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## **Canadian Indigenous sovereignty, self-government and identity: Recent Dichotomy**

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Indigenous peoples or tribes of Canada have long suffered under the political and cultural oppression of European and Canadian societies. As a result, these indigenous peoples are perceived as stateless and “nations within” Canadian state. The term “nation” implies sovereignty of indigenous peoples as community possessing self-determination right to indigenous governance- a right that indigenous peoples never relinquished or given up to any foreign white people to control and alter the matters relating to their lives. However submergence of this nationhood within the larger Canadian nation-state is the reality behind the “nations within”-is a paradigm shift in indigenous –state relations where latter attempts to control and maintain the status of this new social order.

Thus, in this article, an attempt is made to understand the undercurrents acting on the indigenous-state relations in terms of governance. Since the decade of 1980s witnessed significant changes in relation to autonomy for indigenous communities nevertheless the fact remains that struggle for indigenous peoples is not yet over because the structure of self-government as proposed by federal government will not help indigenous peoples, for long, to sustain their indigenous cultures and traditions and

make them distinct and culturally different ethnic groups among recent immigrants to Canada. Hence this article also attempts to emphasize on the importance of indigenous self-government right as an existing right that will reflect indigenous sense of culture and spirituality.

### **Politics in Defining Sovereignty**

“We are the original inhabitants of this country now called Canada, and as First Nations peoples we never gave up our sovereignty. We are the First Peoples and we are a Nation with the inherent right to create and maintain our own identities and cultures, languages, values, practices, to govern ourselves and to govern our relationship with other governments as distinct entities.”<sup>1</sup>

The above lines clearly state the indigenous sovereignty as vital and important in governing indigenous lifestyle and that indigenous right to self-government is derived from indigenous status as original inhabitants of Canada which is important in defining indigenous identity. So sovereignty as an indigenous concept is defined as power to govern indigenous political, social and cultural affairs. It is a distinct right derived from their ancestral Canadian land. It is also based on the indigenous-white settlers relationship on nation-to-nation basis. Such rights according to indigenous peoples, is an inherent right that can never be surrendered or taken away. But today, indigenous concept of sovereignty is understood in the context of the European nation-state. As Dale Turner writes, “Aboriginal sovereignty is viewed solely as a legal political term, its meaning remains safely embedded in Western-European legal and political traditions.”<sup>2</sup> However, in this connection, sovereignty as interpreted by indigenous is based on the settlement of Canadian land and the relationship that developed between the settlers and the indigenous. Hence, it can be said that indigenous sovereignty can be defined on the basis of interpretation of indigenous history which has never been considered as legitimate and without an indigenous interpretation of history, one cannot understand the right to indigenous self-government leading to indigenous identity. Indigenous sovereignty which is based on indigenous belongingness to their land and is rooted in notions of freedom, respect and autonomy-stands in direct contrast to European-Western concept of sovereignty in which there is “a permanent transference of power or authority from to an abstraction of the collective called government”. Such notion of western concept relates

to notion of domination which indigenous peoples rejects and finds it incompatible with the indigenous concept of governance which sees “government as the collective power of the individual members of the nation; there is no separation between society and state.”<sup>3</sup> Therefore, sovereignty as an exclusionary concept, is an inappropriate concept for indigenous peoples “rooted in an adversarial and coercive Western notion of power.”<sup>4</sup>

As an exclusionary concept, Paul Keal states that, Taiiaki Alfred attempts to draw attention to the fact that, “it [sovereignty] confers property rights on some people and not others; and that it excludes some from the rights enjoyed by others”. Further, “it is coercive because it is inextricably linked to the practices of colonization and colonialism which means it has served to justify dispossessing indigenous peoples of their lands and taking their children away from them”. Sovereignty also continues dependence of indigenous peoples on the state. This “suggests that sovereignty is not imaginable outside state structures, that it involves structures of domination, including the imposition of non-indigenous systems of justice and policing, and that it is not about spiritual connection with land” that indigenous peoples emphasize on.<sup>5</sup>

Thus, attempts by indigenous peoples to emphasize on indigenous sovereignty to reassert control over their sacred lands and their cultural heritage from the 1970's, has given rise to indigenous nationalism. Further, what emerges from the demand for recognition of indigenous sovereignty is that, it is an essential step to self-determination and self-government, an expression of distinct identity and a way of achieving empowerment, autonomy and equality. For indigenous peoples demand for indigenous sovereignty is to demand the recovery of indigenous identity in Canada but the politics of defining indigenous sovereignty both by indigenous and non-indigenous raises many complexity of the matter. Thus due to lack of proper definition of indigenous sovereignty, the issue of self-government had “bothered” and continues to “bother” Canadian government and their leaders, the public, academicians, and indigenous peoples. Nevertheless, it has become an “effective vehicle for indigenous critiques of the state's imposition of control”, and “created space required for greater assertion of self-governing powers”.<sup>6</sup> Since sovereignty is seen as the best vehicle to assert their territorial rights which, once again, will provide indigenous peoples to govern themselves according their traditional socio-cultural and

political rules and regulations. In other words, it can be said that indigenous rights to sovereignty over their ancestral land was never extinguished and that it still exist by virtue of being the original occupants of Canadian land.

