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Arctic indigenous peoples' internationalism: in search of a legal justification

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ABSTRACT. This paper focuses on the evolution and development of the legal scope of governance and the right to autonomy in the Arctic context by considering contemporary indigenous internationalism through a legal lens and by employing examples from the Arctic indigenous peoples of Greenland and Nunavut. It argues that depending on national policy, partnerships, and relations, there are possibilities for considering direct international representation, and the participation of autonomous sub-national units or indigenous peoples, as a part of the right to autonomy/self-government or internal self-determination. Since indigenous peoples have a limited legal personality and capacity in international law, the states of which they are a part can take special measures to accommodate their needs.

Contents

Introduction

Indigenous internationalism (trans-nationalism, international diplomacy, activism, globalism, and more recently, global indigenism) is not a new phenomenon.[1] It emerged in a period when indigenous peoples had few recognised legal rights and the support of only a handful of political institutions (Jull 1999: 12–13). Despite the states' improved tolerance for aboriginal rights, the proliferation of indigenous peoples' organisations after decades of trans-national cooperation, sharing of ideas, cultural and language exchange, and attempts to influence national governments and institutions of global ordering, the international activity of indigenous peoples is not yet well understood from the legal standpoint. Through self-determination and movements and via interaction with state institutions of governance, indigenous peoples are trying to achieve a new kind of political and legal understanding of their activities as international actors. By attempting to consider contemporary indigenous internationalism in the Arctic through a legal lens and by employing examples of experiences by the Inuit of Nunavut and Greenlanders, this paper examines the complex relationship and dynamics of development between the legal institutions of governance and the aspirations of indigenous peoples to legitimise involvement in international relations when it directly concerns or affects their homelands. This paper aims to clarify the impact of indigenous internationalism on the evolution of the legal concept of governance in the circumpolar north. It examines to what extent indigenous international activity challenges the legal image of governance in the Arctic and investigates grounds for the legal justification of indigenous peoples' participation as international actors.

Trans-nationalism and legal personality of indigenous peoples

The effects of indigenous internationalism on northern communities and, in particular, on the citizens of Greenland and Nunavut are questionable. Around the globe this phenomenon itself is stalled by many problems and high expectations which are often hard to implement because of financial burdens, government priorities in other more 'pressing' areas, and unclear political and legal grounds for its justification. Political argument for the recognition of indigenous peoples' international activity on the basis of the past practices of colonial subjugation is not sufficient for its justification from the legal standpoint. At the same time, the growing involvement and representation of indigenous actors in international diplomacy, trans-national networks, and international bodies invite some recognition by their respective states of the degree of legitimacy of such actions. There is an emerging 'customary' practice to deal with this kind of recognition. Thus:

> Inasmuch as Indigenous peoples' own sense of themselves as authentic political communities possessed of legitimate global agency was never adequate to elevate their diplomacies prior to implicit recognition by states, acknowledgement of Indigenous peoples in these terms is continually reproduced in the institutionalization of their presence at the United Nations and elsewhere' (Beier 2007: 130).

The scope and goals for involvement of indigenous peoples in international activities are evolving. Often indigenous peoples around the world share similar problems

vis-à-vis state authorities with direct independent representation in international bodies. Despite an inevitable, gradual, political and social evolution and the devolution processes and constitutional changes taking place in many regions populated with indigenous groups, legal clarity on the legitimacy of indigenous participation and representation in international forums leaves much to be desired. This situation is well observed in the Arctic where is witnessed growing indigenous peoples' involvement in global and regional policies. However, their legal capacity as international actors and their capability to participate in international decision-making processes or norm-making procedures are limited and hampered with constraints.

National industrial developments in the north in the 1970s, poor living conditions, and the threat of socio-cultural assimilation and integration policies served as a major catalyst for the political mobilisation of Arctic indigenous peoples (Jull 1998, 2003: 23). Thus, in search for more power in managing their lives and their homelands, through the gradually growing process of indigenous activism, the Inuit and other indigenous peoples have been strengthening new political institutions nationally and trans-nationally and making their voices heard globally. At the same time, the international indigenous movement is affected by globalisation (Daes 2003: 67–69; Radcliffe and others 2002), which has given indigenous peoples enormous opportunities to enter the political processes at various levels. Thus, the re-evaluation of cultural identity and political goals nationally in institutional terms took place along with the construction of new indigenous organisations and governmental structures with indigenous representation. Further, it developed into trans-border and global undertakings. The influence of external forces, such as globalisation, and the importance of activities by local/regional/national indigenous peoples' networks for the growth of international movement (moving from local to global) served as a catalyst for the construction of a political agency among indigenous peoples.

