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Organizing Indigenous Governance in Canada, Australia, and the United States

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Introduction

My purpose in this paper—a preliminary contribution to a larger project—is to raise a set of research and policy issues having to do with the organization of Indigenous governance in Canada, Australia, and the United States. I make the assumption, both in this presentation and in the larger enterprise of which it is a part, that there is value to be found in comparative work on certain Indigenous issues across these countries. While they differ in important ways, they have significant commonalities in political and legal heritage, in the historical displacement of Indigenous populations, and in the vigorous and contemporary Indigenous pursuit of self-determination.

One of the primary goals of Indigenous populations in all three countries is to establish and exercise the right to govern themselves, and the set of issues surrounding Indigenous governance is my concern here. While this paper is based on ongoing research, much of what I have to say at this point is impressionistic. This is, emphatically, a preliminary exploration.¹

The Rise of Governance as an Indigenous Issue

The rise of governance as an Indigenous issue echoes to some degree a broader discussion of governance in the economic development community around the world. That community has paid an increasing amount of attention to governance issues in recent years, and to the link between institutions of governance on one hand and development outcomes on the other (see, among others, Bräutigam and Knack 2004; Doornbos 2001; Egnal 1996; Knack and Keefer 1995; La Porta et al. 1999; North 1990; Ostrom 1992). But that community has paid only occasional attention to Indigenous peoples and their often distinctive situations. Furthermore, in the development community, the focus on governance remains primarily a donor and academic concern over what less developed countries are not doing. In the Indigenous community—at least in the countries considered in this paper—the focus on governance is being driven as much by Indigenous initiatives, and reflects a somewhat different policy dynamic.

Nonetheless, the concern with governance on the part of central governments addressing Indigenous issues probably reflects some familiarity with the larger development discussion. At the very least, central governments, looking for solutions to seemingly intractable poverty among Indigenous peoples, saddled with discouraging histories of failed policies, and having tried almost everything else, would seem likely eventually to hit on a “governance” approach.

Real life has been given to the governance debate, however, by factors within the Indigenous arena. Three, in particular, seem important. The first is the *relative* success of the Indigenous rights agenda in all three countries. I emphasize “relative” because any account that describes the fight for Indigenous rights as successful must be carefully qualified. But in each of these countries the last few decades have seen some progress—admittedly mixed—on the rights front. This is apparent in a number of places, among them the self-determination policy dating from the 1970s in the United States; the 1997 *Delgamuukw* and 2004 *Haida* and *Taku River* decisions (among others) of the Canadian Supreme Court; the work of Canada’s Royal Commission on Aboriginal Peoples; and the 1992 *Mabo* decision of the Australian High Court, the related Native Title Act of 1993, and various Australian co-management agreements.²

To be sure, these developments are hardly secure—recent Supreme Court decisions in the US, for example, have undermined much of what was earlier achieved (Williams 2006), while actions of the Howard government in Australia have stripped *Mabo* and Native title legislation of much of their effect (e.g., Behrendt 2003). But, in all three countries, Indigenous peoples have succeeded in increasing, to one degree or another, their control over at least some of the decisions that affect their lives.

Success—even modest success—in the pursuit of self-determination eventually leads to issues of governance. As Indigenous peoples increase their control over major decisions, how they make and implement such decisions are becoming, more and more, a topic of discussion, not least among those peoples themselves. As long as they had little or no governing power, such discussions were pointless. Now that Indigenous peoples have some governing power, both they and outside authorities look to the resultant governments for decisions and for capable execution of decisions, once made. Along with the shift in power, there is a shift in accountability—a point not missed by many Native communities now looking to their own leadership to address problems that outside governments have neglected or been incapable of solving.

Another source of the turn toward governance issues within the Indigenous arena is the need for funding. This is most apparent, probably, in the United States, where American Indian nations with ambitious nation-building agendas are faced with reduced federal support and the need to generate revenues of their own with which to operate. They have discovered, in some cases quite independently, the significance of governance as a critical factor in economic development. The

result is that governance has joined economic development near the top of some Indian nations' lists of concerns.

Something similar is happening in Canada and Australia as well. As Indigenous peoples in all three countries begin to replace federal or other outside agendas with their own, they often are confronted with the realities of outside funding limits and the divergence, in some cases, between their priorities and those of funding bodies. In addition, many of them have recognized the difficulty and incongruity of governing in the name of self-determination while remaining substantially dependent for operating funds on decisions made by some other government that may be serving other interests.

