and identities and the introduction of policies that have benefited Indigenous peoples socially, culturally and economically. Some of these successes have occurred in countries like Colombia, Venezuela and Guyana, where Indigenous peoples represent a very small percentage of the total population. But, the most significant advances have occurred in countries like Ecuador and Bolivia, where demographic strength has translated into greater political capital.<sup>83</sup> Bolivia had the most dramatic results when it elected its first Indigenous president, Evo Morales, in 2005 and again in 2009 and 2014. Morales' party, the Movement Towards Socialism (MAS), captured the majority of seats in the Constituent Assembly in 2006, where it helped shape a new Constitution (2009) that contained breakthrough provisions for Indigenous rights. These provisions included collective rights to land and natural resources, territorial autonomy and self-government, recognition of the pluricultural and plurinational character of Bolivian society and official status for Indigenous languages. As president, Morales appointed Indigenous representatives to influential positions in cabinet and senate, and introduced numerous policies in the area of health, education, literacy, land reform and employment access that have directly benefitted Indigenous peoples.<sup>84</sup>

Developments in Ecuador have been somewhat less spectacular, and the fortunes of Pachakutik, the main Indigenous political party, have declined

<sup>82</sup> Austl, New South Wales, Standing Committee on Social Issues, *Enhancing Aboriginal Political Representation: Inquiry into Dedicated Seats in the New South Wales Parliament* (Report No 18) (Sydney: Standing Committee on Social Issues, 1998) at 50; James Malloy & Graham White, "Aboriginal Participation in Canadian Legislatures" in Robert J Fleming & JE Glenn, eds, *Fleming's Canadian Legislatures*, 11th ed (Toronto: University of Toronto Press, 1997) 60 at 65.

<sup>83</sup> Madrid, *supra* note 53 at 3, 107, 168; Donna Lee Van Cott, *From Movements to Parties in Latin America: The Evolution of Ethnic Politics* (New York: Cambridge University Press, 2005) at 228–32; Van Cott, "Latin America's Indigenous Peoples", *supra* note 5 at 133–34; Donna Lee Van Cott, *Radical Democracy in the Andes* (New York: Cambridge University Press, 2008) at 1 [Van Cott, *Radical Democracy*].

<sup>84</sup> Madrid, *supra* note 53 at 51–52, 175–77; Lupien, *supra* note 5 at 785–89. Morales also came into conflict with Indigenous groups in the country, not all of whom have benefitted from his policies. See Alexandra Ellerbeck & Benjamin Soloway, "The Limits of Evo Morales's Identity Politics" (29 February 2016), online: *Foreign Policy* <[foreignpolicy.com/2016/02/29/the-limits-of-evo-morales-identity-politics](http://foreignpolicy.com/2016/02/29/the-limits-of-evo-morales-identity-politics)> [perma.cc/BD7W-FXWK].

significantly in recent years. Nevertheless, Pachakutik continues to be an active player in Ecuadorian politics and has done much to advance the interests of Indigenous peoples in Ecuador. As in Bolivia, this political party has helped elevate Indigenous representatives to influential positions in local, regional and national politics, and by participating in constitutional reform processes, has secured greater recognition of collective Indigenous rights, including the right to self-government.<sup>85</sup> Pachakutik's efforts have also brought significant dividends on the policy front. As Madrid concludes:

Many of the traditional demands of the Indigenous movement, from multicultural education to the recognition of Ecuador as a plurinational state, have been achieved. Progress has even been made in addressing ethnic discrimination and inequality in the last decade ... A variety of actors have helped realize these achievements, but Pachakutik has played a crucial role in placing these issues on the policy agenda. Thus, Pachakutik has left an enduring mark on Ecuadorian politics that far outshines its electoral achievements.<sup>86</sup>

Outside Latin America, one of the best examples of Indigenous electoral impact comes from New Zealand. There, a system of dedicated Maori seats and a mixed member proportional representation system have helped translate Maori demographic strength into a steadily increasing number of Maori Members of Parliament (MPs). In the most recent election in 2017, candidates self-identifying as Maori captured 29 out of 120 seats in Parliament, a number which includes 19 MPs in the governing coalition and 6 cabinet ministers.<sup>87</sup> Greater presence has, in turn, meant greater influence. For example, Maori MPs have risen to occupy influential positions in cabinet, Maori-controlled political parties have negotiated their way into coalition governments and political parties across the ideological spectrum have adapted their legislative agendas to compete for the Maori vote. As Maaka and Fleras conclude: "All political parties that seek power must interact with the Maori constituency and not just have a token Maori representation [sic] or relegate Maori to an advisory capacity."<sup>88</sup> On the policy front, Maori MPs have worked with the

