

Rights of the Indigenous Peoples to Self-Government: A Comparative Analysis between New Zealand and Canada

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Abstract

Canada and New Zealand are the western liberal democracies settled by a predominantly English-speaking majority. Their legal and constitutional system depends on English common law. Both Canada and New Zealand have a high percentage of indigenous peoples irrespective of the 4% difference in Canada and 15% in New Zealand. Both states rank high in global comparisons of human development. There exist many differences in the rights of self-government of indigenous peoples in both Canada and New Zealand. These distinctions in the application of the self-government right in local and regional level greatly impacts how indigenous peoples put self-government into practice and brings forth significant questions about which version of these applications best serves the interests of indigenous peoples. This is a comparative study that expounds the differences between constitutions of both countries together with the distinctions in the rights of self-government of indigenous peoples. By using the legal combative method to compare constitutions of Canada and New Zealand and their policies regarding rights of self-government of indigenous peoples, this study concludes that with respect to clear constitutional and legislative recognition of the right of self-government Canada is more advanced. Additionally, this study points out significant institutional work differences between indigenous peoples' self-government rights in both countries.

Keywords: Canada; Indigenous peoples; indigenous rights; native; New Zealand; self-government

Abstrak

Kanada dan Selandia Baru adalah negara demokrasi liberal barat yang dihuni oleh mayoritas berbahasa Inggris. Sistem hukum dan konstitusional mereka bergantung pada hukum umum Inggris. Baik Kanada maupun Selandia Baru memiliki persentase masyarakat adat yang tinggi terlepas dari perbedaan 4% di Kanada dan 15% di Selandia Baru. Kedua negara bagian ini memiliki peringkat tinggi dalam perbandingan global pembangunan manusia. Ada banyak perbedaan dalam hak-hak pemerintahan sendiri masyarakat adat di Kanada dan Selandia Baru. Perbedaan dalam penerapan hak pemerintahan sendiri di tingkat lokal dan regional ini sangat mempengaruhi bagaimana masyarakat adat menjalankan pemerintahan sendiri dan menimbulkan pertanyaan penting tentang versi aplikasi mana yang paling sesuai dengan kepentingan masyarakat adat. Ini merupakan studi banding yang memaparkan perbedaan konstitusi kedua negara serta perbedaan hak pemerintahan sendiri masyarakat adat. Dengan menggunakan metode legal combative untuk membandingkan konstitusi Kanada dan Selandia Baru dan kebijakan mereka mengenai hak pemerintahan sendiri masyarakat adat, penelitian ini menyimpulkan bahwa sehubungan dengan pengakuan konstitusional dan legislatif yang jelas atas hak pemerintahan sendiri Kanada lebih maju. Selain itu, studi ini menunjukkan perbedaan kerja kelembagaan yang signifikan antara hak-hak pemerintahan sendiri masyarakat adat di kedua negara.

Kata kunci: Kanada; masyarakat adat; hak-hak adat; warga asli; Selandia Baru; pemerintahan sendiri

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Introduction

The UN Declaration of Indigenous Peoples 2007 (UNDRIP) calls to respect and promote the inherent rights of Indigenous Peoples. These rights include the rights that

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originate from their political, economic, and social structures, their cultures, spiritual traditions, histories, laws, and philosophies. These rights also include their rights to their lands, territories, and resources. Article three of UNDRIP (2008) states that: “Indigenous Peoples have the right to self-determination. By that right, they freely determine their political status and freely pursue their economic, social and, cultural development.”

Indigenous Peoples have a long history of the struggle for their rights. Their right of self-government can somehow wash away the miseries inflicted upon them by their colonial masters in the process of imposing their agendas on these indigenous Peoples. Consequently, self-government will allow them to survive and take care of themselves, thus, ending their long-lasting plight. This study aims to explore the right of self-government of indigenous Peoples in Canada and New Zealand by comparing the governance structures of both countries.

Research Problems

The different applications of self-government for indigenous Peoples around the world raised the necessity of a comparison between these different applications globally. A comparative analysis is necessary to lay solid grounds to ensure the rights of these indigenous Peoples and to guarantee their universal implementation. Canada and New Zealand follow different practices to ensure the rights of indigenous Peoples. This difference raises the questions about validity and suitability of each system for the implementation of the rights of indigenous Peoples and their mechanisms for effective self-government.

Research Method

This is a comparative study, that will attempt to compare the governance systems of Canada and New Zealand with respect to the rights of self-government of indigenous Peoples. A mix of quantitative, primary, and secondary research methods was used to collect data for the study to describe, interpret, contextualize, and understand the topic of study. This study collected data through reviewing the relevant literature related to the study and content analysis. Secondary data sources such as books and government reports, surveys, journal articles, and official reports are used to collect data for the study. Primary data of the research includes international treaties, and clauses from the constitutions of states.

This study proceeds as follows: firstly, it identifies the concept of self-government and indigenous Peoples in each country. Then, it provides a historical glance of their position, followed by the discussion on the right of self-government of indigenous Peoples in Canada and in New Zealand. The conclusion will be given in the last section of study.

