Disenfranchised Democracy: Administrative Interventions in Historically-Segregated Communities of Canada and South Africa

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An idea of democracy has won out as the central justification—perhaps the *raison d'être*—of the modern state.[1] This particular idea stresses an electorates' right to vote for its representatives to the state law-making body from a class of professional politicians. A state's legitimacy is thus somehow parasitic on the extent to which it realizes this general form. Unsurprisingly, much academic work in the past few decades seeks to analyze and prescribe electoral systems, especially for the national legislature. Sub-national elected legislatures, seen as smaller-scale versions of national electoral systems, are of marginal interest.

Not only is this concept of democracy accepted as the ideal form of institutional and political government, it has more recently been seen as a remedy for societies driven by historical injustices. In the case of colonial states with a settler-dominated government, democracy has been invoked by both protagonist and antagonists to transform constitutional relations. In Canada, 'Indians'[2] could not vote in federal elections until 1960.[3] The 1982 (and failed 1992) constitution recognized the treaty and other rights of its aboriginal peoples, in particular some form of self-governance. Universal suffrage in South Africa would not come until the 1994 general elections.[4] The Constitution of 1996 created democratic municipal councils as a third sphere of government. Both Indian band councils and local municipalities have limited powers consisting largely of delivering basic services like water, housing, health

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[1] John Dunn's intellectual history of democracy describes it as a victory of the 'Egoists' over the 'Equals'. The latter's idea is less concerned with creating institutions of representation (or co-opting an expanding electorate into existing institutions), and instead focuses on the goal of realizing a society of substantive "equals": *Democracy: A History* (Toronto: Penguin, 2005).

[2] When used in this paper, the term 'Indian' refers to those individuals so defined by federal legislation in the *Indian Act*, R.S.C., 1985, c. I-5, s. 1.

[3] Act to Amend the Canada Elections Act, S.C. 1960, c. 39.

[4] The history of disenfranchisement is more complicated than presented here: see *e.g.* Richard H. Bartlett, 'Citizens Minus: Indians and the Right to Vote' (1980) 44 *Saskatchewan Law Review* 163-94; Albie Sachs, *Justice in South Africa* (London: Chatto [and] Heinemann for Sussex University Press, 1973).

and infrastructure. In recent years, this paper will argue, the national and provincial governments in both countries have increasingly intervened in elected councils through administrative, rather than constitutional, means. By undermining the customary and participatory practices of these local democratic experiments, these interventions sap the transformative promise of autonomous local governance for historically-segregated communities. In an age of constitutional democracies, administrative intervention has become a new form of disenfranchisement.

I. TWO CONSTITUTIONAL PRINCIPLES OF DEMOCRACY

If democracy (and its related ideas of constitutionalism and the rule of law) is a basis to transform unjust societies, it is worthwhile examining this claim in two countries with rather different histories of excluding certain communities from its public space. The following two sections provide a brief sketch of the democratic principles found in the Canadian and South African constitutions. While the principles are not identical, they are remarkably similar considering the distinct historical, political and socio-economic contexts of both countries. Their key elements support Dunn's claim that an idea of democracy privileging representation and elections is the dominant norm of today's self-consciously 'democratic' states.

Canadian principle of democracy

Democracy is one of the four "unwritten principles" of the Canadian constitution.[5] The Supreme Court defined the principle of democracy as "a fundamental value in our constitutional law and political culture".[6] While it is not so stated in the written constitution, the Court has argued that the Canadian constitution implies a constitutional democracy, and then distinguished between two aspects of this democratic principle.[7] The first is an

[5] The others are federalism, constitutionalism and the rule of law, and respect for minority rights: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ['*Secession Reference*'], p. 49; also *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 S.C.R. 3 ['*Judges Reference*'].
[6] Secession Reference, p. 61.
[7] Secession Reference, p. 100.

institutional system of representative government.[8] The framers of laws must reflect, in some sense, the will of the sovereign people. Moreover, "the people" include all Canadian citizens, including formerly excluded groups such as women, minorities and aboriginals. As the Court put it, democracy is "the process of representative and responsible government and the right of citizens to participate in the political process as voters [...] and as candidates."[9] In the federal system of Canada, there are several "sovereign wills" represented in the provincial and federal legislatures.[10] The second aspect is a substantive one of self-government.[11] It ensures the dignity of citizens by enabling them to construct a more just and equal society. However this goal is tempered by the rule of law, which constrains the majority's will especially regarding minorities.[12] The most important form this principle takes is a right to a referendum to secede from the Canadian federation.

The democratic principle in reinforced in the written texts of the Canadian constitution. Voters elect representatives from their districts to the federal and provincial legislatures.[13] The Charter of Rights and Freedoms only permits limits to its fundamental rights that are "demonstrably justified in a free and democratic society."[14] This "democratic right" is confirmed in section 3 of the 1982 Charter of Rights and Freedoms.[15] Today there are no restrictions on women, minorities or indigenous people from voting in provincial or federal elections, yet this democratic principle is not quite so clear regarding aboriginal self-governance.[16]

Federal parliament retains legislative authority over "Indians",[17] while the 1982 constitution "recognized and affirmed" aboriginal and treaty rights.[18] The Charter rights,

[8] Secession Reference, p. 63.
[9] Secession Reference, p. 65.
[10] Secession Reference, p. 66.
[11] Secession Reference, p. 64.
[12] Secession Reference, p. 68.
[13] *British North America Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.), ss. 40 & 41 ['*BNA 1867*'].
[14] *Canada Act*, 1982, c. 11 (U.K.), sch. B, s. 1 ['*Constitution 1982*'].
[15] "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." *Constitution 1982*, s. 3.
[16] Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 *Windsor Yearbook of Access to Justice* 329-61.
[17] "Indians, and Lands reserved for the Indians." *BNA 1867*, s. 91(24).
[18] Constitution 1982, s. 35(1).