<sup>85</sup> Madrid, *supra* note 53 at 101–07, 177; Van Cott, *Radical Democracy*, *supra* note 83 at 48–50; Leon Zamosc, "The Ecuadorian Indian Movement; From Politics of Influence to Politics of Power" in Nancy G Postero & Leon Zamosc, eds, *The Struggle for Indigenous Rights in Latin America* (Brighton, Sussex Academic Press, 2004) 136 at 136–37.

<sup>86</sup> Madrid, *supra* note 53 at 107.

<sup>87</sup> "MMP turns 25: more women, Asian, and Maori MPs" (18 November 2018), online: RNZ <[www.rnz.co.nz/national/programmes/the-house/audio/2018671578/mmp-turns-25-more-women-asian-and-maori-mps?](http://www.rnz.co.nz/national/programmes/the-house/audio/2018671578/mmp-turns-25-more-women-asian-and-maori-mps?)> [perma.cc/F3YF-Z8]6; "New Zealand Election Results" (last visited 28 July 2019), online: *Elections: Electoral Commission* <[electionresults.govt.nz/electionresults\\_2017/](http://electionresults.govt.nz/electionresults_2017/)> [perma.cc/2MPE-QFSZ]; "Maori Ministers and their portfolio applications" (25 October 2017), online: *teao MaoriNews* <[teaomaori.news/maori-ministers-and-their-portfolio-allocations](http://teaomaori.news/maori-ministers-and-their-portfolio-allocations)> [perma.cc/W3T7-Z8EZ]; "Who are our Maori Members of Parliament Now?" (24 September 2017), online: *teao MaoriNews* <[teaomaori.news/who-are-our-maori-members-parliament-now?](http://teaomaori.news/who-are-our-maori-members-parliament-now?)> [perma.cc/V3G5-QFNR].

<sup>88</sup> Maaka & Fleras, *supra* note 5 at 104. See also Ann Sullivan, "The Treaty of Waitangi and Social Well-Being: Justice, Representation, and Participation" in Michael Belgrave et al, eds, *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005) 123 at 126–27.

government to repeal legislation prejudicial to Maori customary rights to the foreshore and seabed, and have been effective in fending off government threats to eliminate the dedicated Maori seats. Maori MPs have pushed governments to grant official status to the Maori language, maintain robust environmental protections in the resource management process, target Maori socio-economic deprivation and involve tribal decision-making bodies as partners in the goals of Maori social, economic and political development. Perhaps, most significantly, Maori MPs have played a key role in the creation of a nationwide framework for addressing Maori grievances under the *Treaty of Waitangi* – a process that has had a major transformative effect on New Zealand’s social, economic and political landscape.<sup>89</sup>

Seeing the advantages of electoral empowerment should not, of course, blind us to its limitations, particularly in countries where demographics are likely to restrict the level of Indigenous representation. A small number of Indigenous representatives in a legislature dominated by non-Indigenous parties and politicians will struggle to have their voices heard, let alone influence government policy-making. Even in cabinet, Indigenous ministers will find themselves constrained by the strictures of party discipline and executive solidarity, the need to work collaboratively with ministerial colleagues motivated by different priorities and electoral constituencies and the normal give-and-take bargaining of mass-scale democratic politics.<sup>90</sup>

Even countries with more favourable Indigenous demographics are not immune to these problems. For example, the successes of Indigenous political parties in Ecuador and Bolivia have depended heavily on their willingness to modify their political platforms to attract white and mestizo voters, whose legislative priorities are not always consonant with those of their Indigenous supporters. The difficulty of this balancing act is emphasized by the fact that Indigenous constituencies in both countries harbour diverse, and not always mutually compatible, interests.<sup>91</sup> As a result, Indigenous political parties often find it difficult, if not impossible, to address the demands of all their Indigenous supporters; sometimes they have to make difficult choices that disappoint, or even alienate, particular sectors of their broader constituency.<sup>92</sup> To simply dismiss electoral representation as irrelevant or antithetical to Indigenous interests, however, is to dismiss an institutional access point to political power that has paid real dividends to Indigenous peoples and proven particularly

<sup>89</sup> Tina Dahlberg, “Maori Representation in Parliament and Tino Rangatiratanga” (1996) 2:1 *He Pukenga Korero* 62 at 63–67, 70; Durie, *Tides of Maori*, *supra* note 18 at 127–28; Ann Sullivan, “Effecting Change Through Electoral Politics: Cultural Identity and the Maori Franchise” (2003) 112:3 *J Polynesian Society* 219 at 223–26.