Discussion

The definition of indigenous Peoples and the rights of self-government as a part of their right of self-determination.

The most widely accepted definition of indigenous Peoples was introduced by Martinez-Cobo, the first UN special rapporteur on the issue of indigenous peoples. Cobo identified number of criteria that would determine the indigenusness of any group, but the general definition is:

“Indigenous communities, Peoples, and nations are those which, have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations in their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal system” (UN Doc. E/CN.4/Sub.2/1997/14, para.129. See also UN Doc. E/CN.4/Sub.2/1996/21, paras. 153-154).

However, there is a lack of consensus on this definition, the International Declaration on the Rights of Indigenous Peoples does not state any specific definition and Working Group. The Draft Declaration on the Rights of Indigenous Peoples (WGDD) decided that the definition is not necessary for the adoption of the Draft of Declaration on the Rights of Indigenous People (The Working Group Report, UN Doc. E/CN.4/Sub.2/1996/21).

Contemporarily, the degree of autonomy of indigenous peoples within states “is an indicator of the probability of their survival.” Article 23 of UNDRIP states that:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions (Weeks, 1985).

The right of self-government of indigenous people is supported by many covenants, agreements and the United Nations declaration on the rights of indigenous peoples itself. The self-government right under the International Covenant on Civil and Political Rights (ICPPR) can be found in article one which asserts that the states commit themselves to promote the rights of self-determination: “All people 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.”

Furthermore, the international Covenant on Economic, Social, and cultural rights (ICESCR) states in the first article that the right of self-determination including the rights to determine political statues and perusing their own economic, social, and cultural development. But the self-government is stated in the article three and four of the United Nations declaration on the rights of indigenous peoples. Article four states that:

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions” (UN General Assembly, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, A/RES/2200).

The Canadian Encyclopedia defines indigenous self-government in Canada as “Indigenous self-government is the formal structure through which indigenous communities may control the administration of their peoples, land, resources, related programs and policies through agreements with federal and provincial governments. The forms of self-government, where enacted, are diverse and self-government remains an evolving and contentious issue in Canadian law, policy and public life.” The government has a shared duty to improve its ties with the indigenous groups based on their recognition to uphold their right to self-determination, including their fundamental right to rule themselves as article four of UNDRIP insists: “Indigenous peoples in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

The linkage of terms self-determination and self-government is explained by Shin Imai (2008):

“Because self-determination is a choice, it can be exercised in different ways. The ‘sovereignty and self-government’ option leads to more autonomy for the Indigenous community to control its own social, economic, and political development. The ‘self-management and self-administration’ option leads to greater control of local affairs and the delivery of services within a larger settler government legislative framework.”

Nancy argues that “powers of self-determination ranges from the non-self-governing territory at one pole to the fully independent state at the other, a wide range of forms of autonomy are possible between the extremes” (Weeks, 1985). Federal government has the responsibility to make improvements in the its working procedures. For indigenous peoples, these responsibilities include how they identify and rule themselves as nations and governments and the boundaries of their relationships with other orders of government.

The self-government has various interpretations. In one view, it will affect the governments and will increase the sensitivity of the doubt about self-determination, which will eventually lead to a divide in any county. However, the widely accepted view of self-government is premised on UNDRIP that depends on that the nature of self-determination and deals with the right of minority groups within a nation to determine their futures through taking part in state-level decisions which impact them directly (Reinders, 2019).

Indigenous Peoples in New Zealand

On February 6, 1840, the treaty of Waitangi was established between Her Majesty Queen Victoria (late) and the Māori peoples of New Zealand. This day is now a public holiday in New Zealand. Term 'Maori' is used to describe the indigenous peoples of Aotearoa/New Zealand (Anaru, 2011). Māori are the aboriginal peoples of New Zealand. After Captain Cook's first visit in 1769, sporadic contact between Māori and Europeans happened. In the first decades of the 19th century, the interaction became regular. 800 years ago, East Polynesians came to these islands. Between 1642 and 1769, Captain Cook paid several visits to New Zealand. The Māori society and culture were the blend of independent and often competing iwi tribe and hapu clan, who had different dialects and traditions. Their culture was well-established and complex.

The agreement between Her Majesty Queen Victoria (late) and the Māori peoples on founding a sovereign state together with establishing a government in New Zealand was the first founding document and first constitution to set up a political system. This document had three papers. Throughout the English edition, Māori ceded New Zealand's sovereignty to the Britain; Māori granted the crown an exclusive right to purchase land they wished to sell, and in return got full guaranteed ownership rights to their property, forests, fisheries and other properties; Māori were given the rights and privileges of British citizens. This treaty was described by an Australian report as "Legally mostly ineffective: because it is not entrenched in the Constitution (New Zealand has no formal Constitution), and it is only enforceable when expressly incorporated into legislation." Nevertheless, it became a basic legal ground for Maori rights as they considered it they assert Socio-politically quite effective. As stated, "while initially the Treaty did not carry much political or moral force, over time as politics and mindsets have themselves changed, the Treaty has helped shift national and political mindsets towards a greater respect towards Māori rights, such that New Zealand is seen as a bicultural nation and Māori are seen politically as something more akin to equal Treaty partners" (What We Can Learn from New Zealand: for Constitutional Recognition of Indigenous Peoples in Australia. (2014)).

