

**International Conference on Federalism
Mont-Tremblant, October 1999
BACKGROUND PAPER**

DOES FEDERALISM SAFEGUARD INDIGENOUS RIGHTS?

Christine Fletcher

Director, North Australian Research Unit
The Australian University

Introduction and Overview

The purpose of this paper is to provide a backdrop for identifying and challenging aspects of relationships between indigenous peoples and governments in federal systems. Federal systems operate on the principle that authority is shared and federal constitutions, at least those in democratic federations, represent the interests of communities in sub-national jurisdictions as well as those at a national level. Yet, despite emphasising the virtues of federal democracies, federal constitutions in western democratic systems do not easily represent the interests, or satisfy the needs, of their indigenous populations.

Understanding the relationship between the quality of life of indigenous peoples and the federal framework of systems governing them requires bringing several political, cultural and constitutional strands together. These strands include how political beliefs might affect government institutions, particularly structures designed by western societies, belief systems of indigenous peoples and the close relationship between federal principles and the principles of self-determination.

Questions concerning the dominance of civil society in some of our democratic federations form part of the discussion on federal reform because they provide insight, into how social developments influenced the organisation of power – constitutions, justice systems, political processes, financial systems, territorial jurisdictions, and so on. How jurisdictions share power varies between our federations – some jurisdictions discourage certain freedoms, and some do not. On the other hand, governments in federations are not independent. In practice few if any governmental functions can be carried out by any one level of government solely independent of the functions of another.

The opportunity to address the special needs of indigenous peoples is likely to be advanced far more in a democratic federal system than in one where freedoms are constrained. If people are not free then federalism will be unlikely to be of much help for indigenous people. If governments do not recognise the principles of self-determination, how can these principles be turned into practice?

History illustrates that many of the problems now facing indigenous peoples can be linked first, to their dispossession and second, to their exclusion from citizenship. Until relatively recently, aboriginal populations had no way of influencing federal institutions – they had little effect on constitutional design or the allocation of authority. Their lack of input into the way systems operate raises points about the possible role of civil society in the processes of dispossession.

There have been concerns also over the years that federal arrangements may have actually multiplied the organisations that hastened aboriginal dispossession, or that federalism at a regional level can discourage freedom for minorities – the argument that federalism was a racist form of government was made famous by William Riker in the early 1980s. He later reversed his conclusions.

It may be that federalism complicates the chance of indigenous people to progress their rights. Alternatively, federalism may increase the opportunity for indigenous people to turn to another level of government for support. Either way, federalism is a system with a vast

array of administrative architecture which, in most cases, is promoted for its flexibility. Its strengths lie in its political responsiveness and its potential to accommodate relationships between different peoples.

Federal systems have the instruments for practicing positive reform. In view of the need for reform, the value of adding new dimensions to our federal arrangements is well worth pursuing.

Belief systems, democracy and federalism

Every country is conditioned by the combined affect of its political history, immigration, its cultural and social landscape, and its systems of beliefs.

With some exceptions, social, political and economic institutions that dominate the lives of the indigenous people across most federal countries generally don't incorporate indigenous beliefs. The initial exclusion of indigenous societies from citizenship and from the national, state, provincial and local institutions that support the general population, can be argued to be a central determinant in the processes leading towards how indigenous people are now governed.

In settler federations, particularly those where selective immigration policies placed limits on exposure to new cultures – in the case of Australia, pre world war two immigrants were almost all from the British Isles – beliefs about government institutions in Australia were based solely on British parliamentary traditions. Australian federal democracy was probably the most uninspiring because it moved through the first phase of the 20th century within a framework of monocultural traditions which some observers have rather unkindly traced back to its anglo-celtic inheritance. During the most formative years of government institution building, the only aspects of civil society that most people were likely to have experienced in that country were shaped by the values of the dominant groups.

Western liberal federal systems generally encourage their regional communities to share in the decision-making process. How federal systems that are not democratic can meet community expectations in the absence of being responsive is a difficult question.