<sup>90</sup> Murphy, “Indigenous Self-Determination”, *supra* note 5 at 204–05, 215–16.

<sup>91</sup> Yashar, “Indigenous Politics”, *supra* note 81 at 274–78; Madrid, *supra* note 53 at 58–62, 99–107, 185–86.

<sup>92</sup> Lucero, *supra* note 78 at 172–73, 183; Madrid, *supra* note 53 at 58–62, 99–107, 185–86; Yashar, “Indigenous Politics”, *supra* note 81 at 274–78, 280.

useful as part of a broader relational strategy of self-determination.

## B. Part of a Broader Strategy

While it is important to understand how different institutional options can advance the goal of Indigenous self-determination, considering these options in isolation may obscure the fact that their greatest effect is frequently achieved when they are used in combination. These combinations can be with one another, and with tactics that lie outside the traditional bounds of institutionalized autonomy and inclusion. Indigenous peoples have been the pioneers of this broader strategy and as the following examples attest, their tactics exhibit all of the core features of a relational approach to self-determination. These features include striving to exercise influence through multiple institutional channels and at multiple scales, both inside and outside state institutions; balancing cooperation and mutual accommodation with opposition and resistance; working towards context-specific solutions that suit the distinctive needs, capacities and circumstances of different Indigenous communities; and proceeding in a piecemeal and incremental manner that illustrates both a sense of realism in the face of the existing power imbalance and a sense of determination to continue the struggle in order to build on the modest successes they have achieved.

Across Latin America, Indigenous peoples have used a combination of means to advance their claims to self-determination. These means include social movement activity; asserting their rights in regional judicial bodies, like the Inter-American Court of Human Rights, and international legal forums, like the United Nations Working Group on Indigenous Populations; forming their own political parties; gaining representation in constitutional assemblies; and whenever necessary, resorting to confrontation and other forms of direct action.<sup>93</sup> In Bolivia and Ecuador, for example, Indigenous social movements initially advanced their agendas through mass mobilizations and protests, as well as the successful cultivation of regional and global support networks that helped sustain these domestic pressure tactics. Looking for additional tools, Indigenous leaders turned to electoral politics, forming their own political parties and gaining vital representation in constitutional assemblies, capturing local mayorships, establishing an effective presence in local, provincial and national legislatures, and in Bolivia, by securing the Bolivian presidency. Tensions have sometimes arisen over the combination of these different tools. But, on the whole, this multi-pronged strategy has proven to be very effective in transferring power to Indigenous peoples and securing

<sup>93</sup> See generally Van Cott, "Latin America's Indigenous Peoples", *supra* note 5; Yashar, *Contesting Citizenship*, *supra* note 21; Madrid, *supra* note 53; Lucero, *supra* note 78; Alison Brysk, *From Tribal Village to Global Village Indian Rights and International Relations in Latin America* (Stanford: Stanford University Press, 2000).

many of the symbolic and substantive demands associated with their broader claims to self-determination.<sup>94</sup>

What is also clear is that Indigenous peoples at the forefront of these struggles do not view the existing reforms as an endpoint, but as a platform upon which to consolidate, extend and push for further, and more thoroughly empowering, reforms. As one leader of the Ecuadorian Indigenous movement argued:

We have worked hard to achieve what is in the constitution, now we must continue to work hard to ensure that officials do their duty, as public servants, by respecting the constitution and its provisions. But now, we have more to build on. We can use what we have gained to ensure that our rights are respected.<sup>95</sup>

In the 1960s and 70s, Indigenous peoples in Canada and the United States pressured intransigent governments through litigation, protest, militant forms of direct action, media campaigns and political lobbying. These efforts led, in the United States, to the abandonment of tribal termination and the introduction of the Indian Self-Determination and Education Assistance Act (in 1975), and in Canada, to the demise of the assimilationist White Paper (in 1969) and the birth (in 1973) of a new federal policy for negotiating Indigenous claims to land and self-government.<sup>96</sup>