The New Zealand human rights commission report linked the UNDRIP with the Treaty of Waitangi. When "The Treaty and Declaration are strongly aligned and mutually consistent, the declaration assists with the interpretation and application of the Treaty principles" (The Right of Indigenous Peoples). So, according to the report they both introduced the protection of self-determination, language, customs, knowledge, land, and resources rights.

In the communal economies, seasonal food collecting is significant. But in warmer areas, horticulture is significant. A variety of resources have been distributed across New Zealand to build comprehensive trade networks. Growing population and rivalries over 16th century resources has resulted in the conflict and peace-organized societies. In 2017, Māori peoples in New Zealand accounted for 15 percent out of 4.5 million of total population (Maori Population Estimates, 2017). Some statistics from New Zealand explain

the living-conditions of Māori peoples there. The Māori life expectancy is less by 7.3 years than non-Māori; their household income is 78 percent of the national average; 45 percent of Māori leave upper secondary school without qualifications and more than 50 percent of the prison population is Māori (Statistics New Zealand, 2020).

The Māori have been the victims of discriminatory colonial policies and laws. They have often been prohibited from practicing their cultures, languages, and social life. Colonization and settlement were violent at times. Multitude of indigenous deaths have occurred due to imported diseases. The Māori population declined significantly; eventually, becoming a minority in the population of New Zealand.

In 2015, the United Nations Committee against Torture (CAT) and the UN Working Group on arbitrary detention (WGAD) expressed their concerns regarding the state of human rights of Māori. The report said: “The WGAD acknowledged that, overall, legislation and policy concerning deprivation of liberty in New Zealand is well-developed and generally consistent with international human rights law and standards. However, they drew special attention to the overrepresentation of Māori in the prison population, the detention of refugees and asylum-seekers, and loopholes in law and practices regarding judicial proceedings involving persons with intellectual disabilities” (Statistics on Indigenous peoples in Canada, 2020).

New Zealand endorsed the UN Declaration on the Rights of Indigenous Peoples in 2010; however, it has not ratified ILO Convention No. 169.

Indigenous Peoples in Canada

The Canadian Constitution Act 1989 recognizes Indians, Inuit, and Metis as indigenous peoples. In 2016, these indigenous groups were estimated to be 1,400,685 and represented little more than 4% of Canadian People. The report of Royal Commission on aboriginal of Indigenous Peoples (RCAP) defined the aboriginal people in Canada as, “The Commission uses the term *Aboriginal people* to refer to the indigenous inhabitants of Canada, when we want to refer in a general manner to Inuit and to First Nations and Métis people, without regard to their separate origins and identities.” The commission stated that there are differences between the local communities and aboriginal people. As mentioned in the report, “The Commission distinguishes between local communities and nations. We use terms such as *a First Nation community* and *a Métis community* to refer to a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation or people. Despite the name, a First Nation community would not normally constitute an Aboriginal nation in the sense that Commission defined the term above. Rather, most (but not all) Aboriginal nations are composed of several communities” (Report of the Royal Commission on Aboriginal Peoples, Available at: <http://data2.archives.ca/e/e448/e011188230-01.pdf>).

Canada has a long history of prejudicial treatment of the people deemed as indigenous. There is a theory that the newcomers adopted to justify their unequal practices toward the indigenous peoples there. Which is the racist doctrine of discovery

(UN Doc. E/C.19/2014/3). Indigenous people are totally being ignored by the subsequent governments in Canada, who try to undermine recognition of their right of self-determination. Indians, Oblates, and integrated Schooling discussion on education divided the Canada's history of Indian administration into two parts namely "Paternalistic ideology, and the democratic ideology: The Indian, a Full-Fledged Citizen" (Hawthorn, 1966). Although, the local and international responses vis-à-vis the rights of indigenous peoples have prominently increased; yet, various rigorous steps are required to end the plight of indigenous peoples. Unjust practices continue against indigenous people as Amadahy and Lawrence (2009) argue, "Indigenous peoples are still being targeted for physical and cultural destruction and are widely assumed to have already "vanished". Erased from history as viable nations, their lands therefore continue to be "there for the taking," either as ongoing sources of resource theft or as real estate for the world's wealthy migrants. In this context, Indigenous peoples globally are still relentlessly being pushed toward extinction, as peoples."

When the Liberal party won the Canadian elections in 2015, Prime minister Justin Trudeau consistently promised to re-establish relations with the indigenous peoples as he said: "built on respect, rights and a commitment to end the status quo." He vowed to support indigenous cultural and education programs. He called for aboriginal land rights to be recognized. But he also continued to promote the expansion of Canada's fossil fuel industry to new territories. This expansion has also largely relied on ignoring, if not flagrantly abusing, the indigenous peoples' wishes and interests (Vending & Mikkelsen, 2016).