Finally, there are research results. In particular, research generated over the last 20 years by the Harvard Project on American Indian Economic Development and its partner organization, the Native Nations Institute at the University of Arizona, has shown that the form and quality of Indigenous governance, assuming there is substantial and meaningful Indigenous jurisdiction, is a powerful predictor of success in economic and community development (see, for example, Cornell and Kalt 1997a, 1997b, 2000, 2003, 2005; Cornell 2005; Jorgensen 2000, forthcoming). Recent scholarship in Australia also is underlining the importance of governance in realizing Indigenous agendas (see Hunt and Smith 2006 for a summary).

There may be other factors involved as well. We have some evidence that a new generation of leaders and professionals in all three countries is less inclined to spend time blaming outsiders for current problems—however justified that blame may be—and more inclined to focus their energies on what steps Indigenous peoples themselves can take to regain control of their situations and generate their own solutions to pressing problems. Not all of these people are in community leadership positions; some are in NGOs of one kind or another, or are prominent in activist Indigenous networks.

Regardless of the exact combination of factors, however, the result has been to establish governance as a major issue in Indigenous policy debates—both among Indigenous peoples and in central governments—in all three countries. It has become a headline topic at major conferences, a leading agenda item for a number of organizations, and a growth topic in policy and academic dialogues.

Some Policy Questions

These developments raise a number of policy questions. I want to highlight four of them.

First, when states and Indigenous peoples talk about governance, they often seem to have different things in mind, and they consequently talk past each other. In Canada, and to some extent in Australia, the state often appears to conceive Indigenous self-government as self-management or self-administration.³ The core idea seems to be that Indigenous communities can administer programs designed

by central governments for their benefit. Much of the focus is on fiscal accountability, process, and bureaucratic rules (see Cornell, Jorgensen, and Kalt 2002; Cornell, Curtis, and Jorgensen 2004, Table 1).

Indigenous conceptions of governance, on the other hand, often differ from those of the state in at least two ways. First, they conceive self-government as involving significant, substantive power over the decisions that shape Indigenous lives, from law-making to governmental design to resource management to intergovernmental relations. Second, the idea of governance is often consciously embedded in a more comprehensive set of concerns that get little attention from state actors.

For example, a former governor of a New Mexico Pueblo recently remarked, “Governance is ... multi-layered. One layer is maintaining the harmony of a community—its well-being. It is about maintaining all the things we cherish: the language, the culture, the ways we are with each other.... Another layer of governance is jurisdiction. It involves dealing with counties, states, school systems. This is a very different context. It is potentially a win-lose context, and it can be dangerous ... You have to work very carefully at this level, and the governance challenge is very different.”

A retired judge with an American Indian tribal court, discussing governance over a meal, said, “We are dealing with two very different systems here. We have the customary system ... It is about how to live a successful life, a good life, a meaningful life. Then there is the Western system. It is a very different system, with different roots ... We have to figure out how to live in these two systems. It is not a matter of making a choice. And they do not mix easily ... What we face is how to live in this place where these two systems meet and still be ourselves.” He indicated a bowl of stew in front of him. “The question is: how do you make this bowl of stew feed everybody? That’s what governance is about.”⁴

A second issue is related to the first. What will be the scope of Indigenous jurisdiction? Will it be limited to administrative decisions within a local legal and political context that is controlled by outsiders? Or will central governments give up enough jurisdictional power to enable Native peoples who are equipped with capable governing systems to have practical impacts on real-world problems?

This is a critical matter. A substantial body of research now demonstrates that Indigenous progress on economic and related community development depends substantially on jurisdiction. Indigenous nations need to have the authority—and the accountability that goes with it—to shape what happens on their lands and in their communities. Without jurisdiction, governmental reform is an exercise in futility: regardless of the resultant form, the government remains toothless.

This problem raises the third issue. What institutional form will Indigenous governance take? In all three countries, central governments have been eager to provide the answers to this question. This is apparent in the Indian Act in Canada and its various amendments; it also is apparent in the Indian Reorganization Act

in the United States, which strongly encouraged American Indian nations to adopt governmental forms designed in the Solicitor General's office in the US Department of the Interior. And it has been a recurrent theme in the efforts of Australian governments to encourage Aboriginal community organization (see Morphy 1999; Rowse 2000; Smith 2004).