Looking more closely at Canada, Indigenous peoples capitalized on these successes by pushing the Canadian government to entrench Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, which secured constitutional protection for existing and future land and self-government agreements.<sup>97</sup> Constitutional recognition paved the way for a new federal policy recognizing an inherent right to Aboriginal self-government in 1995 and the successful litigation of Aboriginal rights, including rights to land and resource harvesting and the right to be consulted and treated honourably by federal and provincial governments in Canada.<sup>98</sup>

In Canada, there may be no better example of the successful application of a relational approach to self-determination than that of the James Bay

<sup>94</sup> Yashar, *Contesting Citizenship*, *supra* note 21 at 300–08; Van Cott, “Latin America’s Indigenous Peoples”, *supra* note 5 at 130–39; Madrid, *supra* note 53; Pamela Martin & Franke Wilmer, “Transnational Normative Struggles and Globalization: The Case of Indigenous Peoples in Bolivia and Ecuador” (2008) 5:4 *Globalization* 583.

<sup>95</sup> Lupien, *supra* note 5 at 792; Cf Van Cott, “Multiculturalism”, *supra* note 44 at 285.

<sup>96</sup> Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States* (New York: Routledge, 2006) at 57–59, 62–72, 182–93; Prucha, *supra* note 38 at 364–67, 374–80; Troy Johnson, Joane Nagel & Duane Champagne, *American Indian Activism: Alcatraz to the Longest Walk* (Urbana: University of Illinois Press, 1997).

<sup>97</sup> *Constitution, 1982*, *supra* note 37.

<sup>98</sup> The 1995 self-government policy is laid out in Canada, “Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” (1995) 1:2 *Australian Indigenous L Reporter* 330. For a useful summary of Aboriginal rights recognized by the Supreme Court of Canada see Slattery, *supra* note 5.

Cree.<sup>99</sup> In 1975, the James Bay Cree took advantage of the new federal land claims negotiation policy and signed Canada's first modern treaty with the governments of Canada and Québec. Although the treaty brought clear benefits for the Cree, they became increasingly dissatisfied with its shortcomings in the areas of self-government, resource co-management and access to the economic benefits derived from resource development projects on their traditional territory. The Cree were further disillusioned by the failure of governments to live up to their responsibilities under the treaty and their willingness to allow environmentally destructive resource development projects on Cree lands without their input or consent. Undaunted by these challenges, the Cree set out to work both inside and outside the terms of the agreement to consolidate and extend their authority over their communities, lands and resources.<sup>100</sup>

In 1994, utilizing a highly effective media campaign combined with litigation, domestic and transnational protest activities, alliance-building with environmentalists and effective lobbying, the Cree forced the cancellation of Québec's massive Great Whale hydro-electric development project. This cancellation effectively undermined the government's claim to exclusive and unilateral decision-making authority over development projects in Cree territory. Through litigation, the Cree held Canada and Québec's feet to the fire, compelling them to fulfill their obligations under the treaty. The Cree were helped by the constitutionally-protected status of their treaty rights after 1982, which imposed a duty upon governments to consult with the Cree and conduct themselves honourably whenever government actions had a negative impact on aboriginal or treaty rights.<sup>101</sup> All the while, the Cree consistently demonstrated their willingness to negotiate and their persistence eventually paid off. In 2002, they signed a new agreement with the province of Québec that included recognition of Cree nationhood, the expansion of Cree autonomy over their own community and economic development, increased powers of resource co-management and extensive revenue sharing from resource development. In 2008, they signed a second agreement with the government of Canada to expand their powers of self-government in their territories.<sup>102</sup> As

<sup>99</sup> Another good example is provided by the Haida in British Columbia. See Mark Dowie, *The Haida Gwaii Lesson: A Strategic Playbook for Indigenous Sovereignty* (San Francisco: Ink Shares, 2017) at 91-127.

<sup>100</sup> Philip Awashish, "From Board to Nation Governance: The Evolution of Eeyou Tapay-Tah-Jeh-Souwin (Eeyou Governance) in Eeyou Istchee" in Michael Murphy, ed, *Reconfiguring Aboriginal-State Relations* (Kingston: McGill-Queen's University Press, 2005) 165 at 168-80; Harvey A Feit, "Neoliberal Governance and James Bay Cree Governance: Negotiated Agreements, Oppositional Struggles, and Co-Governance" in Mario Blaser et al, eds, *Indigenous Peoples and Autonomy: Insights for a Global Age* (Vancouver: UBC Press, 2010) 49 at 77-79; Jane Jenson & Martin Papillon, "Challenging the Citizenship Regime: The James Bay Cree and Transnational Action" (2000) 28 *Politics & Society* 245 at 247-55.