There are problems also in western democratic systems: if the groups are indigenous, the standard of their quality of life is likely to resemble standards in third world countries rather than those in a democratic federal system. Statistics on health and welfare, and community developments, in countries such as Australia, Canada, and the United States, for example, illustrate that indigenous peoples often experience widespread community deprivation commonly found in developing countries.

In a federal system, relationships between indigenous peoples and governments are determined, in part, by the constitutional allocation of powers between state/provinces and federal governments – most lands tend to fall under state/provincial jurisdiction, rather than under the jurisdiction of federal governments – although, federal governments have the authority to determine the administration of their own land.

Also, in post-colonial federal systems, early European settlers gravitated towards the most arable and accessible lands which then led to the dispossession of the traditional indigenous land owners. In most cases, following the period of transition from colonial governance to a system of states or provinces, territorial and social dispossession, and general deprivation, worsened. Aboriginal peoples turned to the federal government for assistance - the constitutional protection of rights, intervention in state/provincial exploitation of traditional lands, funding for essential services, treaty processes, reconciliation and so on.

Whether the behaviour of state and provincial governments means that federalism, as a system, has worked against the interest of indigenous peoples or, whether, without federalism, aborigines would be trapped in a unitary system of bad governments without the opportunity to appeal to government at another level is difficult to determine. Whatever the speculation, hostility over land at the sub-national level has historically

generated adversarial relations between indigenous peoples and governments. As a consequence, aborigines have turned to federal governments at a national level for the constitutional protection of their rights.

In some federations, state constitutions predate those of the central government and for that reason, some scholars, most notably Daniel J. Elazar, argue that the concept of a 'central' government at the national level of a federation is misleading. In that scenario it would be virtually impossible for a national government to decentralise itself in state jurisdictions without consensus. Also, not all indigenous communities want to distance themselves from lower level government. The Australian aboriginal people are constantly demanding that the states take responsibility for delivering goods and services to indigenous communities of the same standard as those delivered to non-indigenous communities.

Recognition of self-determination

There is universal agreement by indigenous people that self-determination is their best chance for survival – self-determination, put into practice, is their bottom line.

Indigenous gains have been made – territorial and self-governing institutions in Canada, sub-national economic sovereignty in some states in the United States, land rights and a limited form of recognised indigenous title (native title) in Australia, attempts to alleviate poverty and protect the peoples of Latin America and Mexico, and limited recognition for hill tribes in India and Pakistan.

The prime aim of indigenous peoples is to achieve political recognition. Their claims are often illustrative of the destruction of their ancestral territories and their economic impoverishment. This certainly has been the case in Brazil, in Mexico and in other regions of the world – the countries of Latin America are home to some 30 million indigenous peoples and public interest groups are mindful of environmental issues in that part of the world. Environmental issues provide an international platform for indigenous people.

The type of self-determination that indigenous groups pursue through the United Nations and other international forums appears to compete with various levels of sovereignty – in practice there is plenty of room for compromise. On the other hand, the fact that the federal principle embodies elements of self-determination means that there is a degree of competition within the relationship of these two principles. Also, governments in federal systems often see indigenous self-determination and self-government as potentially destabilising to their existing processes for policy control. The control factor is generally articulated as putting accountability at risk.

Consensus over what actually constitutes self-determination differs between countries, and between the declarations resonating from the United Nations Indigenous Peoples Working Group and the governments whose jurisdiction might be effected by decisions taken elsewhere. In principle, self-determination provides the base for reform – in practice, self-determination ranges from limited recognition as first peoples in some countries, special institutional responses in other countries, constitutional recognition, through to control of revenue and expenditure, and self-government.