Importantly, however, indigenous activism pioneered new dimensions in international diplomacy by influencing national behaviour at international forums. Thus, it served as an important background for establishing new structures and institutions (for example the Arctic Council, the UN Permanent Forum on Indigenous Issues (PFII), etc.) and advanced the recognition of indigenous peoples' rights. On the other hand, in spite of the limited decision-making powers accorded to indigenous peoples' representatives, indigenous activism helped to increase the global awareness of the situation of indigenous peoples and enhanced their cooperation, unity, and support. Because of the accomplishments of the indigenous international movement today, it is hard to exclude indigenous issues from international forums, policy documents, and agendas.

The era of indigenous internationalism began in 1973 at the Arctic peoples' conference in Copenhagen (Kleivan 1992). Despite the successes and failures of the era the legal grounds for its justification are still questionable after more than three decades of this phenomenon. Developments in national legislative practices and international law are not in favour of any far-reaching agreement or understanding concerning how to regulate this matter by consensus. For instance, while the UN PFII looks like an impressive body on paper and '[it] is ostensibly the jewel in the crown of indigenous peoples' achievements in international law', it is not so impressive in practice. It has a very limited and restrictive mandate (Davis 2005: 5).

Currently, there are weak legal grounds for the recognition of direct representation of indigenous peoples in international organisations and their participation in international decision-making processes. Do we, in fact, need some legal justification for the direct involvement of indigenous peoples in international politics or is the existing practice, the frequently tacit approval by national governments, sufficient? The *de facto* increasing indigenous diplomacy and participation in international decision-making procedures require some legal justification. What is the role of law in the regulation of indigenous internationalism?

Grounds for a legal justification: the right to self-determination

The international indigenous lobby supported by non-governmental organisations (NGOs) has called on the human rights body of the UN to consider further and to recognise the rights of indigenous peoples. Increasing the effective participation of indigenous peoples in global, national, and regional processes has been the goal of various indigenous bodies, for example the UN PFII. Further, as Tennant notes: 'Procedurally, indigenous peoples claim the right to their increased participation in international institutions' (Tennant 1994: 4). 'Such procedural claims assert that indigenous peoples are, like other peoples, both capable and entitled to participate equally in the international legal and political system. As such, these claims can be understood as an extension of claims to self-determination' (Tennant 1994: 46). The rights of indigenous peoples as well as the dimensions of the international indigenous political movement are evolving. Representatives of indigenous peoples claim collective and individual rights as peoples and state that they are no longer merely objects but subjects of international law (Simon 1994: 99). Thus, the question is whether the indigenous activism of sub-national units and direct indigenous representation in institutions of global ordering should be recognised as rights. If so, are they rights implied within the right to self-determination (including external elements), within the right to self-government (internal self-determination), or within some other legal framework? Does this matter gain stronger support if treated as a subject of regional/national legislative policies?

Firstly, because of the limited international legal personality of indigenous communities and the limited legal

capacity of indigenous peoples as international actors (for example consultative status without decision-making powers, action through NGOs, etc.), it is unlikely that national governments would recognise direct indigenous representation in international forums as a right. In some cases, this situation is not much different in regard to the recognition of 'independent' international activity of self-governing sub-national units with indigenous majorities.

Secondly, there are obstacles to the development of indigenous internationalism (for example self-interest of some groups in pursuing their goals, financial burdens, and sovereignty debates) and complexities in the international discourse on the legal position of indigenous peoples in global politics. Therefore, without a consensus, it is not feasible to come to any binding arrangement for legalising the international activity of indigenous peoples.