including the right to democratic participation, cannot derogate from these particular rights.[19] The Charlottetown Accord, a substantial amendment to the constitution that failed in a 1992 referendum, would have granted First Nations a distinct status as a third order of government along with federal and provincial governments, and recognized their "inherent right to self-government within Canada." Although the proposed amendments were never realized, the federal government has adopted these self-governing principles as its policy towards aboriginal peoples.[20]

Since the 1982 recognition of aboriginal rights, the judiciary has interpreted the right to self-government in several cases. In *R. v. Pamajewon*, the Supreme Court considered, but did not decide on, an aboriginal right to self-government.[21] The majority applied a test developed in earlier series of cases dealing with specific aboriginal rights like fishing or hunting.[22] Assuming self-government fell under s. 35(1), the test for this aboriginal right is that the activity in question "must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[23] By linking a right to a specific activity, both the majority and dissenting judges agreed that there was no broad aboriginal right to self-government. In this light, the majority narrowed the appellant First Nations' claims for self-government, as Chief Justice Lamer wrote, to a right "to participate in, and to regulate, gambling activities on their respective reserve lands."[24] The appellants tried in turn to tie this distinctly modern activity to old Ojibwa traditions of games from before contact with Europeans. The majority rejected this claim in the second part of the test since gambling, while it had in fact existed, was not "of central significance to the Ojibwa people".[25]

The *Pamajewon* decision seems to affirm an aboriginal right of self-government, but only a very narrow one relating to particular activities that are (and have been since European contact) central to the culture of the First Nation asserting that right. This right has also been

[19] *Constitution 1982*, s. 25. The written constitution does not, however, list specific aboriginal rights.
[20] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995).
[21] [1996] 2 S.C.R. 821.
[22] The aboriginal rights test is expounded in the so-called 'Van der Peet trilogy': R. v. Van der Peet, [1996] 2 S.C.R. 507; R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; R. v. Gladstone, [1996] 2 S.C.R. 723.
[23] Van der Peet, p. 46.
[24] *Pamajewon*, p. 26.
[25] *Pamajewon*, p. 28.

asserted as an essential element of aboriginal title, which is a broader claim to a sort of sovereignty over a territory. In 1984, 35 Gitxsan and 13 Wet'suwet'en hereditary chiefs, on behalf of their respective Houses, began a claim for aboriginal title in the lower courts. Their case eventually made its way to the Supreme Court in their 1997 decision, *Delgamuukw v. British Columbia.*[26] The Court declined to decide the merits of the appeal by the chiefs since they had not re-framed their claim as "Houses" to that of two "First Nations".[27] Since the *Pamajewon* decision had come out after the appellants' appeal, they framed their self-government claim too broadly "in a manner not cognizable under s. 35(1)".[28]

Yet the Court did go on to imply some characteristics of self-government in the context of aboriginal title. Aboriginal title was a *sui generis* right that was inalienable, communal and source in aboriginal and common laws' interaction.[29] Self-government is then parasitic, in some sense, on this underlying title. It would be practiced 'communally', tied to the land in question, and incorporate elements of custom and common law.[30] Finally, in *Delgamuukw*, Chief Justice Lamer concluded the majority judgment by urging the parties to pursue "negotiated settlements, with good faith and give and take on all sides", rather than litigation (though he did not preclude this).[31]

South African principle of democracy

The democratic principle in South Africa is broadly similar to that in Canada. During the Constitutional Convention, the parties agreed on an interim constitution that set out several principles to bind the drafters of a final constitution. The first principle provides for, *inter alia*, "one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races".[32] Other principles provide for multiparty, representative democracy at each level of

[26] [1997] 3 S.C.R. 1010.
[27] *Delgamuukw*, p. 77.
[28] *Delgamuukw*, p. 170.
[29] *Delgamuukw*, pp. 113-15.
[30] Campbell v. British Columbia (Attorney General), [2000] 4 C.N.L.R. 1 (B.C.S.C.), p. 137.
[31] *Delgamuukw*, p. 186. See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1105.
[32] Constitution of the Republic of South Africa Act, 200 of 1993 ['*Interim Constitution*'], sch. 4, principle I.

government.[33] Importantly, this democratic principle is circumscribed to allow the institution of traditional leadership to continue in some form.[34] In its first certification judgment, the unanimous Constitutional Court expanded on the democratic principle.[35] For the Court, the first principle of a "democratic system of government" also entailed "representative government" based in general on proportional representation.[36] Regarding traditional leadership, it would have no direct power in "democratically elected" local government.[37] The national legislature, however, could "allow traditional leaders to have a role as part of or in association with democratic municipal government".[38] In their second certification judgment, the court added that since the transition to a "democratic" local government system would take time, it was not inconsistent with the democratic principle to delay its implementation.[39]

The preamble to the final constitution stresses the principle of democracy as the basis of society and government.[40] The first section reiterates that the republic is "one, sovereign, democratic state" founded on the values on, *inter alia*, "Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".[41] The Bill of Rights is then declared to be "a cornerstone of democracy in South Africa" that "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".[42] Specific rights to elect representatives to legislative bodies and stand for election to such bodies is also protected in the Bill of Rights.[43] There are also provisions to allow direct democratic

[33] *Interim Constitution*, principles VIII & XVII.
[34] Interim Constitution, principle XIII.
[35] Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996, 1996 (CCT 23/96); 1996 (4) SA 744 (CC) ['First Certification Judgment I'].
[36] First Certification Judgment, p. 183.
[37] First Certification Judgment, pp. 402-04.
[38] First Certification Judgment, p. 407.
[39] *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996; 1997 (2) SA 97 (CC) ['*Second Certification Judgment*'], p. 85. The first local government elections did not take place until December 2000.
[40] *Constitution of the Republic of South Africa*, no. 108 of 1996 ['*Constitution 1996*']. The terms 'democracy' or 'democratic' are mentioned in 16 distinct sections of the Constitution, as well as all of Chapter 9, 'State institutions supporting constitutional democracy'.
[41] Constitution 1996, s. 1(d).
[42] Constitution 1996, s. 7(1).
[43] Constitution 1996, s. 19(2).