There is a distinct relationship between the federal principle, which promotes guaranteed levels of authority at sub-national level, and the principle of self-determination – a principle that also leads governments and societies to a point where the foundations for claims to self-government, sovereignty, and autonomy can be negotiated. Just as freedom and federalism operate effectively together, so do the principles of self-determination and federalism. The territorial jurisdiction claimed by sub-national governments is the cornerstone of a federal constitution. State/provincial governments are often reluctant to share their territorial self-determination with indigenous peoples and it is left to national governments to either carve indigenous self-determination out of national jurisdiction, compensate the states/provinces, or use the boundaries of former native or aboriginal reserves and missions as the foundations for indigenous territorial autonomy.

To reform relationships, first, we need to understand what gives federalism its special qualities, how federal systems differ, and how respective qualities can be improved. This would lead to a better understanding of the federal culture. It is the interplay of different cultures that produces the institutional responses necessary for good government and for improving the federal framework for reconciling differences.

Indigenous unity

At the international level, political unity among indigenous peoples has been based primarily on their status as 'first peoples', rather than through the structure of the domestic power-sharing arrangements in their respective countries. However, it is clear from the United Nations Working Group that forms of indigenous sovereignty are critically important.

Indigenous peoples from developing countries, both unitary and federal – Indonesia, the Philippines, Laos, parts of Africa, the Pacific Island countries and the Americas – incorporate their interests into the international forum under the same principle of self-determination.

For aboriginal peoples, unity across borders has given them a global identity. Also, historically, 'the State' is not an indigenous concept. It is something that indigenous people unwillingly inherited – the formation of the State led to their dispossession.

The general effect of their united action at an international level has heightened public awareness, added to the strength of aboriginal organisations, increased the political status and given leverage to demands for land control. It means too that quality of life factors for indigenous people are now under greater scrutiny than before.

Self-determination – international trends and responses

The United Nations has a proven record as an accessible forum for indigenous peoples. The United Nations Working Group on Indigenous Peoples provided the blueprint, the principles, and basis, on which issues of self-determination and sovereignty have been able to be redefined and shaped by indigenous peoples from some federations, particularly Canada, Australia, the United States, India, Latin American countries, and Pakistan.

The United Nations Working Group has met every year since 1983 following its endorsement by the United Nations Commission on Human Rights in 1982. The Working Group's two main objectives are aimed at ensuring the protection of rights and freedoms and the monitoring of international standards. However, without support from national governments, the influence of the United Nations on member states is limited. Where indigenous rights are concerned, national sovereignty, the way power is shared between national and sub-national governments and the reality of domestic politics, tends to be much more telling on how government policy is made than United Nations declarations.

By some accounts, the United Nations interpretation of self-determination puts too much distance between the demands of indigenous groups and the preparedness of governments to formally recognise self-determination.

Progress in advancing the interests of indigenous populations depends also on political and cultural traditions. India is the world's largest federal democracy but that country's complex social, tribal and ethnic realities make life difficult for hill tribes who claim special treatment. Self-determination for hill tribes in India, and also in regions of Pakistan, has to be compatible with the traditions and religious practices of other groups and also with the practices of local, state and national governments.

There is little evidence that indigenous peoples from Pakistan or Bangladesh have benefited from their system of government. On the other hand, indigenous hillpeople from the Chittagong district have been successful in mobilising support at the UN and the International Labour Organisation (ILO).

By comparison, the Inuit have established very successful territorial jurisdictions and intergovernmental connections with national and sub-national governments in Canada.

The overall trend towards measuring success has been to implement land based solutions by making provisions for indigenous communities to share the policy jurisdictions of other governments, or to work within new jurisdictions.

The next section illustrates that the principles of self-determination and federalism are not so far apart.

Federalism and self-determination

Shared government is the practical outcome of what is often referred to as the federal principle – a principle that promotes unity by encouraging consensus between diverse states, provinces and territories. It does this because it promises, through federal constitutions, to place limits on central authority. The principle is marked by its ability to marry different levels of constitutional authority with different types of regional autonomy and for the various sub-national and national governments to unite under a constitutional system.