The Indian Act is a Canadian federal law regulating the Indian rights, bands, and reserves. Over the years, the federal government has been extremely invasive and paternalistic. It authorizes registered Indians and reserve communities to regulate and administer their businesses and everyday lives. Its authority ranges from overall political controls, including the imposition of structures of governance in the form of band councils on Aboriginal communities to the control of Indians' rights to their traditions and cultures. The Indian Act also authorized the government in the form of reserves to decide the land basis of these groups. The Indian Act has long been part of an assimilation policy designed to put an end to aboriginal peoples' cultural, social, economic and political differences by incorporating them into Canadian major values. The Indian Act is a very controversial piece of legislation. The Assembly of First Nations describes it as a form of apartheid.⁹ Amnesty International, the United Nations, and the Canadian Human Rights Commission have continually criticized it as a human rights abuse. These groups claim that the Canadian government does not have the right to unilaterally extinguish Aboriginal rights—something the government could legally do to status Indians up until 1985 through the process of enfranchisement, and can still control). through status (Indigenous Foundations: https://indigenousfoundations.arts.ubc.ca/the_indian_act/

Indigenous populations have a constitutional relationship with the Crown. This relationship is acknowledged and confirmed by Article 35 of the Constitution Act 1982. It includes current indigenous and treaty rights. Section 35 contains a full set of rights and promises, based on fair and just conciliation between indigenous peoples and the Crown, that indigenous peoples will become confederation partners.

Self-government of indigenous peoples in Canada

The right to self-government is protected under section 35 of the Canadian Constitution Act, 1982. The Act recognizes and affirms existing aboriginal rights of Indian, Inuit, and Métis peoples. Section 35 of the Constitution Act states:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Hence, Section 35 asserts that the First Nations/Indigenous Nations have “inherent sovereignty”, inherent rights, and the power of self-determination that exists now and for the future. Inherent rights and the title of First Nations/Indigenous Nations are “granted by the Creator”; they are not granted by any agreement, treaty, constitutions, or law and include: (a) Inherent rights to language, spirituality, and culture; (b) Inherent rights of education, social, and health; (c) Inherent rights to justice and economics; (d) Inherent rights to citizenship/citizens and membership; (e) Inherent right for fishing, hunting, trapping, and gathering; (f) Inherent rights to Air and Water; (g) Inherent rights to Lands and Resources. (Renewable and Non-Renewable Resources, etc., and (h) Inherent rights and powers to self-determination (Implementation of Section 35 (1) and (2), Canada Constitution Act 1982).

Some argue that “It is defined narrowly and falls short of allowing meaningful self-government for the majority of Indigenous peoples” (Reinders, 2019). Many improvements done in regard of indigenous peoples were motivated by the national and international awareness of the indigenous rights. However, the main issue is the rights indigenous peoples demand are different from the rights demanded by normal citizens because they have been always treated differently. Srikanth claims that “The native Indian communities were not treated as citizens for over a century” (Srikanath, 2012). The differences that distinguish indigenous peoples from the citizens of the state make the self-government the most important right as it guarantees their basic rights.

Consequently, UNDRIP mentions self-government in articles 3 and 4 of its declaration. “Indigenous peoples have the right to self-determination “By virtue of that right they freely determine their political status and freely pursue their economic, social

and cultural development”(Article 3). “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” (Article 4). These articles of UN DRIP give indigenous peoples the rights to freely partake their political, economic, and cultural development together with the right of self-determination.

Nevertheless, the Canadian conduct with indigenous peoples has drastically changed after the second world war. One of the changes was the amendment of the Indian Act aimed to exclude the discriminatory racist practices, a pointing some experts to investigate the statue of aboriginal peoples in Canada (Srikanath, 2012).

After more than one century of advocating the constitutionally protected land and self-governing agreement, the representatives of the Nisga'a nation, Canada and the British Columbia signed Nisga'a Final Agreement. In 2000, the agreement became law and the federation signed it. This was turning point which in Sir John's time was not conceivable. A new era in aboriginal activism was inspired by the Nisga'a Campaign not only in British Columbia, but across Canada. It also contributed to wider changes in federal law, including a fundamental reorientation of Aboriginal Rights case-law and communications of the Supreme Court of Canada (Murphy, 2005).

Several types of federalisms related to the differences in the relationships between aboriginal, organizational, and other orders of government within the federal system were described in literature on aboriginal political system in Canada (Wilson et.al.) The federal policy guide on self-government of indigenous peoples states that: “Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditional languages and institutions, and with respect to their special relationship to their land and their resources” (Guide, 2004).

While looking at the Canadian constitution, Erik Anderson noticed that “Although the government of Canada had patriated the Canadian Constitution in 1982, including the addition of section 35, which recognized and affirmed aboriginal and treaty rights in Canada, it was unclear to aboriginal peoples and the Canadian courts whether self-government was included among those rights” (Anderson, 2006). Negotiation on self-government started early in Canada. Lindau and Cook argued in their book that, “In 1986, The Schlet Indian band of British Colombia was granted self-government by act of parliament. This prosperous and successful band; thus, was able to control and administer their own valuable lands and resources. However, many others Indian groups did not approve the Schelt model because it created local and municipal self-government rather than the sovereign political entity proposed by some native leaders.” Erik Anderson (Cook and Lindau, 2000) also claims that:

“The Canadian government had side-stepped the question of constitutional entrenchment of the right to self-government by accepting the idea that the inherent right to self-government already exists in the constitutions. Its negotiating policy leaves the responsibility for initiating discussion with aboriginal peoples.