The status of indigenous peoples as international actors is studied extensively. For example, there are attempts to explore the revolutionary potential of soft-law normative practices, especially within the Arctic Council model, as a possibility enabling the involvement and influential participation of indigenous peoples in international law-making processes (Koivurova and Heinämäki 2006). Furthermore, there is an extensive scholarship that looks at the practice of international human rights law; the participatory options and indigenous issues in the UN system under headings pertaining to the rights of minorities; racial discrimination; individual human rights; decolonisation or self-determination, and other relevant themes (Sanders 1998). Generally, the legal understanding of the international activity of indigenous and autonomous sub-national units is developing around the right to self-determination.

Although self-determination itself is regarded by some indigenous peoples as an inspirational concept with a wide spectrum of political possibilities and 'the conceptual basis for progressive empowerment,' (Thornberry 1998: 119) the legal discourse on the right of indigenous peoples to self-determination points to its ambiguity. In fact, the practice of international human rights law shows that the idea of self-determination in the case of indigenous peoples has a different connotation than in the case of minorities or other peoples. As Kingsbury notes: '[T]he construction and affirmation of a distinct program of "the rights of indigenous peoples," going beyond universal human rights and existing regimes of minority rights, has been one of the objectives of the international indigenous peoples' movement.' (Kingsbury 2001: 235). The issue is complicated further by continuing discussion on the importance of the recognition by states of indigenous people as 'peoples', the possibilities of employing minorities' rights regimes, and the juxtaposition of individual human rights versus collective rights to indigenous populations (Alfredsson 2005). In addition, the relational dimension of self-determination 'treating self-determination as an end-state issue' (Kingsbury 2001: 226) implying that 'most of the aspirations of most groups in the indigenous peoples' movement involve definition of relationships with states' (Kingsbury 2001: 225) points to the difficulty of recognising full legal capacity of indigenous peoples in international law. The dynamically evolving concept of self-determination is ambiguous and lacks clarity under international law. Notably, this ambiguity is not clarified in the UN Declaration on the Rights of Indigenous Peoples that is considered to be a milestone in the evolution of human rights (United Nations 2007). In Article 3 the Declaration repeats the wording of common Article 1 of the two UN Covenants on Human Rights of 1966 and reads that:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[2]

Further, Article 4 provides for a 'right to autonomy or self-government in matters relating to their internal and local affairs' as a specific form of exercising the right of indigenous peoples to self-determination. However, the content of this right does not embrace direct indigenous representation in international forums.

Various opinions expressed for example by numerous international human rights lawyers on the right to autonomy, self-determination, and indigenous peoples are explored elsewhere.[3] It is argued by the author that there is an emerging right to indigenous people's autonomy in international law and that there is a developing practice of its recognition within constitutional jurisprudence (Loukacheva 2005). However, the question is whether the legal scope of the right to autonomy encompasses international indigenous activism and direct participation in international forums?

Based on the wording of the right to self-determination in the UN Covenants on Human Rights and other general provisions which leave room for further interpretation, it is suggested by some scholars that there are external aspects in the right to self-determination that do not entail secession. For instance, according to Saami legal authority Henriksen (2001: 10), 'indigenous peoples' participation in political processes relating to issues that transcend state boundaries can be seen as a dimension of the external aspects of their right to self-determination.' This line of argument was supported by the compilers of the draft Nordic Saami Convention (2005) and consequently followed by some legal scholars (Koivurova and Heinämäki 2006). In other words, the international representation and participation of indigenous peoples in activities beyond the boundaries of nation states can be justified within the framework of external right to self-determination. But is there really a need to expand that far an already ambiguous legal interpretation of the concept of right to self-determination? For instance, the provisions of the draft 2005 Nordic Saami Convention (Article 19) implying that Saami representation in international institutions and their participation in international meetings are aspects of Saami people's external right to self-determination bring more confusion to the scope of the Nordic Saami people's rights at international forums.

At the same time, despite this discourse, in some countries the international legal capacity of sub-national units and special groups is regulated by domestic legal measures and often by constitutional practices (for example the international treaty-making power of the regions and communities in Belgium, treaty-making capacity of lands in Germany, evolving recognition of international activities by 'federal' subjects in the 'living constitutions' of Italy and Spain, etc.) (Palermo and Woelk 2005: 279–289).