The danger in this approach is the lack of legitimacy that imposed governance solutions almost invariably have with the people being governed. People tend to respect governments that they view as genuinely theirs, regardless of whether they actually played a part in their design (although that is one way to build legitimacy). Governments are likely to perform better where they reflect Indigenous conceptions of how authority should be organized and exercised.

The last issue is a variation on the second and the third. It has to do with a particular aspect of both jurisdiction and form: scale. What should be the boundaries along which both jurisdiction and governing institutions are organized? To put it somewhat differently, who is the self in self-government? This is the topic I will pursue in the remainder of this paper.

Who Is the Self in Self-Government?

The answer to this question is more obvious in some situations than in others. For example, in much of the United States, the logic of what Sanders and Smith (2002) call "the social geography of governance" is readily apparent. While both the expropriation of Indigenous lands and the colonial administration of Native communities were enormously destructive, the organizational boundaries of many American Indian nations today coincide with Indigenous conceptions of peoplehood. In other words, a large number of Indian reservations in the United States are homes to more or less unitary peoples. The organizational and the cognitive dimensions of peoplehood coincide (Cornell 1988, ch. 5).

This is not everywhere the case, not even in the US. Not only were some nations forced together on single bodies of land (for example, the Shoshone and Arapaho on the Wind River reservation or the fourteen tribes and bands of today's Yakama Nation), but there are tensions in some nations that share language and culture between component village or kinship units with long traditions of autonomy and centralized structures empowered by the United States (for example, the Hopi Tribe and the Tohono O'odham Nation). In still other places, historical events or administrative or organizational boundaries sometimes separated groups who had seen themselves as a single people, while in Alaska, efforts to regionalize administration fly in the face of many Indigenous concepts of peoplehood and of appropriate organizational scale.

While such issues are more the exception than the rule in the United States, the fragmentation of peoples has been common in Canada. Aboriginal group organization was diverse. In parts of the country, such organization seldom reached beyond the extended family; in others, supra-familial units sustained

coordination over extended periods of time through political structures of considerable complexity. As throughout much of the world, colonization had a leveling effect, reducing organizational diversity as colonial administrators reorganized Indigenous communities in ways that facilitated administration, land transfers, and assimilative programs. In Canada, it also had a fragmenting effect as Indigenous lands were taken and individual bands were restricted to tiny fragments of land: the reserves. The reserve structure then became the organizational structure of Indigenous affairs, with each reserve treated as a separate unit.

The effect of this, in many cases and in contrast to the pattern in the United States, was to pull apart the organizational and cognitive dimensions of peoplehood.⁵ Bands sharing a sense of themselves as a people, based in kinship links, shared language and culture, and intimately shared histories, found themselves separated into multiple, small, heavily administered settlements and enclaves.

This has left a legacy that vastly complicates the challenge of Indigenous self-government. In 1996, the Royal Commission on Aboriginal Peoples estimated that Canada has approximately 1,000 Aboriginal reserve and settlement communities—many of them identified as First Nations—but that those communities make up only 60 to 80 nations, defined as “a sizeable body of Aboriginal people that possesses a shared sense of national identity and constitutes the predominant population in a certain territory or collection of territories” (1996, 25). Fragmentation and isolation have made it very difficult for these nations to organize self-government along national (as opposed to First Nation) lines. Meanwhile, small land bases and populations mean many First Nations have only limited human capital pools and limited assets that can be used in productive economic activity.

The “who is the self” issue is most complicated in Australia. Hugely diverse and widely dispersed across a vast landscape, most of the Indigenous peoples of Australia lived in small populations with few supra-familial political structures other than, in some cases, shared understandings of law. Such shared understandings shaped decisions, but in complex ways. Diane Smith comments, for example, that

In Indigenous societies, certain scales of social aggregation are associated with “proper” authority and decision making about particular kinds of matters. But these aggregations are fluid in their composition and stability. For example, religious, economic and political interests in land are not held exclusively by primary owners. Rather, rights and responsibilities overlap and are dispersed across a range of people and interest groups. Extended families deal with particular domestic matters and localities; larger groups of extended kin may come together for particular economic activities; “clans” may meet across larger regions for ceremonial and dispute-resolution purposes; and responsibility for the conduct of particular ceremonies is distributed across kin categories of ownership and management resident in different locations. (Smith 2004, 18; see also Sutton 1995, ch. 4 and 5)