Their shopping list can include among others, education, language and culture, police services, and law enforcement, health care, social services, housing, property rights, and adoption and child welfare. Aboriginal set the pace of negotiations and shape their own forms of government to suit their historical, cultural, political, and economic circumstances. At the same time, the government is firm that the self-government will be exercised within the constitution which therefore does not mean sovereignty in the international sense.”

One of the main aspects that self-government gives is a treaty-making right. A common note that talks about the self-government rights given by the Canadian constitution is, “The inherent right of self-government does not include a right of sovereignty in the international law sense and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society” (Government of Canada, 2020).

Initially, Inuit and other indigenous peoples of Canada strived for this right. A negotiation program about self-government of First Nations started early in 1986 with the Canadian government and ended by establishing many regional governments and organizations that worked towards the attainment of the goals related to self-governance for aboriginal peoples in Canada. These organizations included: The national representational organization protecting and advancing the rights and interests of indigenous peoples (ITK), The Assembly of First Nations (AFN), The Native Women’s Association, Truth and Reconciliation Commission (TRC), Congress of Aboriginal Peoples (CAP), Métis National Council (MNC), The Royal Commission on Aboriginal Peoples (RCAP) and others.

On March 10, 2001, the first nations bands in British Columbia signed a treaty with the provincial and federal governments that gave these groups the right of self-rule, a large cash payment and shared control with non-aboriginals of old-growth forests and other natural resources. Twelve separate bands within the tribal council were given autonomous rule over almost 760 square kilometers of old-growth forests, beach fronts, and mountainsides on Vancouver Island and nearby Meares Island. Four years later, ten nations among the first nations were engaged in treaty and self-government negotiations with federal and provincial governments of Atlantic Canada, Ontario, Quebec, Alberta, British Columbia and the Northwestern Territories, during the summer of 2004. More specifically, land and self-government agreements were negotiated decades before for Nisga’a of British Columbia and nine of the 14 Yukon First Nations (Anaya, 2014).

Anderson also notes that “First nations had received funding to establish governments through the Indian Community Self-Government Negotiation Program since 1986, and Inuit have sought similar federal funding to assist ITK and the regional Inuit associations in establishing an Inuit Self-Government Political Accord, and to negotiate self-government agreements with the Government of Canada” (Anderson, 2006). However, the rights granted to aboriginal peoples by Canadian government to establish a

federal government excluded some jurisdictions that the indigenous self-government could not conduct. Some critiques pointed out that that such exemptions lead to anything but not self- government. Canada in its negotiations with aboriginal peoples clearly defined the subjects -matters that were non-negotiable. Thus, exposing the fears of separatism. Fear of separatism is the sole reason that makes any state's government reluctant to grant right of self-government rights to indigenous peoples. "There are a number of subject matters where there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority. These subject matters cannot be characterized as either integral to Aboriginal cultures, or internal to Aboriginal groups. They can be grouped under two headings: (i) powers related to Canadian sovereignty, defense, and external relations; and (ii) other national interest powers. In these areas, it is essential that the federal government retain its law-making authority. Subject matters in this category would include: Powers Related to Canadian Sovereignty, Defense and External Relations" (Government of Canada, 2020).

The excluded jurisdictions are explained in detail, and as noticed include international/diplomatic relations and foreign policy, national defense and security, security of national borders, international treaty-making, immigration, naturalization and aliens, international trade, including tariffs and import/export controls. Also those under "Other National Interest Powers and management and regulation of the national economy, including: regulation of the national business framework, fiscal and monetary policy, a central bank and the banking system, bankruptcy and insolvency, trade and competition policy, intellectual property, incorporation of federal corporations, currency, maintenance of national law and order and substantive criminal law, including: offences and penalties under the Criminal Code and other criminal laws, emergencies and the "peace, order and good government" power, protection of the health and safety of all Canadians, federal undertakings and other powers, including: broadcasting and telecommunications, aeronautics, navigation and shipping, maintenance of national transportation systems, postal service, census and statistics" (Government of Canada, 2020).

However, the negotiations of the Canadian government about self-government with aboriginal peoples have been criticized by many. Irlbacher Fox, who supported negotiating teams on behalf of multiple groups of indigenous peoples, argues that "the very processes by which the negotiations occur prefigure outcomes that will transfer very little real authority to aboriginal communities. Governments select the matters to be negotiated, set the terms for and the pace of negotiations, and determine which negotiating positions are valid. Resultantly, "self-government negotiations marginalize and exclude indigenous peoples' experiences and aspirations, to the point that agreements reached do not represent a form of self-determination but rather another iteration of colonization and forced dependence" (Irlbacher-Fox, 2009).

Self-government of the Indigenous Peoples in New Zealand

The Ratification of the Treaty of Waitangi in 1840 had significant implications. The Crown had to recognize the sovereignty of Māori to ensure its ratification. Although this version of the Treaty abolished the full sovereignty of those who ratified it, it also established the minimum political sovereignty for Maori peoples, contrasting to what the Crown wanted.