participation through referenda initiated by the president or a provincial premier.[44] While the constitution does not mention a right to secession, nor has the Constitutional Court been called on to consider it, section 235 does provide for "self-determination" for both the "people as a whole" and "any community sharing a common cultural and language heritage". The Constitutional Court has characterized the constitution as "a participatory democracy, which is accountable, transparent and makes provision for public involvement".[45]

The democratic principle is realized at local level through a two-level system of municipal government. The Constitution sees local government as the means "to provide democratic and accountable government for local communities" with a duty to develop their basic needs of the community.[46] These municipalities have "the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation".[47] Unlike national and provincial legislatures, municipal councils may be elected by either proportional representation, or a mixed proportional and ward systems.[48] Local government is entrenched as one of the three "distinctive, interdependent and interrelated" spheres of government in South Africa.[49] As the Constitutional Court has put it, a municipal "council is a deliberative legislative assembly with original legislative and executive powers recognized in the Constitution itself."[50] As such, its by-laws must be reviewed on judicial, not administrative, grounds.

Municipalities autonomy is quite restricted. National and provincial governments retain significant powers to create framework legislation and otherwise regulate and oversee local government functions.[51] Provincial executives also have the power to intervene when a municipality "cannot or does not fulfill an executive obligation" found in the Constitution or

[44] *Constitution 1996*, ss. 84(2)(g) & 127(2)(g).
[45] Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others, (CCT 59/2004); 2006 (2) SA 311 (CC), p. 111.
[46] *Constitution 1996*, ss. 152(1)(a) & 153.
[47] Constitution 1996, s. 151(3).
[48] Constitution 1996, s. 157
[49] Constitution 1996, s. 40(1).
[50] Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council [1998] 1999 (1) SA 374 (CC), pp. 26 & 38.
[51] Constitution 1996, s. 155(7).

other legislation.[52] This intervention process is quite rigorous, which reflects the importance placed on protecting the autonomy of elected municipal councils (see Part II below). The Constitutional Court has held that national and provincial legislatures must not unduly interfere with local government.[53] The Court has also proven reluctant to resolve intergovernmental disputes. In a national-provincial dispute over public service legislation, it held that matters:

> which are essentially administrative and political in nature, lend themselves to good faith negotiations, using if necessary, the machinery contemplated by section 41. The courts would then serve as a last resort in the event of the machinery failing.[54]

In a later case involving several municipalities and the national executive, the Court again held that they would not resolve a dispute until "every reasonable effort to resolve it at a political level" had been exhausted.[55] By characterizing a dispute as "administrative and political in nature", the Court has greatly limited the cases that it will adjudicate between different spheres of government.

The principles of democracy

This brief reading of the both constitutions does not reveal much of the substantive content of their respective principles of democracy. What is clear is that a 'democracy' is central in structuring and justifying the constitution orders of both countries. The Canadian and South African constitutions declare themselves as a "democratic society" and "democratic state", respectively. Limits on fundamental rights in the constitutions may only be those justified in a "democratic society". In institutional terms, the democratic principle seems to imply only a

[52] s. 139 as amended by *Constitution Eleventh Amendment Act*, no. 3 of 2003, s. 4. Previously, the Constitution provided scant detail for various interventions in local government.
[53] Executive Council, Western Cape v Minister of Provincial Affairs, [2000] 2000 (1) SA 661 (CC), p. 29.
[54] Premier, Western Cape v President of the Republic of South Africa and Another, [1999] 1999 (3) SA 657 (CC), fn 76.
[55] Uthukela District Municipality and Others v President of the Republic of South Africa and Others [2002] 2003 (1) SA 678 (CC), pp. 14 & 19.

representative legislature elected from all citizens not otherwise disqualified. Indian band council elections and municipal council elections both permit mixed proportional and plurality voting systems. Direct participation is quite limited: a qualified right to a secession referendum in Canada (and arguably South Africa)[56] and the possibility of national and provincial referenda in South Africa.[57] Citizens also have a right to vote to elect representatives to national and provincial (and municipal in South Africa) legislatures.

The courts of last appeal in both countries have not greatly expanded on the principles of democracy. In Canada, the Supreme Court has introduced the "unwritten" principle of democracy, but it does not appear to change much of the constitutional order except in an extreme case of provincial secession. The courts of final appeal have otherwise given a somewhat thin reading of this principle given its prominent, if vague, position in the written texts of the constitutions. At the very least the principle justifies some protection to band councils and local governments from arbitrary acts from provincial or national governments. Yet the courts will only go so far. When it comes to the disputes between local government against national and provincial governments, both courts have a remarkably similar response. The Supreme Court has characterized an Aboriginal right to self-government as a narrow exercise of power relating to a specific, historically-legitimate activity. First Nations that have tried to exercise self-government as an element of aboriginal title have had the court characterize their claim as a political one that is best resolved through "good faith" negotiations (and not by the judiciary). Likewise, the Constitutional Court has characterized disputes between spheres of government as "administrative and political in nature", and thus urged them to pursue "good faith" negotiations rather than resort to judicial resolution.

II. ADMINISTERING DISENFRANCHISEMENT

For much of the last century, the Canadian and South African states excluded portions of their population from participating in governing institutions. Despite such different contexts, the

[56] Most commentators are, at best, ambivalent on this question: see *e.g.* John Dugard, *International Law: A South African Perspective*, 3rd ed. (Cape Town: Juta & Co, 2008), 102-09.
[57] There is also a practice of referenda in Canada on various provincial matters (e.g. on new taxes) and constitutional amendments.

administrative histories of indigenous people in Canada and black Africans in South Africa is remarkably similar. A web of national legislation, originating in the late 1800s and perfected in the 1950s, defined, segregated and administered these populations. The *Indian Act* in Canada transformed the multiplicity of indigenous peoples living in its territory into several hundred Indian bands governed by the department of Indian affairs.[58] A similar process transformed the many 'Bantu' peoples of South Africa into ten Bantustans (and the multitude of townships and other 'illegal' settlements) under the effective authority of a department of native affairs.[59] These administrative archipelagos deepened a spatial and socio-economic chasm across from which stood the 'free' society without.