On top of this variability and fluidity came mid-twentieth-century federal policies that forced many of these Aboriginal groups to leave their territories and resettle

at mission stations, where welfare and social services could be administered more economically and, supposedly, more effectively. The result was the creation of numerous central and outlying service centres with largely Aboriginal populations of great diversity in language and culture, concentrated on lands to which only one of these peoples may have a traditional claim. Economic, social, and ceremonial relationships may not at all coincide. Nonetheless, outside governments want these physically separate communities to make decisions; they want to know who speaks for them; and they want to know who will be accountable for what happens.

In such situations, unitary governmental structures may end up reflecting administrative realities but no Indigenous boundaries at all, either organizational or cognitive, or may have legitimacy in one domain of decision-making but no legitimacy in another. The challenge of building capable governing institutions under such circumstances is daunting (see discussions in Smith 2004; Taylor 2004, ch. 1; Morphy 1999).

Efficacy vs. Legitimacy

For Indigenous peoples, the significance of the “who is the self” issue is partly practical: many of the nations or communities involved are small and operate at the limit of their own human capital supply. They have to figure out how to exercise governmental functions effectively, and they have to consider potential economies; larger units may not only be easier to staff but, in some cases, are more effective at executing certain governmental functions and/or cheaper to run. They also may wield more political clout, not an insignificant consideration for many Native peoples.

But the issue is also a matter of legitimacy. The resultant governments must have the support of the people they govern. Imposed boundaries—however much administrative or economic sense they make—can fatally undermine processes of governance (Cornell and Kalt 2003).

The issue has significance for non-Indigenous governments as well. Where it remains unresolved or is inadequately resolved, the likely result will be Indigenous governments that are inefficient, abused by their own citizens, and conflict-ridden, leading to problematic intergovernmental relations and greatly increased costs.

Cornell and Kalt (2003, 2005) argue that the organization of Indigenous self-governance has to pay attention to both of these requirements—efficacy and legitimacy. This means that governance solutions have to be adequate to the practical, governmental challenges Indigenous nations currently face and have to be viewed, at the same time, by their peoples as appropriate ways of governing. As part of any governance solution, social geography is likewise subject to these same requirements. The boundary aspect of the organization of Indigenous self-government also has to address concerns both of efficacy and legitimacy. Of course, efficacy

solutions and legitimacy solutions do not always coincide. Discontinuities between the two can produce pressure on Indigenous nations for cultural change, institutional innovation, or both.

Unfortunately, Native and non-Native governments often part company in their respective emphases when they consider Indigenous governance. Dominant governments tend to be much more interested in efficacy than legitimacy. Often overlooking legitimacy issues, they want to organize Indigenous self-governance—to the extent that they want it at all—for administrative convenience and efficiency: how we can deliver services to Indigenous peoples in cost-effective ways. Often operating within a self-administration or self-management framework, they have difficulty looking beyond efficacy as a governmental goal.

Indigenous nations, on the other hand, while not necessarily ignoring efficacy, tend to operate in a very different framework and to be more interested in legitimacy (perhaps only implicitly) insofar as their concerns, in part, are with the survival of Indigenous communities, not only as physical entities but as complexes of social relationships. For example, while economies of scale in service provision might matter to them, survival is as much a cultural and political issue as it is an economic one. Indigenous nations may be quite willing to accept higher economic costs for higher cultural and political returns to a specific form or scale of organization. These different emphases can produce divergent solutions to the “who is the self” question.

What’s more, efficacy and legitimacy affect each other. Governments that have legitimacy with those being governed are likely to be less vulnerable to rent-seeking and internal conflicts, and consequently are more likely to perform well. Similarly, governments that perform well over time are more likely to maintain or establish legitimacy with those being governed. “This government works” and “this government is ours” may appear to be competing orientations, but they tend, ultimately, to support each other.

Governance Solutions

As one might expect, in all three countries, an assortment of nations and groups are developing governance solutions, sometimes within, sometimes outside of state-sponsored processes. Many of them directly address the “who is the self” issue, from the Ktunaxa Nation in British Columbia that links five First Nations in a unitary governance structure, to the Thamarrurr Regional Council that links twenty different clan groups in the Northern Territory of Australia, to intertribal courts and intertribal service organizations in the United States.