Depending on national policy, partnerships, and relations, there are possibilities to consider international representation, the participation of autonomous sub-national units or indigenous peoples, as part of the right to autonomy/self-government or internal self-determination. The essential element of the right to autonomy is inclusive of the participatory rights (effective participation) of subjects involved in decision-making processes when it concerns their jurisdiction or interests. Since indigenous peoples have a limited legal personality and capacity in international law, the states to which they belong can take special measures to accommodate indigenous peoples' needs. The direct international representation of organisations of indigenous peoples or their participation in international negotiations and decision-making undertakings is a subject of regulation by their respective national states. Thus, the experience of the Inuit of Nunavut and Greenlanders in that regard is exemplary. It is also useful to other aboriginal groups in the Arctic and elsewhere.

The cases of Greenland and Nunavut

The cases of Greenland and Nunavut are interesting because, on the one hand, they allow one to look at the international activity of sub-national units populated with majorities of indigenous people. On the other hand, the Inuit citizens of Greenland and Nunavut are well represented in Arctic and global forums via the activities of trans-national NGOs, such as the Inuit Circumpolar Council (ICC).[4] At the same time, the cases of Greenland and Nunavut differ. The legal history of Greenland varies from that of Nunavut in important respects. Until 1954 Denmark, in its report to the UN, listed Greenland as a non-self-governing territory under Chapter XI of the UN Charter, thus confirming the colonial nature of its administration of the island. The Constitution of 1953 ended Greenland's colonial status by integrating the island into the Kingdom of Denmark. However, Greenland was not given a choice other than to opt for integration with Denmark. Thus, over the years some legal authorities and Greenlanders argued that they constitute 'a people' in terms of international law and thus retain the right to external self-determination (Alfredsson 1982, 2003). In May 2008 the report of the Danish-Greenlandic Self-Rule Commission recognised Greenlanders as 'a people' under international law (Agence France Presse 2008). This recognition has special implication to Greenlanders' right to external self-determination and opens different options in terms of future free association with, an integration with or an independent existence from Denmark (Alfredsson 2003, 2005). These options will be decided by Greenlanders in the near future. The Inuit of Canada are not entitled to this possibility under current international law. Furthermore, compared to Greenland, the scope of Nunavut's autonomy is less advanced and is more centred on the resolution of more pressing internal matters versus broad engagement in international affairs or foreign policy issues that concern this Arctic jurisdiction. Despite different pathways in legal and political developments of Greenland (for example the option of external self-determination) and Nunavut (for example the focus on a devolution agreement and resource-sharing benefit agreement with the federal government) the case of Greenland is of particular interest. At the time of writing, Greenland was seeking an extended version of self-governance in the form of a new partnership agreement with Denmark. Although the recognition of Greenlanders as a people opens different options compared to those of the Inuit of Nunavut in international law, for the purposes of this paper focus is mainly laid on the scope of the internal right of self-determination as it applies to indigenous activism.

This analysis of the extensive international involvement of the Inuit in trans-national, global, and indigenous politics reveals the necessity of a new dimension in international law and domestic legal regimes regarding the legal capacity of indigenous peoples as international actors. These activities do not challenge the sovereignty of former colonisers but they call for a new partnership with national states for the protection and promotion of indigenous cultures, traditions, and knowledge (Loukacheva 2004, 2007, 2008). Thus, following this dimension, in 2005 the Danish parliament in agreement with Greenlandic authorities adopted legislation known as the Authorisation Act (Greenland 2005) providing Greenland home rule with full statutory powers to negotiate and conclude certain international agreements on behalf of the Danish realm. This legislation also deals with Greenland's possible membership in international organisations that allow entities other than states and associations of states to attain membership in their own name. This legislation allows Greenland to negotiate and conclude agreements under international law with foreign states and international organisations within subject matters of transferred jurisdiction to Greenland. This Authorisation Act expanded Greenland's foreign policy involvement in line with Danish constitutional law and within increasing cooperation with the Danish kingdom in the field of foreign affairs. The Authorisation Act excluded the areas of defence and security policy, but was considered to be an important milestone in expanding Greenland's self-governance. However, this legislation did not amount to an actual transfer of power from Denmark to Greenland to act independently in international affairs, as the Danish kingdom is one subject in international law.