<sup>101</sup> See *Québec v Moses*, 2010 SCC 17 at para 45.

<sup>102</sup> Government of Quebec, "Agreement Concerning a New Relationship Between Le Government Du Quebec and the Crees of Quebec" (2002), online (pdf): *Secretariat aux affaires autochtones Quebec* <[www.autochtones.gouv.qc.ca/rerelations\\_autochtones/ententes/cris/entente-020207\\_en.pdf](http://www.autochtones.gouv.qc.ca/rerelations_autochtones/ententes/cris/entente-020207_en.pdf)> [perma.

Matthew Coon Come, Grand Chief of the Crees, summarized:

Since the signing of our Treaty, the James Bay and Northern Québec Agreement, we have made enormous strides in improving the living conditions of our First Nations, in setting our relationship with both Canada and Québec on a 'nation-to-nation' basis [and] ... [a]ll this has been achieved through difficult struggles, media campaigns, legal challenges and hard negotiations. We have in our own way carried out a revolution.<sup>103</sup>

Across the Atlantic in the 1960s and 70s, the Sami of Northern Europe were also mobilizing to defend their claims to territory and self-determination, and the strategies they adopted bore all of the hallmarks of a relational approach to self-determination.<sup>104</sup> Transnational activism, Sami institution-building and forming alliances with other Indigenous and non-Indigenous groups proved to be a valuable strategy. Two good examples are the formation of the Nordic Sami Council, which played an important role in the crafting of ILO Convention 169, and Sami involvement in the World Council of Indigenous Peoples, an influential player in the United Nations Working Group on Indigenous Populations and in the early development of UNDRIP.<sup>105</sup>

Success in the international domain offered new tools in the domestic struggle for Sami rights, as evidenced by the experience of the Sami in Norway. A crucial turning point in this struggle was Sami opposition to the Alta River Dam project in the Finnmark region of northern Norway in the 1970s and 80s. Joining hands with environmental activists, the Sami engaged in protests, hunger strikes, occupations and other forms of civil disobedience, while seeking to block dam construction through the courts.<sup>106</sup> These efforts failed to defeat the dam project, however, they had a galvanizing effect on the Sami people by bringing national and international attention to questions of Sami rights and well-being, and further advancing a new era of state-Sami relations. Largely as a result of these developments, in 1988, the Norwegian government passed a constitutional amendment that placed a positive duty on state authorities "to create conditions enabling the Sami people to preserve and develop their language, culture and way of life," and in 1989, it created

---

cc/3TW3-DEM8]; "Agreement on Cree Nation Government Between the Crees of Eeyou Istchee and the Government of Canada" (2017), online: *Government of Canada* <[www.rcaanc-cirnac.gc.ca/eng/1504798011685/1542989671051#chp10](http://www.rcaanc-cirnac.gc.ca/eng/1504798011685/1542989671051#chp10)> [perma.cc/88Z5-7W5D].

<sup>103</sup> Matthew Coon Come, "Tide is Turning on Canada's Relationship with Indigenous People", *The Globe and Mail* (2 July 2017), online: <[theglobeandmail.com/opinion/tide-is-turning-on-canadas-relationship-with-indigenous-people/article35530261/](http://theglobeandmail.com/opinion/tide-is-turning-on-canadas-relationship-with-indigenous-people/article35530261/)> [perma.cc/B8M3-RRMD].

<sup>104</sup> See Broderstad, "Finnmark Estate", *supra* note 18 at 16; Broderstad, "The Case of the Sami", *supra* note 5 at 72-73, 78.

<sup>105</sup> Anaya, *Indigenous Peoples in International Law*, *supra* note 2 at 58-61; Peter Johansson, "Indigenous Self-Determination in the Nordic Countries: The Sami, and the Inuit of Greenland" in Corinne Lennox & Damien Short, eds, *Handbook on Indigenous Peoples' Rights* (New York: Routledge, 2016) 424 at 425-26 [Johansson]; Lightfoot, *supra* note 4 at 37-38.