These solutions typically involve institution-sharing, bringing together previously separated parts of single nations or uniting multiple nations for some governmental tasks. In most cases, they rely on shared cultures, shared ecosystems, or shared histories as bases for building trust among entities that have become accustomed to operating independently. They also typically distinguish among

governmental functions, with some functions remaining the primary responsibility of a component group, while others are deferred to the larger collectivity; in other words, many of these solutions are multi-scalar. More and more, these nations also are trying to learn from each other, sharing models and ideas that may have relevance across cultural and even international boundaries.

Effective approaches to this issue will require both Indigenous and non-Indigenous governments to abandon certain preconceptions. Central state approaches to Indigenous government typically indulge a one-size-fits-all fantasy that denies diverse Native nations the freedom to choose institutional solutions of their own design, including solutions that may depart from state ideas about what viable governance structures should look like. Meanwhile, Native nations often have a we-can-do-it-all fantasy that hesitates to cross political boundaries in search of more viable institutional solutions to governance challenges. Both preconceptions present obstacles to the kind of innovation that some of these challenges may require.

Preliminary Lessons

This is a preliminary presentation of these issues, but it suggests some equally preliminary lessons.

- In many cases, and for reasons outlined above, the current organization of much Indigenous government is ineffective.
- Capable governance will require change and, in some cases, innovation.
- Some innovations will necessarily involve adjustments in scale for at least some peoples and, for some governmental purposes, a rethinking of “who is the self.”
- Not all governing institutions within a nation or community must have the same social or geographical scale.
- Governing institutions shared across communities or even nations can be a solution to size, asset, and isolation problems.
- Institution-sharing is an act of self-determination.
- Institution-sharing, because it often is a departure from recent practice, typically faces legitimacy challenges, but these challenges can be solved through:
 - Shared culture, ecosystem, experience, etc.
 - A deliberate “process of Indigenous choice” (Smith 2004, 27)

What We Need

How such lessons should be applied in practice is a major question and beyond the scope of this presentation. However, there is a research agenda that could be of considerable assistance to both Indigenous and non-Indigenous policy makers wrestling with these issues.

First, we need a better understanding of how Indigenous and non-Indigenous conceptions of governance differ, so as to facilitate more productive communication between the two about the governance challenges Indigenous peoples face.

Second, we need a systematic examination of what Indigenous governance requires in terms of both structure and scale. Such an examination will have to be sensitive both to the different requirements of various governmental functions—including functions that Indigenous peoples see as critical but that central governments fail to comprehend—and to the variable concerns and situations of diverse peoples.

Much of this second need could be met by the third: documentation of effective models and of how change toward those models takes place. We do not have, in any of these three countries, a shortage of Indigenous solutions to governance challenges. However, we are not very good yet at analyzing those solutions and making these emergent Indigenous models and the practical analysis of why they work available to Indigenous and non-Indigenous decision makers.

Finally, we need to know more about the sources of governmental legitimacy and about Indigenous processes of legitimation that can allow innovative governance solutions once again to emerge and endure in Indigenous communities.

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Endnotes

- 1 Much of the material in this paper applies also to New Zealand, which is included in the larger project of which this paper is a part. For further discussion of the grounds for comparative work across these countries, see Cornell (2005).
- 2 On the US, see Castile (1998), Cornell (1988), and Nagel (1996). On Canada, see Asch (1999), Cairns (2000), McNeil (1998), and the Royal Commission on Aboriginal Peoples (1996). On Australia, see Baker, Davies, and Young (2001), Behrendt (2003), Craig (2002), and Smith (2004).
- 3 This was at one time the case in the United States as well, and a similar view still surfaces in the federal bureaucracy and elsewhere, but over the last thirty years or so, it has been widely accepted that American Indian nations can exercise, among other things, significant law-making, enforcement, and judicial powers. The long-term security of those powers is another matter.
- 4 These comments are taken from my field notes on conversations about Indigenous conceptions of governance, November 2005.
- 5 As Satsan (Herb George) of the Wet'suet'en people in British Columbia put it, "they shredded our nations." Presentation at the University of Arizona College of Law, Tucson, Arizona, September 23, 2005.

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