The principle of democracy was extended to these communities in the Charlottetown Accord and interim Constitution as a means to transform the legacy of a segregated system of government administered by a specialized national bureaucracy. This constitutional transformation needed to extend deeper than a universal franchise, an effective right to vote for representatives to national and provincial legislatures. It sought to establish "self-government" for communities who had been effectively excluded from participating in decisions about their daily lives together. This shared history also left these communities with socio-economic conditions far worse than elsewhere in their countries. Thus "self-government" had as its primary goal the effective delivery of basic services. The principles of democracy were to be harnessed to administering a "developmental" local government tied to its community. This section examines the administering of democratic local government by sketching the legal framework of elected band and local councils illustrated by selected administrative interventions in both Canada and South Africa.

Administering democracy for Indian band councils in Canada

[58] James Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto, University of Toronto Press, 1991); see also J. Leslie & R. Macguire, *The Historical Development of the Indian Act* (Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Department of Indian and Northern Affairs Canada, 1979).
[59] David Welsh, *The Rise and Fall of Apartheid* (xxx: University of Virginia Press, 2010).

The daily life of "Indians" is governed by the *Indian Act* and related federal legislation. The band council on each reserve is the legislative and executive body responsible for passing and implementing by-laws. The councils themselves are composed of a chief and councilors by either custom[60] or elections. Bands under the customary system can adopt their own selection process, often based on traditional practices modified by over a century of tutelage under the Department of Indian and Northern Affairs ("INAC"). Current INAC policy is to urge bands to codify their customary elections procedures to help them resolve "governance disputes".[61] The 'model' election code itself closely resembles the election procedures set out in the *Indian Act*.

The Minister of INAC has the power to order band elections to hold elections "[w]henever he deems it advisable for the good government of a band," even if this is against a band's will.[62] The chief and councilors are elected directly or by a ward system. At present, a vast majority of bands under the elected system elect their chief and councilors directly.[63] INAC also has significant powers, acting through the Governor in Council, to make detailed election regulations applicable to all s. 74(1) bands.[64] The only restrictions are that all elections are by secret ballot[65] and eligible voters are all registered Indians over 18 years old who are ordinary residents of the reserve.[66] Finally, the federal executive has the power to order, by the Governor in Council, an election to be set aside after a report by the Minister for reasons of corrupt practices, contravening the *Indian Act* or if the nominated candidate was ineligible.[67]

Band councils under either system have the same the same, limited competencies for making by-laws typical for local government.[68] Councils can provide for health services on reserves, general law and order, water and sanitation, local infrastructure (*e.g.* roads, bridges,

[60] *Indian Act*, s. 2(1)(b).
[61] INAC Custom Election Dispute Resolution Policy. On file with author.
[62] *Indian Act*, s. 74(1).
[63] Indian Bands Council Elections Order, SOR/97-138
[64] Indian Act, s. 76(1); see also Indian Bands Council Method of Election Regulations, SOR/90-46
[65] *Indian Act*, s. 76(2).
[66] *Indian Act*, s. 77. The Supreme Court has held that otherwise eligible band members living off-reserve may, in some cases, vote in band elections: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
[67] *Indian Act*, s. 79. The Minister can also depose a chief or councilor for similar reasons; s.78(2).
[68] *Indian Act*, s. 81(1).

fences) and commerce (*e.g.* licensing hawkers, zoning for businesses), as well as imposing a fine of less than $1,000 or a prison term of less than 30 days upon summary conviction under such by-laws.[69] Councils may also pass by-laws for taxing reserve land, businesses and trades,[70] as well as prohibiting the sale or consumption of intoxicants on the reserve.[71] These legislative powers are subject to the Ministers right to disallow them at his discretion.[72] The exception is liquor-related by-laws, which instead only require the consent of the majority of electors.[73] INAC can also has extensive power to order regulations, by the Governor in Council, that cover the most important band council legislative powers.[74]

A band council's power to shape its community and address its basic needs like health, water and roads, is thus quite limited under the *Indian Act*. The Minister has three other administrative tools to intervene in the workings of a council. The first is the discretionary power under section 74(1) to order a band to adopt the electoral system. Some bands remain under the customary system, which allows them limited autonomy to sustain their community's governance traditions in the face of the restrictive *Indian Act*. This is especially important when one realizes that most bands number from a few thousand to only a couple hundred members. Moreover, the politics of many bands today is fractured by a complicated colonial history unique to each band.[75] Since customary systems stress consent instead of competition in elections, polarized politics can paralyze such bands. A close look at INAC policy and practice reveals that they have favored (and even imposed) a particular conception of democracy in resolving such disputes.

The INAC policy to resolve customary elections disputes is based on four principles: (i) encourage First Nations to resolve disputes themselves, (ii) resolve disputes quickly, (iii) resume council work quickly if a third-part administrator is appointed, and (iv) foster "a strong foundation for the inherent right to self-government policy and the accountability

[69] *Indian Act*, s. 81(1)(r).
[70] *Indian Act*, s. 83(1).
[71] *Indian Act*, s. 85(1)(1).
[72] *Indian Act*, ss. 82(2) & 83(4).
[73] *Indian Act*, s. 85(1)(2).
[74] *Indian Act*, s. 73(1).
[75] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996), vol. II, pt. 1(3).

framework".[76] INAC encourages bands to codify their leadership selection codes, preferably modeled on one provided by the department. Regional INAC directors must then follow a dispute resolution framework that begins with assessing the dispute and encouraging a local solution. A director may then choose from a set of increasingly intrusive interventions: first, ensure the band has complied with its election code, if it has one; next, mediation by an impartial party (though INAC has no power to impose this); and, last, the parties can agree to a binding arbitration process. If all these steps fail to resolve the dispute, the Minister can then intervene directly in two ways. The Minister may order a referendum on the dispute, asking the band members to decide between a customary or electoral system, or to choose between two disputed versions of a custom. Finally, the Minister may, "where a community is in chaos and it is impossible to get agreement to mediation or arbitration from the parties", exercise discretionary power to order the band to come under the electoral system by section 74(1). But INAC recognizes that this is the "antithesis of self-government" and only a last resort.