Tom Bennion in the New Zealand Land Law noted that the importance of *R. v. Symonds* case (NZPCC (1840-1939)). He stated that "Maori customary interests were to be solemnly respected and were not to be extinguished without the free consent of Maori" and it "remains one of the strongest assertions of aboriginal title in any of the jurisdictions in which it has been recognized" (Bennion, 2009). Some refer the award of *R. v. Symonds* case to the effect of *Marshall (R v Marshall (No 1) [1999] 3 S.C.R. 456* and *R v Marshall (No 2) [1999] 3 S.C.R. 533* are two decisions given by the Supreme Court of Canada on a single case regarding a treaty right to fish). "The notion of aboriginal title as the Marshall Court envisioned it was adopted into New Zealand law in the case of *R. v. Symonds (1847)*. It is important to remember when examining this case that the precedents relied upon linked aboriginal title and self-government derived from legal sovereignty. Like *Johnson v. McIntosh*, this case was constructed through collusion to gain a specific ruling". But in 1877 the case not recognized by justice Prendergast in *Wi Parata v Bishop of Wellington* that the Treaty of Waitangi, where he concluded "could not transform the natives' right of occupation into one of legal character since, so far as it purported to cede the sovereignty of New Zealand, it was a simple nullity for nobody politic existed capable of ceding sovereignty" (*Wi Parata v The Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72*).

Some researchers describe the self- government for Māori in New Zealand as an unarguable issue "Yet the issue is not even on the table for discussion" (Lane, 2008). In broad terms, New Zealand's policies toward indigenous peoples have been widely criticized. The long history of Māori protests and governments' insensitivity and lack of cooperation towards them has found some limitations. The government of New Zealand is now taking these issues seriously. One of the governmental efforts in this regard is Waka Umanga Act. This act that discusses the rebuilding of Māori institutions and new legal frameworks by indigenous peoples themselves. The aims of this act as mentioned in its proposal are:

- (a) Process for forming entities and resolving formation dispute
- (b) Recognition of tribal authorities.
- (c) Establishing good governance standards; and ongoing support by way of an independent national Secretariat (New Zealand & Law Commission, 2006).

The mentioned report states that the benefits of the proposed act for the Māori are twofold. Firstly, to provide tribes and general Maori groups stamped certificate that give them an approved representative structure charter that meets democratic and commercial objectives. Secondly, enable Māori to develop institutions that fit with their culture,

traditions and vision and provide for a corporate entity honed to their needs (New Zealand & Law Commission, 2006).

A part of the report talks about recognition of tribal authority and refer the cause of lack authority for those cause, the ability of external parties to choose the tribal representatives they deal with, the ability of tribal members to promote competing representative institutions, and the lack of a certified body to represent the tribe creates uncertainty for commercial, local government and other interests wishing to treat with the tribe, and for those who are obliged by statute to consult with it (New Zealand & Law Commission, 2006).

But many are not optimistic about these initiatives. As Lane (2008) notices: “Every self-government initiative put forth by the Crown has been done so with the thought that it would aid in the assimilation of Maori. When the anticipated assimilation did not occur, the initiative would be dropped until the next assimilation project came along”.

When many states around the globe have recognized the rights of self-government of indigenous peoples, the self-government right of the indigenous peoples of New Zealand seems a distant dream. Negotiations about their representation in local government have started; however, nothing substantial achieved yet. Also, the government decided to turn down the recommendation of the Royal Commission of at least three Māori councilors for the new council of Auckland. According to the human rights commission: “The number of Māori elected to local government remains far lower than their proportion of the population: in the 2007 local government elections less than 5% of successful candidates were Māori, although Māori form nearly 15% of the population. Many councils have no Māori members at all” (Human Rights Commission, 2008).

Māori political influence is approximately 20% in Parliament. The Māori Party is a coalition partner with the current National Government. In a case study published by Department of Internal Affairs titled “There is much that can be learnt” (de Bres & a Iwi, 2010) the department talked about the situation of Environment Bay of Plenty” where the council of Bay of Plenty shows “promoting and establishing ways of strengthening Māori engagement in council processes and decision-making” and refer the successful case to a several factors, one of them is:” The council demonstrated its commitment to Māori and the Treaty of Waitangi through their actions and not just their words”. Chair of council seemed to be the highest right that the government can give in terms of indigenous peoples’ self-government even in a region where the Maori represent 28% of the population. In the Bay of plenty, A joint Māori-Council working party was established to consider the issue that proposed the promotion of a local bill through Parliament to establish a Māori constituency (based on the Māori Electoral Roll) to elect three councilors, The council was presented for public submission. Most peoples favored it. Judge Peter Trapski (1998), who was appointed as an independent commissioner to

provide a report, reported the arguments of both who were in the favor and who were against. However, he opposed the report in following words:

- (a) There is nothing to stop Māori standing for Regional Council
- (b) Councilors should stand on their own merits.
- (c) The basis of democracy would be undermined. New Zealanders should be treated equally
- (d) The present system seems fair and democratic.
- (e) It will create another area of conflict.
- (f) We are one land and one people.
- (g) We want to keep the costs of local government down
- (h) It will promote separateness; will lead to apartheid.
- (i) The proposal is racist and extraordinarily divisive.