<sup>106</sup> Kuokkanen, "Self-Determination", *supra* note 29 at 42-43; Broderstad, "The Case of the Sami", *supra* note 5 at 74-75.

the Norwegian Sami Parliament.<sup>107</sup>

In 1990, Norway became the first country to ratify ILO Convention 169, and the Sami have successfully used this commitment to expand their influence over Sami land rights, resource rights and other core areas of concern. For example, in 2005, the Sami Parliament concluded a consultation agreement with the Norwegian government that significantly increased their capacity to shape state laws and policies that affect their interests.<sup>108</sup> In the same year, the *Finnmark Act* was enacted.<sup>109</sup> This legislation, which was developed in consultation with the Sami Parliament and a committee of experts from the ILO, granted the Sami equal representation in co-managing the lands and resources within the Finnmark Estate (95% of the Finnmark County in Northern Norway). This new management regime, which has been described as a form of territorial co-determination, also made provisions for ongoing input from the Sami Parliament. The Sami Parliament was authorized to elect the Sami members of the co-management board (FeFo) and offered its own guidelines for assessing the impact of proposed management activities on Sami cultural, economic and social life in the region.<sup>110</sup> In conclusion, while the Sami in Norway certainly have not yet achieved all of their objectives in their struggles with the Norwegian state, the progress they have made is significant and has come about largely through their adoption of a relational approach to self-determination.

#### IV. Conclusion

Looking back on these achievements, a more skeptical observer would undoubtedly point out their many limitations and conclude that meaningful self-determination is still more of an ideal than a reality for many (if not most) of the world's Indigenous peoples. I am not entirely unsympathetic to this perspective. The progress of self-determination has been especially disappointing in Asia and Africa, where many governments reject the very existence of Indigenous peoples, let alone the legitimacy of Indigenous rights. Across these two regions, dispossession, discrimination and deprivation are all too common Indigenous experiences, as is state persecution and, at times, state violence. In some cases, Indigenous peoples have been denied the most

<sup>107</sup> Norway, *Constitution*, *supra* note 36.

<sup>108</sup> Ministry of Local Government and Modernisation, "Procedures for Consultations Between State Authorities and the Sami Parliament [Norway]" (2005), online: *Government.no* <[www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743/](http://www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743/)> [perma.cc/8UVM-4CFZ].

<sup>109</sup> "Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act)" (last visited 17 April, 2019), online (pdf): *World Intellectual Property Organization* <[wipo.lex.wipo.int/en/text/244972](http://wipo.lex.wipo.int/en/text/244972)> [perma.cc/AF6G-YYRE].

<sup>110</sup> Broderstad, "Finnmark Estate", *supra* note 18 at 9-17; Johansson, *supra* note 105 at 425-26.



basic rights of citizenship.<sup>111</sup> Even in regions of the world where progress has been more encouraging, there are considerable variations in country-specific outcomes. In Latin America, for example, considerable progress has been made in countries like Panama, Bolivia and Ecuador, somewhat modest achievements have been realized in places like Colombia, Mexico, Brazil and Nicaragua, and progress has been negligible in countries like Chile, El Salvador and Guyana.<sup>112</sup>

A similar pattern of irregularity repeats itself in more highly consolidated western democracies with Canada, New Zealand, the United States and the Scandinavian countries generally leading the way, and countries like Australia, Japan and Taiwan lagging far behind.<sup>113</sup> Even in higher-performing countries, like Canada, progress toward self-determination has been far from uniform. The greatest achievements are being realized in Canada's remote northern regions where the political and economic stakes are not as high. Progress has been significantly slower in southern regions where there is greater competition with non-Indigenous peoples over land, resources and jurisdiction.

Implementation is another significant roadblock on the path to meaningful self-determination. This theme is prominent in the literature on Latin American Indigenous peoples; observers regularly cite the failure of governments to respect their commitments to land rights, self-government and duties to consult on major development projects.<sup>114</sup> Implementation failures can be partly attributed to the weaknesses of many Latin American states that frequently lack the resources or institutional capacity to follow through on promised reforms.<sup>115</sup> Nevertheless, this should not obscure the fact that many governments have simply been unwilling to keep promises that threaten their hold on power and resources. Moreover, as illustrated by Brazil and Colombia, some states have been prepared to defend their transgressions

<sup>111</sup> Tomei, *supra* note 17 at 8, 17, 25–41; Robert K Hitchcock & Diana Vinding, "Indigenous Peoples Rights in Southern Africa: An Introduction" in Robert Hitchcock & Diana Vinding, eds, *Indigenous Peoples Rights in Southern Africa* (Copenhagen: International Work Group for Indigenous Affairs, 2004) 8 at 8–10, 19; Don McCaskill & Jeff Rutherford, "Indigenous Peoples of South-East Asia: Poverty, Identity and Resistance" in Robyn Eversole, John-Andrew McNeish & Alberto D Cimadamore, eds, *Indigenous Peoples and Poverty: An International Perspective* (London: Zed Books, 2005) 126 at 130–38.