INAC is often involved in internal disputes at the levels of interpretation of customary codes,[77] mediation and arbitration. It is the two direct invention powers, however, that go to the root of administrative intervention in band councils. The Minister's power to order a referendum privileges a conception of democracy as primarily concerned with representing the "will" of the constituent body. Justice Rouleau of the federal court, trial division, expanded on this:

> It is true that the Constitution Act, 1982 entrenches the customs of Aboriginal peoples, but if the latter decide that they will no longer elect the band council in accordance with custom, they cannot be accused of infringing their own customs. That would be illogical.[78]

In this case, the chiefs of the Six Nations, the largest reserve in Canada, had appealed to aboriginal self-determination based on aboriginal customs. For the judge, however, the "logic"

[76] INAC Custom Election Dispute Resolution Policy. On file with author.
[77] INAC has now stopped interpreting election codes, instead encouraging either internal resolution or appeals to the courts: personal communication with Ingrid Trudel, INAC, 14 October 2010.
[78] Six Nations Traditional Hereditary Chiefs v. Canada (Minister of Indian and Northern Affairs), [1992] 3 C.N.L.R. 156 (F.C.T.D.)

of the constitution demanded that the ultimate test of legitimacy was a referendum, despite the long-standing confederated constitution of the Six Nations.[79] By a one-time referendum, a simple majority can dispense entirely with the confederated custom of the Haudenosaunee. Aboriginal self-government, it seems, is of a difference order than a province, like Quebec, which could only negotiate secession after a clear referendum question and a clear majority in favor (admittedly, a more radical political action — though one must not underestimate the importance of abandoning a customary system of governance).

The second, and most controversial intervention, that "antithesis of self-government," is a Ministerial order to change a band from a customary to electoral system. It is so controversial, in fact, that it has only been invoked four times since the 1982 constitutional amendments.[80] In 2004, the Minister converted the Eskasoni band to the electoral system. Just a few thousand people, the band has since struggled to adapt the *Indian Act* system to their community. There have been regular accusations of corrupt elections[81] and the band has recently moved towards self-government along traditional lines by reverting to a section 2(1)(b) customary status band.[82] Whether as an order or a threat, the Minister's power to force bands to adopt the electoral system remains a key administrative tool for INAC to control band councils that disagree with federal policy (as will be seen below in the case of the Algonquin of Barrière Lake).

The third administrative power to intervene in band councils allows the Minister to appoint a co-, or third-party manager to take over band administration. This power is derived from two distinct sources. The first, contractual source consists of specific Canada/First Nations funding agreements, which are intergovernmental contracts for fiscal transfers.[83] The

[79] Not only is Six Nations the largest reserve in Canada, it is also one with a rich political history of which this court case is only one of the most recent clashes: Willam N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy*, (Norman: University of Oklahoma Press, 1998).
[80] Dakota Tipi Band Council Elections Order, SOR/2002-316; Sandy Bay Band Council Elections Order, SOR/2003-78; Eskasoni Band Council Elections Order, SOR/2004-105; Indian Bands Council Elections Order, SOR/97-138.
[81] 'Accusations of vote buying surface in Eskasoni band election,' *CBC News*, 21 Nov 2008 <http://www.cbc.ca/canada/nova-scotia/story/2008/11/21/eskasoni-votes.html>.
[82] 'Eskasoni ponders self-government,' *Cape Breton Post*, 29 May 2008 <www.capebretonpost.com/Living/People/2008-05-29/article-764423/Eskasoni-ponders-self-government/1>; 'Language, Culture and Mi'kmaq Values Central to Governance in EskasonNCFNG, June 2008 <www.fngovernance.org/news/eskasoni2.htm>.
[83] Funding Arrangements Intervention Policy, INAC, on file with author.

second, statutory source is the "co-management and third-party management" provisions of the *First Nations Fiscal and Statistical Management Act*.[84] Both sources give the Minister or the First Nations Financial Management Board power to impose co-, or third-party management when an Indian band does not fulfill its contractual (i.e. a council defaulting on specific undertakings, failed audit, excessive operating deficit, or "reasonable belief, based on material evidence, that health, safety or welfare of First Nation members is being compromised")[85] or statutory (*i.e.* a council is at risk of defaulting on its obligations to the First Nations Finance Authority)[86] duties.

The Algonquin of Barrière Lake (*Mitchikanibikok Inik*), with just a few hundred members, provide an (extreme) example of interventions into band councils. After a leadership crisis split this small community in the early 1990s, the factions reconciled after mediation by a provincial court judge and codified their customary governance practices in the 1996 *Mitchikanibikok Anishinabe Onakinakewin*, "to retain our customary system of government, but at the same time recognize the need to adapt to changes affecting our lands and institutions and that such changes require the consent of the people".[87] The governing council, the *Nikanikabwijik*, is chosen by *wasakawegan*, a process of nomination by elders and a public vetting process where nominees are agreed to by consensus. Day-to-day administration of band affairs, however, are the duty of the *Oshibikewinik*, a "democratically elected" Board of Directors under the *Nikanikabwijik*'s control.