Despite a limited legal capacity of indigenous peoples in international law, the solution may be to build a better partnership and understanding with the national governments. For instance, before the 2005 Authorisation Act Greenland concluded several fishery agreements with Norway and Iceland on the basis of tacit approval by the Danish authorities. In the framework of cross-border collaboration Nunavut signed several documents with Greenland (the Memorandum of Understanding (MOU) on Cooperation 2000, an agreement to manage shared populations of polar bears 2005, annex on trade to the MOU 2006, etc.). In 2007 the government of Nunavut signed a tourism cooperation agreement with the government of the Republic of France; although formally from a legal standpoint the conclusion of such documents is questionable.

Currently, there are no legal obstacles to the recognition by the Danish or Canadian government of the direct involvement of Greenland or Nunavut in international affairs, as long as it does not breach national sovereignty and covers matters relevant to the better fulfillment of the jurisdiction of these units. The devolution processes taking place in these entities and the continuous changes in Greenland in this direction, including a possible further constitutional change by 2008–2009 (Agence France Presse 2008)[5], also point to this tendency. Evidently, the existing practice of informal methods (international conferences, declarations, recommendations, exchanges, visits, etc.) and the tacit agreement between the national governments on the direct international involvement of sub-national units are not always sufficient. By analysing the situation in Greenland and Nunavut, the conclusion was reached that the legal scope of the right to autonomy (internal self-determination) should encompass and allow direct Inuit participation in international affairs when their homelands are concerned. This is already the case in Greenland in regard to some areas of foreign affairs (Loukacheva 2007).

The scope of the international involvement of indigenous peoples varies. We are currently witnessing a continuous shift in engagement from the national and regional scene to the global arena. At the same time, people think that in some cases sub-national units and indigenous groups should have independent representation in certain trans-national institutions. For instance, in 1980 the Danish Government proposed that self-governing entities such as the Faroe Islands, Greenland, and the Aland Islands should be independently represented in the Nordic Council (Lindholm 1985: 79). The Petri Committee, consisting of the executive body of the Nordic Council and the Ministers of Justice of the Nordic countries, studied this proposal but did not support it. Representatives of sub-national entities were included in national delegations. The situation is not much different as regards to the representation of indigenous peoples within various international forums. They are able to obtain the status of permanent participants having a consultative mandate without voting rights. It is interesting to note that, in 2006, Greenland expressed its desire to have its own delegation in the Nordic Council. It aspires to take part in decision-making processes and to participate independently in the work of the pillars of the Nordic cooperation, such as the Nordic Council and the Nordic Council of Ministers (Siku 2006). Furthermore, in 2007 within the context of increased rivalry among the Russian Federation, Canada, Denmark, Norway and the United States on the extension of their continental shelves to the North Pole, Aqqaluk Lynge, chair of ICC Greenland, announced that the Inuit want to participate in this international process and have an important say in how Arctic territorial claims unfold (Lynge 2007: 5). In 2008, in collaboration with the Danish Ministry of Foreign Affairs, Greenlanders hosted and spoke at the international Arctic Ocean conference in Ilulissat (Greenland) which included officials of several Arctic states and discussed matters of further cooperation on outstanding claims in the Arctic (Ilulissat Declaration 2008).

Despite the changing concept of national sovereignty and the need to facilitate international cooperation among various stakeholders, the limited jurisdiction of sub-national units and organisations of indigenous peoples at the international level point to the fact that those actors are not considered as full independent legal entities. On the one hand, they cannot be put on an equal footing with the states of which they are a part. On the other hand, in practice, in some cases, jurisdiction in foreign affairs is transferable to sub-national units to some extent (for example Greenland and Nunavut). The evolving scope of the right to autonomy is inclusive of international activities, and therefore the right to autonomy should be understood in the context of each particular situation. The development of international activities in the north transcends the states' agendas on sovereignty and the traditional approach to the states' monopoly in the area of foreign affairs. In the last decades, the emergence of new political entities, for example organisations of indigenous peoples and multi-level governance systems, has changed the nature of international diplomacy which calls for more flexibility to the system of international law and consequential domestic legal regimes in order to meet local needs.