Together with the significant difference between the number of (760 in favor and 252 against), this issue also exposed the dismal and limited representation of indigenous peoples locally. This incident also shows that there still a lack of understanding about the self-determination of indigenous peoples how their sufficient representation in local governments and councils is still debatable.

In comparison with the situation in other countries, the Māori Law review (2014) claim that:

“The Indigenous peoples of Canada have a lesser degree of self-determination in law and fact than the USA but still much more than Māori through the Federal comprehensive claims and self-government agreements such as the James Bay Cree and Inuit Northern Quebec Agreement 1975, the Inuvialuit Settlement 1984, the Nunavut Settlement 1993, the Nisga’a Settlement 1999 and the Tsawwassen Settlement 2009. Band government under the Indian Act in Canada is another form of self-determination in law but it appears to be more limited and has some parallels to Māori governance under the paternalistic Māori Land Court regime in New Zealand.”

The Treaty of Waitangi gave Māori peoples important standing and rights in New Zealand. It enabled them to hold the Crown accountable to its promises over time. The Treaty was crucial to the development of institutional structures to recognize and give Māori a voice in New Zealand’s political system. Neul asserts that:

“In New Zealand, the Crown has become national — historically and politically like what happened in Canada, but distinct from what developed in Australia. In both New Zealand and Canada, the Crown made treaties regulating its relations with the aboriginal inhabitants of the new colonies. These treaties, combined with the circumstances of settlement, created an ongoing duty on the part of the Crown towards the native peoples of these countries.” (Cox, 2002).

Indigenous peoples in Canada and New Zealand took advantage of the historical treaties. These advantages, even though, were delayed but at least provided a social and political guarantee for their rights. With the increasing awareness among indigenous peoples internationally tandem with the pressures exerted by human rights movements,

the plight of indigenous peoples is now tougher and louder. The governments now are constrained by moral, social, and international commitments for indigenous peoples.

Conclusion

The base ground of comparison between Canada and New Zealand originates from the population and the percentages of indigenous peoples out the total population in each country, which are 4% and 15% respectfully. Canada has more diversity as it has more than three different tribes and groups. In New Zealand, the only group Maori represented 15% of its total population in 2016. Contemporarily, there exist differences between the rights of self-government of indigenous people in Canada and New Zealand. Canada appears more advance in various aspects. Firstly, there exists a clear constitutional and legal recognition of self-government right. Secondly, Canada has a significant institutional work of indigenous peoples' rights. Every group of indigenous peoples can establish their own institutions and manage their own affairs in their own way. Finally, the presence of the indigenous right of self-governments in the agenda of the Canadian government makes self-government an undebatable right. However, the situation in New Zealand is quite dismal. Basic issues of self-government are still under negotiation. The only self-government authority given to Maori people is the parliamentary representation and regional council's seats. In comparison with Canada, Maori institutions have a limited influence on the affairs of indigenous peoples.

Reference

- Amadahy, Z., & Lawrence, B. (2009). *Indigenous Peoples and Black People in Canada: Settlers or Allies?* In *Breaching the colonial contract*. Springer.
- Anaru, N. A. (2011). *A critical analysis of the impact of colonization on the Māori language through an examination of political theory*. *Dissertation*, Auckland University of Technology).
- Anaya, S. J. (2014). *Report of the special rapporteur on the rights of indigenous peoples in the situation of indigenous peoples in Canada*. Human Rights Council, Twenty-seventh session, UN General Assembly.
- Bonesteel, Sarah. and Anderson, E. (2006). *Canada's relationship with Inuit: A history of policy and program development*. Ottawa: Indian and Northern affairs Canada.
- Anderson, E. (2006). *Canada's relationship with Inuit: A history of policy and program development*. Indian and Northern affairs Canada.
- Bennion, T. (2009). *"Maori Land"*. *New Zealand Land Law*. Wellington: Thomson Reuters.
- Canada Constitution Act 1982. Retrieved on May 28,2020, from https://sencanada.ca/content/sen/committee/421/APPA/Briefs/ConstitutionAct_2017-09-19_e.pdf
- Cook, C. & Lindau, J. (2000). *Aboriginal rights and self-government: The Canadian and Mexican experience in North American perspective*. McGill-Queen's Press-MQUP.