A second governance crisis arose when the chief resigned in June 2006 after INAC appointed a third-party manager to take over the band's administration and finances (the band had been co-managed from November 2004). The band then began the process to select a new chief under the *Mitchikanibikok Anishinabe Onakinakewin*. There was another dispute over the selection process that was mediated by a federal court judge.[88] Instead of following the mediator's report, however, INAC recognized the minority faction's "chief" since it would

[84] 2005 c. 9, ss. 51-4.
[85] Funding Arrangements Intervention Policy, art. 7.1-2.
[86] First Nations Fiscal and Statistical Management Act, ss. 52(1) & 53(1).
[87] *Mitchikanibikok Inik Declaration*, on file with author; for a history of the crisis, see doc001.pdf
[88] Réjean Paul, *The Algonquin of Barrière Lake: Mediator's Report*, 15 May 2007 [on file with author].

led to "improved collaboration of the new council with INAC".[89] The majority faction disputed this recognition and the earlier third-party management decision in two court challenges. When INAC sought to impose its discretionary decision, most of the community joined in a blockade of the only road leading to the reserve (after which the majority "chief" was arrested and jailed).[90] In February 2010, the Federal Court, Trial Division, upheld the minority faction's claim that the June 2009 customary elections were invalid.[91] However, Justice Mainville would not accept INAC's recognition of the minority faction either (especially since they had refused an offer to reconcile with the majority). A few months later the Minister placed the Algonquin of Barrière Lake under the section 74(1) electoral system.[92] At present, the first elections have not been held and the reserve is again blockaded at regular intervals to protest the unilateral INAC actions.

Administering democracy for municipal councils in South Africa

Local government in South Africa is governed by a cluster of laws implementing chapter 7 of the Constitution.[93] Local municipalities,[94] like Indian bands, may have councils elected either by proportional or a mixed proportional-ward system.[95] Each municipality has an elected council and an executive to administer its by-laws. In addition to the council, municipalities must permit traditional leaders a (non-voting) say in their councils.[96] There may be a role for traditional councils in "service delivery", although this remains unclear as the South African

[89] The INAC decision is detailed in a confidential memorandum on the election dispute: see Martin Lukacs, 'Minister's Memo Exposes Motives for Removing Algonquin Chief,' *The Dominion*, 27 March 2009.
[90] 'Road Blocked: Four Arrested at Highway Blockade by Barrière Lake Algonquin,' *Montreal Gazette*, 19 November 2008.
[91] *Ratt v. Matchewan*, 2010, (Federal Court, Trial Division) 160, 17 February 2010.
[92] Indian Bands Council Elections Order, SOR/97-138.
[93] See in general Jaap de Visser, *Developmental Local Government: A Case Study of South Africa* (Oxford: Hart Publishing, 2005), especially pp. 170-208; *White Paper on Local Government*, Ministry of Provincial Affairs and Constitutional Development, 1998..
[94] The Constitution, in s. 155(1), provides for three categories of municipalities: metropolitan ('A'), local ('B'), and district ('C'). This paper focuses on category B local municipalities, which encompass most of the former Bantustans.
[95] Constitution 1996, s. 157(2); Municipal Structures Act, no. 117 of 1998, s. 9.
[96] Municipal Structures Act, s. 81.

government struggles to define the role of traditional councils in a democratic order.[97] For now, however, local government remains in the hands of elected councils with an increasing, yet ambivalent, role for customary leaders in some municipalities.

The legislative competencies of local councils are set out in the Constitution. These include powers similar to, though more extensive than, band councils, including municipal health, water and sanitation, local public works and infrastructure, and other local functions.[98] The national and provincial government should also delegate specific competencies to a municipality if it is more effective to administer locally and the municipality has the necessary capacity.[99] Municipalities also have various fiscal powers to raise funds from property rates, service surcharges and other fees.[100] While national legislation regulates these powers, two independent constitutional bodies, the Financial and Fiscal Commission, and the South African Local Government Organization, share a role in forming the regulatory framework.[101] The national and provincial governments also have a role in monitoring local councils to ensure they fulfill their duties and functions.[102]

Despite promising to bring democratic governance to local communities, the law and practice of municipalities has seen a shift in emphasis towards efficient service delivery. While the *Municipal Structures Act* of 1998 declares local government "fundamental" to "democracy, development and nation-building", the *Municipal Systems Act* of 2000 stresses its "fundamentally developmental" in providing basic services. The current *Provincial Intervention in Local Government Bill* does not mention the democratic purpose of local government at all. This changing attitude is reflected in the evolving intervention powers of national and provincial government in local councils in the last decade. Given the co-operative constitutional system where national and provincial governments share oversight duties, assessing the autonomy of local councils is significantly more complex than in the case of Indian band councils.

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[97] Traditional Leadership and Governance Framework Act, no. 41 of 2003, s. 5; Barbara Oomen, Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era (Oxford: James Currey, 2005), pp. 58-69.
[98] *Constitution 1996*, schs. 4 & 5, part B.
[99] *Constitution 1996*, s. 156(1) & (4).
[100] Constitution 1996, s. 229.
[101] *Constitution 1996*, s. 229(5); Christina Murray & Yoni Hoffman-Wanderer, "The NCOP and Provincial Intervention in Local Government," (2007) 18 *Stellenbosch Law Review* 7-30.
[102] Municipal Structures Act, ss. 105-08.

The national executive has initiated an enormous administrative project to address local capacity. In 2004 the Department of Cooperative Governance and Traditional Affairs (formerly the Department of Provincial and Local Government) launched 'Project Consolidate', a mass administrative intervention in more than half of the municipalities to improve delivery of basic services. "Over 1280 technical experts were deployed [from the national government] to 268 municipalities", a recent report notes, "since the start of Project Consolidate at the end of December 2008".[103] What is not mentioned is that these municipalities were almost exclusively those in the former Bantustans and other marginalized communities. This top-down project is run by the President's Coordinating Council out of the cabinet and then down through the DCGTA structures, the Premiers' offices and then the mayors of local councils.[104] By framing itself as a capacity-building project, Project Consolidate has largely escaped constitutional provisions and legislation governing local government intervention. Until a full empirical study is done, however, it is impossible to say without further study (none of which exist) what impact the presence of centrally-deployed administrators taking over local functions has had on the autonomous practice of local governance.