The principle of self-determination also has multiple applications: the most general form of self-determination can be found in the domestic context. It arises when people and governments consent to share a formal framework with other regional communities. If agreement can be reached, it enables communities to control decisions for meeting their direct needs.

For most aboriginal peoples, self-determination can range from constitutional reform through to simply policy agreements between different parties. On the other hand, to guarantee that policy agreements will be sustained there must be some degree of constitutional protection, backed up by political will. The spectrum of self-determination ranges from the creation of new territories (Nunavut), through to forms of American Indian self-government programs, and legislation that establishes provisions for inalienable freehold land rights (the Australian states and territories).

Canadians have been engaged in constitutional referenda, renewed treaty processes and territorial reforms for two decades. In the United States, of course, revenue and expenditure policies became part of Native American self-government processes some time ago. Treaty processes date back to the 19th century in both the United States and Canada. Most agreements are framed with national, rather than state, governments, with the exception of Australia. In Australia, the national government is generally excluded from regional agreements with indigenous groups because it has no administrative powers over state lands. In that country, with the exception of commonwealth (national government) administered territories, agreements with aboriginal groups are made with the states and other interested parties for various purposes - commercial purposes, to accelerate services, for site protection, and so on.

Indian self-government programs in the United States are supported by congressional provisions for sovereignty – bearing in mind that this is a sub-national form of sovereignty compatible with federalism and, in this case, it takes a form that can be revised or revoked by Congress. On the other hand, within the system of intergovernmental relations that supports Indian affairs in the United States, Indian tribal governments have status along with state and local governments. The intergovernmental system now operating was endorsed by the Clinton Administration and is formally recognised by the federal legislature – a position envied by aboriginal peoples in Australia.

Australian Aborigines have only recently been recognised as the original owners (but not the custodians) of their country – that followed a national referendum in 1967. In 1993, Native Title was acknowledged in Australia – the Mabo decision – but governments in that country are so committed to electoral politics that the political will necessary for self-determination or self-government generally doesn't survive to the stage of reconciling differences.

Governments in many non-federal systems also recognise the significance of land for indigenous peoples – New Zealand is an example and, more recently, the Philippines. The

Philippines government recently passed an Indigenous Rights Act 1998 designed to protect indigenous peoples from exploitation and, up to now, governments and the international mining industry have made serious effort to understand the reforms that will take place under that Act. The Act has brought governments and indigenous communities from Australia and the Philippines together to discuss the Australian experience of similar legislation.

In practice, self-determination in federations has been a governmental concept. How self-determination is actually put into practice depends on realistic responses from governments, availability of resources, bureaucracy and, levels of political tolerance in the wider communities.

In federal systems, self-determination implies levels of regional autonomy, either in a limited sense through having access to the design or the resourcing of policies, or by having the power to interact with other governments over various policy issues. For states and provinces, self-determination is formally guaranteed through a constitutional system that, in the older established systems, were initiated by the regions – in other words, the sub-national governments often claim greater constitution responsibility than 'national' government – not all sub-national governments have access to adequate resources. Also, federalism only works effectively because, fundamentally, policy functions are shared amongst different jurisdictions.

Consensus

Federalism and self-determination require an appreciation of cultural differences in order to coexist. In the literature on federalism, particularly that by Daniel J. Elazar, this appreciation is usually expressed in a form of consent. The Canadian experience has shown the effectiveness of achieving consensus. This is not to say that all federations can or should mimic Canada but it simply highlights the closeness of the two principles. Coexistence through consensus is not necessarily always smooth, but it works.

Probably the most difficult barrier to putting self-determination into practice is politics. Demands for self-determination are often questioned by sections of the non-indigenous community, particularly the question of why governments should assist to create conditions that favour aborigines exclusively. For some casual observers, there are ideological questions to overcome: for some economists, there are simple rational reasons to be excluded. But for people whose survival depends on reform, there are underlying cultural paradigms that distinguish indigenous people from the general population.