<sup>112</sup> Van Cott, "Multiculturalism", *supra* note 44 at 273–79; Madrid, *supra* note 53 at 162–78; Van Cott, "Latin America's Indigenous Peoples", *supra* note 5 at 132.

<sup>113</sup> On the limits of Indigenous empowerment in Japan and Taiwan, see Stephen Allen, "Establishing Autonomous Regimes in the Republic of China: The Salience of International Law for Taiwan's Indigenous Peoples" (2005) 4 *Indigenous LJ* 159; Richard Siddle, "The Limits to Citizenship in Japan: Multiculturalism, Indigenous Rights and the Ainu" (2003) 7:4 *Citizenship Studies* 447.

<sup>114</sup> Gonzales & Figuero, *supra* note 55 at 175–81; Stavenhagen, *supra* note 35 at 32–36; Van Cott, "Constitutional Reform", *supra* note 28 at 52–67.

<sup>115</sup> Assies, *supra* note 51 at 167–69; Jean Jackson, "Caught in the Crossfire: Colombia's Indigenous Peoples During the 1990s" in David Maybury-Lewis, ed, *The Politics of Ethnicity: Indigenous Peoples in Latin American States* (Cambridge: Harvard University Press, 2002) 107 at 114–21; Yashar, "Indigenous Politics", *supra* note 81 at 269–74.

with violence and repression.<sup>116</sup> Implementing Indigenous self-determination may be especially problematic in newer democracies, but it is still a challenge known in much older democracies, including Canada. For nearly three decades, the James Bay Cree fought the governments of Québec and Canada over their failure to implement the provisions of the 1975 James Bay and Northern Québec Agreement. Similar failures have plagued other major land and self-government agreements, such as those concluded with the Inuit in Nunavut and the Inuvialuit settlement region, and with First Nations in the Yukon.<sup>117</sup>

More generally, there is no denying that progress towards the goal of self-determination has been painfully slow and required tremendous patience, determination and an almost constant struggle from Indigenous leaders, activists and community members alike. As I emphasize at the outset of this article, settler states remain resistant to Indigenous demands for self-determination. Even when concessions are made, they are all too often limited and motivated by strategic self-interest rather than a genuine commitment to Indigenous empowerment.<sup>118</sup>

Resurgence theorists take this criticism a step further. Not only do they argue that existing reforms have failed to promote Indigenous self-determination. In addition, they argue that the reforms are part of a deliberate state strategy aimed at co-opting Indigenous leaders and containing Indigenous demands while ensuring that truly empowering, and authentically Indigenous, alternatives to existing economic and political power structures are never seriously considered.<sup>119</sup>

I resist this stronger conclusion for several reasons. First, while it is wise to maintain a healthy level of skepticism towards the transformative potential of existing modes of Indigenous empowerment, there is simply no denying that Indigenous peoples have made important progress in their quest for self-determination. For all their noted limitations, the reforms discussed in this

---

<sup>116</sup> Rathgeber, *supra* note 69 at 116–23; David Maybury-Lewis, “For Reasons of State: Paradoxes of Indigenist Policy in Brazil” in David Maybury-Lewis, ed, *The Politics of Ethnicity: Indigenous Peoples in Latin American States* (Cambridge: Harvard University Press, 2002) 329.

<sup>117</sup> Canada, Standing Senate Committee on Aboriginal Peoples, *Honouring The Spirit of Modern Treaties: Closing the Loopholes* (May 2008), online (pdf): <[sencanada.ca/content/sen/Committee/392/abor/rep/rep05may08-e.pdf](http://sencanada.ca/content/sen/Committee/392/abor/rep/rep05may08-e.pdf)> [perma.cc/UE3E-VULS]; Jessica Orkin, “Keeping the Promise: The Implementation of Modern Treaties in Canada”, *Northern Public Affairs* 1:3 (2012) 23, online: <[northernpublicaffairs.ca/index/magazine/volume-1-issue-3-fall-2012/](http://northernpublicaffairs.ca/index/magazine/volume-1-issue-3-fall-2012/)> [perma.cc/ZWQ7-HKEY].