In more extreme cases, the provincial minister in charge of local government ('MEC') may intervene in local councils under section 139.[105] First, the province may issue a directive to the council detailing its failure and steps to remedy this. Second, it may take over responsibility for the unfulfilled obligation if necessary to (i) "maintain essential national standards or meet established minimum standards for the rendering of a service", (ii) prevent the council from harming other provincial or municipal interests, or (iii) "maintain economic unity". The province must submit written notice to the local government minister and the National Council of the Provinces ('NCOP') within a fortnight and it must end the intervention if it not approved by the minister then or by the NCOP within 30 days. The NCOP must also review the intervention regularly and direct the province by a process established by national regulation.

Not only can local councils be dissolved, their structures may be altered in many different ways by administrative action. The *Municipal Structures Act* sets out six distinct local

[103] South Africa Yearbook 2009/10, ed. Delien Burger, p. 271.
[104] *Project Consolidate: A Hands-on Local Government Support and Engagement Programme*, Department of Provincial and Local Government (now CoGTA) <ftp.shf.org.za/lg_project_consolidate.pdf>, p. 21.
[105] Municipal Structures Act, s. 34(3)-(4).

council structures based on different permutations of executive and ward participation systems.[106] The MEC may change any local municipality to any other type after consulting SALGA and other affected local governments.[107] As mentioned above, the MEC may also alter local councils by including traditional leaders in local councils. A community's ability to choose its own form of local government by electoral system and council composition is limited to at most a consultative role in the MEC's discretionary decision.

The section 139 interventions fall into two categories. The first deals with non-financial problems in municipalities and will soon come under the provisional *Provincial Intervention in Local Government Bill*.[108] The bill, along with several constitutional amendments to section 139 it contemplates, seeks to clarify an increasing practice of provincial intervention in municipalities by setting out an "early warning system" of municipal self-monitoring supported by MEC to prevent interventions.[109] These rather scant provisions are followed by a five-level provincial intervention process. If a section 139(1) invention is necessary, the provincial executive may (a) impose measures regulating failed executive obligation of the municipality, (b) issuing a section 139(1)(a) directive to the municipality, (iii) assume responsibility for municipality's failed executive duty by section 139(1)(b), (iv) suspend the council and/or councilors and/or functionary and appoint an administrator, or (v) dissolve the council and appoint an administrator by section 139(1)(c).[110]

The second type of intervention in local government concerns its fiscal functions derived from the Constitution.[111] The *Municipal Finance Management Act* is a sprawling law (180 sections in over 80 pages!) regulating all aspects of local government finance.[112] Each council must follow a detailed budget-making process (the 'integrated development plan') with onerous annual reporting requirements to the provincial and national governments.[113] If a local council cannot meet its fiscal duties, then the provincial executive must decide whether a

[106] Municipal Structures Act, s. 7.
[107] Municipal Structures Act, s. 16.
[108] On file with author. These are found in *Constitution 1996*, s. 139(1)-(3).
[109] Provincial Intervention in Local Government Bill, ss. 6-11.
[110] *Provincial Intervention in Local Government Bill*, s. 14(2); for an analysis of whether a s. 139(1)(b) intervention may suspend a council, see Yoni Hoffman-Wanderer & Christina Murray, "Suspension and Dissolution of Municipal Councils under Section 139 of the Constitution," (2007) *Journal of South African Law* 141-45..
[111] Constitution 1996, ss. 139(4)-(7) & 229.
[112] No. 56 of 2003.
[113] Municipal Finance Management Act, ch. 12.

section 139 intervention is justified.[114] There are several options for intervening depending on the particular fiscal problem at the municipality. In less serious cases, the province may (i) assess the problem, (ii) try to resolve it "in a way that would be sustainable and would build the municipality's capacity to manage its own financial affairs," (iii) ask a third-party to formulate a recovery plan, and (iv) consult the mayor to implement this plan.[115]

For more serious problems, like a council failing to meet its financial or basic service obligations, the province must follow the detailed intervention process set out in the *Municipal Finance Management Act*.[116] An intervention is triggered by several conditions, such as failing to make payments, not passing an auditor review or having an operating deficit greater than 5% of revenue (compared to 8% for Indian band councils).[117] The provincial executive must then organize and help the municipality implement a recovery plan formulated by the Municipal Financial Recovery Service, a statutory body within the national treasury.[118] If the municipality fails to implement the plan, the province must dissolve the council, appoint an administrator and implement the plan itself.[119] Finally, if the province cannot fulfill its intervention duties, then the national executive must step in and do so.[120]

Despite the detailed legislation and regulation of provincial interventions, the process remains confused and uncertain in practice.[121] In the High Court of the Eastern Cape, Justice van Zyl declared invalid a section 139(1)(c) intervention by the provincial executive council to dissolve the Mnquma local council in 2009.[122] The provincial executive had tried to dissolve the council several other times in the preceding months, but kept having their order set aside by courts for procedural reasons. For Justice van Zyl, the section 139(1) types of intervention "provide for an alternative form of intervention as opposed to a step in a process".[123]

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[114] Municipal Finance Management Act, s. 136(1).
[115] Municipal Finance Management Act, s. 137.
[116] Ss. 138-48.
[117] Municipal Finance Management Act, s. 138.
[118] Municipal Finance Management Act, ss. 139-41 & 157.
[119] Municipal Finance Management Act, s. 146(3).
[120] Municipal Finance Management Act, s. 149.
[121] To the author's knowledge, only three court decisions have dealt with s. 139 interventions, including the two cases discussed below, as well as *City of Cape Town v Premier of the Western Cape and Others*, 2008 (6) SA 345 (C).
[122] *Mnquma Local Municipality v The Premier of the Western Cape*, no. 231/2009, 5 August (High Court, Eastern Cape) [unreported].
[123] *Mnquma*, p. 72.