Conclusion

Indigenous internationalism in the Arctic shares commonalities with indigenous movements in other regions of the globe. However, Arctic indigenous peoples are mostly engaged in the institutions of Arctic ordering with some participation in global forums (Loukacheva 2008). In exercising these activities, indigenous peoples are not detached from their national states. These activities are seen as an important step in advancing cultural, social, educational, linguistic, environmental, economic, and to some extent political and legal needs. Thus, broad informal and limited formal collaboration beyond the

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national boundaries by sub-national Arctic units and indigenous peoples is becoming the norm.

At the same time, it can be observed that greater participation of these entities in the international milieu and increasing indigenous involvement and representation in international forums are needed to raise the political awareness and status, but this does not necessarily provide a basis for effective regional governance. The problem is that indigenous internationalism and trans-border cooperation carry a high price tag. Furthermore, strong human resources capacity is required to undertake multi-layered tasks, while immediate internal needs and problems (for example insufficient housing, underdeveloped infrastructure, high suicide rates, shortage of health professionals, and education shortcomings) require urgent financial remedies. In other words, it is not always the case that increased political autonomy and an expansion of the legal scope of autonomy to the area of international affairs are necessarily better or suitable for each case. The need for a legal justification of these activities will depend on the circumstances of each particular situation, the position of national legislators, policies, the existing practices, and the relationships with indigenous peoples and sub-national units. Indigenous peoples have often succeeded in gaining international recognition and influencing the policies of their respective national governments.

The legal discourse on this matter has been relatively successful. Legalising the representation of indigenous peoples in international bodies and the international activities of autonomous sub-national entities is a complicated issue to address in terms of the right to self-determination with its various interpretations in the contexts of formal international law, domestic legislation of the states involved, and indigenous peoples themselves. It is also limited by the principles and divergent concepts of sovereignty (for example national, shared, indigenous), statehood, and indigenous peoples' assertion of their right to self-determination that *per se* implies their capacity to engage in foreign relations. There may never be a consensus in international law scholarship and practice on the legal recognition of indigenous peoples' direct representation in global institutions as a right. It is a continuing challenge in the Arctic to find a legal paradigm for the justification of indigenous internationalism and indigenous activity by sub-national autonomous entities. One can argue that without this recognition it will be hard to push the aspirations of indigenous peoples further within international bodies (for example participation of indigenous peoples in the decision-making of the UN or independent representation of sub-national autonomous Arctic entities in the Arctic regional bodies).

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Notes

1. There is growing multidisciplinary literature in political science, international relations, and history seeking to evaluate the definition of indigenous external and internal diplomacies, indigenous trans-nationalism, globalism, global indigenism, internationalism, and their intersections with the foreign policies of the states and their impact on national and global politics. The bulk of this literature points to the fact that in many cases indigenous internationalism has a history going back to pre-European, colonial contact. See, for example, *Canadian Foreign Policy* 2007(13) 3, special issue on indigenous diplomacies (in particular, articles by Belanger, Beier, De Costa, Abele and Rodon); on the subject of indigenous internationalism and transnational movement see also: Johnston 1986; Wilmer 1993; Niezen 2000; Muehlebach 2003. Concerning the place of indigenous peoples in international relations and the importance of their political movements see Shaw 2002.
2. On 13 September 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Canada voted against its adoption. On 8 April 2008 the Canadian House of Commons passed a resolution to endorse the Declaration as adopted by the UN and calling on the Government of Canada to implement it fully.
3. This literature is too numerous to list in detail. For instance see Morris 1986; Barsh 1988, 1994; Magnarella 2001; Henriksen 2001; Anaya 2004; Muehlebach 2003; Costellino 2005.
4. For the most recent academic examination of Inuit diplomacy in general and the ICC activities see: Abele and Rodon 2007; Wilson 2007; Loukacheva 2007: chapter 5.
5. In November 2008 Greenland is expected to have a referendum on self-rule. In the case of a positive result, the extended self-rule will be introduced on 21 June 2009. Agence France Presse 2008.

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