- Cox, N. (2002). The Treaty of Waitangi and the Relationship Between the Crown and Maori in New Zealand. *Brook. J. Int'l L.* 28(1). 1-31. DOI:10.2139/ssrn.420020
- de Bres, J., & ā Iwi, K. W. (2010). *Maori Representation in Local Government: The Continuing Challenge-A Draft Discussion Paper*. Wellington: Human Rights Commission. Available at <https://www.hrc.co.nz/our-work/indigenous-rights/our-work/maori-representation-local-government/>
- Government of Canada. Crown-indigenous Relations and Northern Affairs. Retrieved on June 3, 2020, from <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#inhrgs> (access 3 June 2020)
- Guide, F. P. (2004). *Aboriginal self-government. Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*.
- Hawthorn, H. B. (Ed.). (1966). *A survey of the contemporary Indians of Canada*. Vol I and II. Indian Affairs Branch.
- Imai, S. (2008). *Indigenous Self-Determination, and the State*. Aboriginal Policy Research Consortium International (APRCI).
- Indian and Northern Affairs Canada. Available at http://www.aincinac.gc.ca/pr/pub/sg/plcy_e.html
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- Irlbacher-Fox, S. (2009). *Finding Dahshaa: Self-government, social suffering, and Aboriginal policy in Canada*. Vancouver. UBC Press.
- Lane, M. (2008). *Indigenous Peoples Tribal Self Government: Legal History and Public Policy Manifestations in Canada, New Zealand, and the United States*. New Zealand and the United States.
- Māori Population Estimates (2017). State NZ website.
- Murphy, M. (Ed.). (2005). *The State of the Federation: Reconfiguring Aboriginal-State Relations (Vol. 98)*. McGill Queens University Press.
- NZPCC (1840-1939) 387.
- Permanent Forum on Indigenous Issues. (2014). *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress*. UN Doc. E/C.19/2014/3. available at <http://daccessny.un.org/doc/UNDOC/GEN/N14/241/84/PDF/N1424184.pdf?OpenElement>
- R v Marshall (No 1) [1999] 3 S.C.R. 456 and R v Marshall (No 2) [1999] 3 S.C.R. 533 are two decisions given by the Supreme Court of Canada on a single case regarding a treaty right to fish.
- Reinders, K. (2019). A Rights-based Approach to Indigenous Sovereignty, Self-determination, and Self-government in Canada. *SURG Journal*. 11. 1-11. <https://doi.org/10.21083/surg.v11i0.4389>
- Report of the Royal Commission on Aboriginal Peoples, Available at: <http://data2.archives.ca/e/e448/e01188230-01.pdf>

- Srikanth, H. (2012). Native Indians' quest for self-government in Canada: Perspectives and prospectus. *Indian Journal of Canadian Studies*. IV. 64-83.
- Statistics New Zealand. Accessed on May 12, 2020 from <http://www.stats.govt.nz>
- Statistics on Indigenous peoples in Canada. Statistics of Canada. {Accessed on June 28, 2020} from, <https://www.statcan.gc.ca/eng/subjects-start/indigenous-peoples>
- The Canadian Encyclopedia, Indigenous Self-Government in Canada. Retrieved on May 29, 2020 from, <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-self-government>
- The Maori Law review, (2014).
- The Rights of Indigenous Peoples: what you need to know. NZ Human Rights. Retrieved on May 29, 2020 ,from https://www.hrc.co.nz/files/5814/5618/4456/NZHR_Booklet_12_WEB.pdf
- The Working Group Report (UN Doc. E/CN.4/Sub.2/1996/21)
- Trapski, P (1998) The Proposal to Establish a Māori constituency for Environment B.O.P, The Bay of Plenty Regional Council. Retrieved from <http://www.envbop.govt.nz/Reports/Maori-980829-EstMaoriConstituencyReport.pdf>. (accessed in 17 May 2020)
- UN Doc. E/CN.4/Sub.2/1997/14, para.129. See also UN Doc. E/CN.4/Sub.2/1996/21, paras. 153-154.
- UN General Assembly, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, A/RES/2200, available at: <https://www.refworld.org/docid/3boof47924.html> [accessed 12 October 2020].
- United Nation Declaration on The Rights of Indigenous Peoples.
- United Nations Committee against Torture. (2015). *New Zealand's 6th periodic review under the Convention Against Torture*.
- United Nations. (2008). *United Nations Declaration on the Rights of Indigenous Peoples*. Retrieved from http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- Vending, D. & Mikkelsen, C. (2016). *The Indigenous World 2016, The International Work Group for Indigenous Affairs (IWGIA)*. Copenhagen. https://www.iwgia.org/images/publications/0740_THE_INDIGENOUS_ORLD_2016_final_eb.pdf
- Weeks, N. C. (1985). *Autonomy of Indigenous Peoples in Canada*. York University.
- Weeks, N. C. (1985). *Autonomy of Indigenous Peoples in Canada. Autonomy of Indigenous Peoples in Canada*. York University
- What We Can Learn from New Zealand: for Constitutional Recognition of Indigenous Peoples in Australia. (2014). Cape York Institute. Retrieved on 26 May ,2020, from <https://www.aph.gov.au/DocumentStore.ashx?id=764fe1f-9cab-4a6f-8c9a-6f8d92bba731&subId=301030>
- Wi Parata v The Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72.

Wilson, G. N., George, P., & Columbia, B. *The Nunavik Commission and the path to self-government in Arctic Quebec*. Department of Political Science University of Northern British Columbia.

Zealand, N., & Law Commission. (2006). *Waka Umanga: a Proposed Law for Maori Governance Entities: Also Published as Parliamentary Paper E3192*. New Zealand. Law Commission.