Provincial executives thus have discretion over the type of intervention. But the intervention must be "appropriate", and this is an objective test subject to judicial review that "requires a balancing of the constitutional imperative to respect the integrity of local government as far as possible against the constitutional requirement of effective government".[124] The radical step of dissolving a council requires "exceptional circumstances" such that the provincial executive must prove that (i) other, less intrusive measures were at least considered, (ii) there is a "causal connection" between a municipal council's actions and its failed executive obligations, and (iii) dissolution can resolve the failure in question.[125] Justice van Zyl concluded that in this case the Eastern Cape executive's actions did not meet the test and so were "irrational," despite significant evidence of problems in the Mnquma local council.

The question of sequencing, moving from minimal to intrusive, arose again in recent decision in the High Court, Western Cape division, regarding a section 139(4) intervention that sought to dissolve the district council of the Overberg municipality.[126] The council of 20 members was split with the African National Congress-led majority coalition comprising 11 members. In a complex series of events (the speaker resigned and no replacement elected, the municipal manager locked out the council from its chambers, the practice of calling meeting by text message was disputed, etc.), the council missed its statutory deadline to pass a budget and was dissolved by the provincial executive council. The question for Justice Bozalek was whether this dissolution, as an executive act, complied with the principle of legality. It did not, he held, because the provincial MEC and executive council, both informed of the district council's problems, did not first attempt the less drastic interventions discussed above for financial crises.[127] "The circumstances of this very case", Justic Bozalek concluded, "illustrate the good sense in s 139(4) requiring a provincial executive to consider appropriate steps falling short of dissolution of a council."[128] In the complex, faction-driven municipal councils, often hobbled by inexperience and lack of capacity, the primary duty for provinces is not to impose

[124] *Mnquma*, p. 75.
[125] *Mnquma*, p. 81.
[126] *Overberg District Municipality v Premier of the Western Cape*, no. 16166/2010, 12 October (High Court, Western Cape) [unreported]; Justice Bozalek bases his analysis on that of Justice van Zyl regarding a s. 139(1) intervention in *Mnquma* [discussed above].
[127] Overberg District Municipality v. Premier of the Western Cape, pp. 48-56.
[128] Overberg District Municipality v. Premier of the Western Cape, p. 55.

order and accelerate service delivery, but instead to foster a civil atmosphere for resolving common goals.

Administrative intervention and democratic principles

The last decade has seen a deepening and quickening of national and provincial intervention in Indian band councils and local councils. Often lacking experience and expertise, the councils are responsible for much of their communities' most pressing needs, from housing and infrastructure, to clean water and primary healthcare. They must perform these duties while complying to a complex web of constitutional, contractual, statutory and regulatory norms. The brief analysis above only alludes to the depths of the local governance problems in historically-segregated communities. In face of all this, local councils must retain and even foster their organic ties to their communities.

New (and proposed) legislation and regulation has granted more and more extensive, powers to intervene in the executive and legislative functions of these councils. National and provincial executives must monitor, support and otherwise regulate local government. In practice, this has been to reorient local government as the deliverer of basic services. No longer primarily experiments, of sorts, in 'participatory' democracy, the councils are evaluated and assisted to maximize efficient service delivery. This is neither surprising nor objectionable in communities with drastically worse living standards to their neighbors without a history of administrative segregation. Yet it also privileges a vision of community members as passive consumers of basic human goods (housing, water, healthcare, etc.) over that of active participants in a shared politics to formulate their collective needs and plans to realize them.

When called upon, courts have held that intervention processes should be a gradual one from less to more drastic curtailing of local government autonomy. Instead, national and provincial governments are increasingly resorting first to the more drastic interventions of dissolution or third-party management. This is explained in part by a realistic assessment of local government driven with factional politics and simply no administrative capacity to perform their functions. However, this structural symptom of historical segregation has led national and provincial governments to prioritize service delivery by any means. For the

communities benefiting from this intervention, their members are again excluded from a meaningful role in deciding the most important decisions of their collective existence. In short, it reproduces the daily political exclusion (though not necessarily the racism) of the old order that the constitutional principles of democracy promised to transform under the rule of law.

Last, many of these communities have revived direct action protests to resist national and provincial interventions. The Algonquin, for instance, have blockaded roads to prevent INAC from altering their customary electoral code. The last few years in South Africa have seen a revival of apartheid-era protests, such as property destruction and mass marches.[129] (In urban areas, there is even a nation-wide organization of shack-dwellers, *Abahlali baseMjondolo*, which advocates direct action to bypass local government structures.) These protests, often deliberately illegal, are the most dramatic evidence of the relative failure of a particular idea of democracy to achieve any meaningful transformation in the daily lives of marginalized communities.

III. A DEMOCRATIC PARADOX

This paper has argued that constitutional principles of democracy, predominantly 'representative' in nature, severely curtail the promise of self-governance to historically-segregated communities in the 1990s. In practice, national and provincial executives have increasingly employed more drastic interventions in band and local councils' electoral systems and functioning. This trend sees members of these communities less as participants in communal decision-making and more as consumers of basic government services. In fact, interventions are justified in the name of basic service delivery, while entitlement to these goods *qua* human rights is justified by an appeal to the constitutional principle of democracy itself: citizens in a democratic society deserve equal access to basic human goods.

This paradox of intervention is rooted in an older problem — more critical and intractable than how to design electoral systems for representatives — of how to

[129] For an urban case study relating to housing in Khayelitsha, see Ephrem Tadess, *et al*. *The People Shall Govern: A Research Report on Public Participation in Policy Processes* (Johannesburg: Centre for the Study of Violence and Reconciliation with Action for Conflict Transformation, February 2006), ch. 3.

institutionalize local democratic practices of particular communities in the fleeting moments of constitutional change. We might call this the 'Arendtian moment', for she concludes her analysis of the American (and French) revolution by lamenting "the failure to incorporate the townships and the town-hall meetings, the original springs of all political activity in the country, amounted to a death sentence for them".[130] Well over three centuries later, the communities segregated in Indian reserves and Bantustans faced a similar moment. A decade and a half on, the fragile experiments in self-governance are threatened by the very constitutional structure erected to shelter them in their nascence.

[130] Hannah Arendt, *On Revolution* (London: Faber & Faber: 1963), p. 239.