### **Towards Self-Government and Identity**

While it is clear that indigenous sovereignty is closely linked to recovery of indigenous identity in Canada. Self-government, for the indigenous peoples, may be viewed as an extension of the individual identity into the community thus the concept of self-government is linked to the restructuring of indigenous nationhood and it has been understood as vital for determination of indigenous affairs.

So far Canadian federal government has been seen advancing indigenous self-government legislation for example the Sechelt Indian Band of British Columbia, the Cree Naskapi of Quebec, the Nunavut territory, the Teslin Tlingit from British Columbia and most recently the Nisga'a. However, the collective indigenous self-government remains under the jurisdiction of the federal and provincial government.<sup>7</sup> Plus its constitutional definitions are yet to be defined.

The issue of self-government emerged in the second half of the 20th century. In 1950's the provinces of Saskatchewan, Manitoba and British Columbia commissioned studies of their indigenous population and finally in 1959, a joint Senate House of Commons Committee examined indigenous issues. On one hand, the house realized problems being faced by indigenous peoples however on the other, it ignored self-government issue of indigenous. Further, in 1966, the Hawthorne Report recommended greater involvement of municipal and provincial government in the matters of indigenous peoples. Though Hawthorn report provided a greater role for the provinces while giving more autonomy to indigenous communities along with improved services, but it aimed at assimilation of and integration of indigenous into Canadian society. The report emphasized more in delivery services to indigenous rather than economic development of indigenous communities.<sup>8</sup> At the same time, the proposals for a much greater role for the provincial governments paved the way for the 1969 White Paper. But instead of improving indigenous status, the White Paper aimed at abolition of indigenous distinct status as Indians. This meant an unequal citizenship for all including the

indigenous peoples. This White Paper was met with serious protests by indigenous leaders.

Nevertheless, decisions in 1973 by the Supreme Court of Canada in Calder case and Quebec Superior Court in James Bay Cree, stimulated the development of policies recognizing the existence of indigenous rights leading to the beginning of land title claims. Finally in 1975, James Bay and Northern Quebec Agreement was signed which became a vehicle for self-government. Infact, this development led Canada pass its Constitution Act which included section 35 (1) which affirmed indigenous existing and treaty rights and that it was applied to all Indian, Inuit and Metis people of Canada. In 1993, Inuit and Canadian government signed the Nunavut land claims agreement that gave birth to Nunavut territory. Infact, creation of Nunavut territory, was the largest and most comprehensive of all indigenous land claims and self-determination agreements settled by Canada. Since then, most of comprehensive claims are being worked in British Columbia, Newfoundland and other parts of Canada. Hence, the issue of sovereignty lies at the heart of rights to self-government. For indigenous peoples, right to self-government is a way to define their distinct indigenous identity.

### **The Supreme Court and Self-government**

The Canadian judiciary, in most cases, doesn't feel passing the judgement in favour of indigenous peoples and this is very much clear from the three main cases- *R. v. Pamajewon*, *Delgamuukw v. British Columbia* and *R. v. Sparrow*, where indigenous peoples have failed to acquire their rights to sovereignty and self-government. This is partially due to the perceived threat of self-governance to the sovereignty of the Crown in Canada.

#### **R. v. Pamajewon**

*R. v. Pamajewon* dealt with the issue of the right of gambling pursued by the Shawanaga and the Eagle Lake First Nations without the licence to gambling. So the court based its judgement of indigenous rights that-it must have an element of a practice, custom, or tradition integral to the distinctive culture of the indigenous group claiming the right to gamble. This judgement disassociated self-government from indigenous rights and because emphasizes was laid more on cultural traits of indigenous peoples so the judiciary aimed to impose the policy of multiculturalism by making them

just another minority ethnic group in Canada.<sup>9</sup>

### **Delgamuukw v. British Columbia**

In *Delgamuukw v. British Columbia*, the court did not give any judgement in relation to self-government because it could not determine a proper definition of self-government. This position of the court reflects the basic fact that judiciary is being used to legitimize the position of the Canadian state and maintain Crown's sovereignty over indigenous land. So the issue of self-government as an independent right was not ushered to them.<sup>10</sup>