<sup>118</sup> See Charles Hale, “Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America” (2005) 28:1 *Political & Leg Anthropology Rev* 10 at 16, 25–26; Fiona MacDonald, “Indigenous Peoples and Neoliberal ‘Privatization’ in Canada: Opportunities, Cautions and Constraints” (2011) 44:2 *Can J Political Science* 257 at 263–64.

<sup>119</sup> Alfred, *Wasáse*, *supra* note 9 at 36–37, 209–10; Isabel Altamirano-Jiménez, “North American First Peoples: Slipping Into Market Citizenship?” (2004) 8:4 *Citizenship Studies* 349; Coulthard, “Subjects of Empire”, *supra* note 9 at 438–39, 456; Coulthard, *Red Skin*, *supra* note 9 at 25–49, 151–59, 179; Kelsey, *supra* note 9 at 81–83.

article – recognizing Indigenous nations, languages and cultures; empowering Indigenous governments, legislators and political parties; and increasing the influence of Indigenous decision-makers over their lands, resources and economies – have tracked a slow, but inexorable decline, of the era of Indigenous assimilation. For example, in the span of three or four decades, Indigenous peoples in Latin America have progressed from a place where they were almost completely excluded from political power and had their very existence denied to one where their leaders exercise power at all levels of government and where their identities and collective rights to language, culture, land and self-government are entrenched in national constitutions.<sup>120</sup> Similar stories of transformative change have been unfolding over the last five decades in Canada, the United States, New Zealand and Scandinavia.

My second objection speaks to the authenticity argument. This argument cannot be reconciled with the fact that Indigenous peoples manifest identities, cultures, traditions and institutions that are incredibly diverse and subject to change and transformation over time.<sup>121</sup> Attempting to define some authentic core of indigeneity from this rich and shifting diversity is not only bound to fail, it may also carry consequences for Indigenous peoples that are unduly restrictive and even oppressive.<sup>122</sup> In the end, to fully embrace the idea of self-determination is to accept that Indigenous communities must be the ones to decide whether the social, political and economic pathways they follow are consistent with their individual and collective sense of indigeneity.

Third, and finally, while I agree that the danger of cooptation is real, many resurgence theorists underestimate Indigenous peoples and their ability to successfully subvert and manipulate the very institutions and legal regimes that were intended to limit or undercut their claims to self-determination. In Latin America, for example, neoliberal reforms have been widely criticized as antithetical to Indigenous self-determination, yet Indigenous peoples have capitalized on one of the key planks of that reform program – decentralization – to gain increased access to resources and political power at the local level in Ecuador, Bolivia and Colombia. Local empowerment was a key factor that helped Evo Morales, and his Indigenous supporters, capture the Bolivian presidency in 2006 and again in 2014.<sup>123</sup> Further, in New Zealand, the dedicated Maori seats were originally conceived as a temporary measure aimed at co-opting the Maori leadership and undermining the movement in favour of

<sup>120</sup> Lupien, *supra* note 5 at 791–92; Van Cott, “Friendly Liquidation”, *supra* note 42 at 269–70.

<sup>121</sup> Borrows, *Indigenous Constitutionalism*, *supra* note 22 at 1–27; Val Napoleon, “Aboriginal Discourse: Gender, Identity, and Community” in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233 at 243–55.

<sup>122</sup> Borrows, *Indigenous Constitutionalism*, *supra* note 22 at 153–56.

<sup>123</sup> Will Kymlicka, “Neoliberal Multiculturalism” in Peter A Hall & Michèle Lamont, eds, *Social Resilience in the Neoliberal Era* (New York: Cambridge University Press, 2013) 99 at 114–15; Van Cott, “Multiculturalism”, *supra* note 44 at 287.

Maori self-determination. However, the Maori declined to follow the script provided for them by the colonial state. Instead, successive generations of Maori representatives have used their voices in Parliament to extend the authority of the Maori people over their language, cultures, lands and resources, and to further increase their influence over the affairs of the nation as a whole.<sup>124</sup>

In these cases, as in all of the cases discussed in this article, Indigenous peoples have steadfastly refused to be contained by the colonial state. Through the adoption of a broad, flexible and relational strategy of accessing and exercising political power, Indigenous peoples have both challenged and engaged with states to advance their individual and collective human rights and well-being. In doing so, Indigenous peoples have slowly brought to life their aspirations for self-determination.

---

<sup>124</sup> Roger Maaka & Augie Fleras, *The Politics of Indigeneity: Challenging The State in Canada and Aotearoa New Zealand* (Dunedin: University of Otago Press, 2005) at 129–34.