### **R. v. Sparrow**

The Supreme court decision in Sparrow case marked a turning point in indigenous rights to fish. In 1984, Musqueam member Ronald Sparrow was arrested fishing with a net longer than permitted by food fishing license. The matter was taken to court and finally in 1990, ruled out that despite governmental regulations and restrictions on Musqueam's fishing rights, indigenous rights has not been extinguished and that this was in accordance with provisions made in 35(1) of the Constitution Act.<sup>11</sup>

Though, this ruling did provide protection to indigenous cultural practices but such rights were not absolute and can be infringed upon providing the government can legally justify it.

In more recent decision in *R v. Sappier; R v. Gray*, the Supreme Court showed its flexibility in defining indigenous cultural rights. In *R v. Sappier*, Dale Sappier and Clark Polchies (Maliseet) were "charged under New Brunswick's Crown Lands and Forests Act with lawful possession of or cutting of Crown timber from Crown lands", for the construction of a house while Darrell Joseph Gray (Mi'kmaq) had cut timber "to fashion his furniture". The Supreme Court, in these cases, held that, "the respondents possessed an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by their respective First Nations" thus, "a practice of harvesting wood for domestic uses undertaken in order to survive is directly related to the pre-contact way of life and meets the 'integral to a distinctive culture' threshold".<sup>12</sup>

In Canada many indigenous rights are considered as cultural rights. The purpose of section 35(1) of the *Constitution* is to reconcile indigenous

peoples' rights to traditional customs and practices with European law and the present-day rule of the state. Because cultural rights are also grounded in the historical practices, customs and traditions, it includes activities practiced by indigenous peoples such as the right to speak indigenous languages and the right to perform traditional customs such as dances, songs and ceremonies. Thus, cultural activities such as hunting, fishing, language and art are the most basic type of indigenous rights, and may exist without indigenous title to land. Further, in order to establish that an activity is an indigenous right, today, it has become necessary to prove that the indigenous group bringing the claim practiced this activity, tradition or custom and that it was culturally important at the time of European contact.<sup>13</sup>

### **Conclusion**

Identity of indigenous peoples of Canada has often been understood by Canadian policy makers within the narrow construct to expand the concept of indigenous rights leading to enhance self-governance movements in Canada, often linked to indigenous sovereignty. Such understanding of indigenous identity politics within the mainstream conceptual framework created by non-indigenous peoples in Canada, is to make indigenous peoples adapt within the value system of the existing dominant paradigm.

### **References**

- 1 Gathering Strength: Canada's Aboriginal Action Plan A Progress Report (Ottawa: Minister of Public Works and Government Services, 2000), p.23.
- 2 Turner, Dale (2000), "Liberalism's Last Stand: Aboriginal Sovereignty and Minority Rights", in Curtis Cook and Juan D. Lindau (eds.) *Aboriginal Rights and Self-Government*, Montreal: McGill-Queen's University Press: 135-147.
- 3 Alfred, Taiaiake (1999), *Peace, Power, Righteousness: An Indigenous Manifesto*, Don Mills: Oxford University Press. P-25
- 4 Ibid, p-325
- 5 Keal, Paul (2008), "Indigenous Sovereignty", in Trudy Jacobsen et al. (eds) *Re-Envisioning Sovereignty: The End of Westphalia?, Ethics and Governance Series*, England: Ashgate Publishing Ltd: 315-330. P- 323
- 6 Alfred, Taiaiake (1999), *Peace, Power, Righteousness: An Indigenous Manifesto*, Don Mills: Oxford University Press. P-55

- 7 Williamson, Pamela and John Roberts (2011), *First Nations Peoples*, Revised Second Edition, Toronto: Emond Montgomery Publications Ltd. P-131.
- 8 C.E.S. Franks (2000), "Rights and Self-government for Canada's Aboriginal Peoples" in Curtis Cook and Juan D. Lindau (eds) *Aboriginal Rights and Self-government: The Canadian and Mexican Experience in American Perspective*, Montreal and Kingston: McGill-Queen's University Press. P-21
- 9 R. V. Pamajewon (1996) 2 S.C.R. P-821
- 10 *Delgamuukw v. British Columbia* (1997) 3 S.C.R 821 at para 72
- 11 R.v. Sparrow (1990) 1. S.C.R. P-1075
- 12 (R v. Sappier; R v. Gray [2006] 2 S.C.R 686) Netaji Nagar, New Delhi