The answer itself is conditioned by different cultural perspectives and belief systems – an acceptance by governments that indigenous belief systems are significantly different to those of non-indigenous societies, notably, western systems, to justify special support.

Does federalism enhance quality of life?

Because of the way that power is shared – the breadth of government and the extent to which some jurisdictions act as a break on the activities of other governments – federalism does offer potential for peoples to pressure governments, at any level they choose, to have their quality of life improved. For indigenous peoples, that can be as a result of empowerment through gaining access to their ancestral lands. But, there is much to be concerned about in a federal system that is undemocratic and controlled through force rather than by consent and abuses the basic human rights of its indigenous people.

No doubt there are arguments that will find favour with federalism even in the worst system of government – the problem then becomes how to avoid down-playing the destruction of societies simply to favour the 'virtues' of federalism. For example, Nigeria is a federal system but it has a history of military rule and, until its recent transition to democratic rule, a poor record of human rights abuses against ethnic populations, particularly the Ogoni. Regime changes of this nature are likely to be linked to deeply rooted, complex problems of government and cannot be simply explained as problems of federalism. Problems of a systemic nature highlight the need for careful consideration

when generalising about the virtues of federal institutions.

If a system is classed as democratic and federal but recognised as corrupt will it be capable of generosity towards its indigenous populations?

There are problems also with democratic federal systems.

As we have already seen, conditions experienced by indigenous people in what some writers refer to as 'mature' federations are often compared to those one would expect to find in a developing country. Mature federations are western and have a long record of stable federal governance. But they have failed their indigenous populations. Although, again, variations can be found across different systems and where some conditions are more favourable than others, there are likely to be inconsistencies in the standard of services available and in quality of life experiences.

Why indigenous peoples need special institutions in their respective federations

Aboriginal societies draw their historical beliefs and traditions from an era not normally measured by European time, nor based on western orthodoxies. Most governments accept that the values and beliefs of indigenous communities underline ways of life that evolved within a set of paradigms that belong to the world's most ancient living cultures. Indeed, the ancient heroes and philosophers of indigenous societies are a mystery to most western societies.

Before dismissing the significance of historical beliefs, it bears remembering that modern democratic principles of governance found in western political thought date back several hundred years and remain actively embedded in our political institutions and our constitutional framework.

Agents of the State – government, the judiciary, the bureaucracy, and so on – consistently recall and interpret those principles to guide practice. Why would indigenous societies pursue their history any less vigorously?

Indigenous institutions are supported by land-based philosophies. Recent experience by ethnic communities in parts of former eastern Europe illustrate that when people are denied citizenship, forced to leave their families, removed from their lands, or forcibly controlled by the State, they no longer receive fundamental citizen protection – they are made totally vulnerable to exploitation and injury. As Walzer and others have argued, once the shackles of repressive government are lifted, associations between peoples and governments can advance to new momentum.

Civil society demands freedom of association – indigenous people were not free.

To ignore this feature of institution building in our federations would be to put the aboriginal peoples at further risk – deciding the shape of policies and of governing institutions without incorporating the people into the process.

Conclusion

This paper has attempted to draw together the main elements that are considered to be a crucial part of the process towards reconciling the differences between indigenous peoples and governments in federal systems.

Indigenous peoples are among the world's most poor. Many federal systems are relatively wealthy and can increase the practical opportunities for aboriginal people to engage in governance. In federal democracies, the possibilities are only as limited as governments and societies choose. In federal systems where governments are unable to identify with the federal principle – where regional self-determination is denied, where democracy is in trouble or where human dignity is compromised – federalism is likely to bring little joy. To generalise about the virtues of federalism and how well it responds to diversity we first need to make sure that a federal system is more than just the single sum of its dominant parts.

Reform turns on the line that if governments are to understand the significance of

indigenous institutions, they need also to understand their own.

Based on the principles enunciated by the UN, self-determination has become the standard used by the indigenous people to measure their limited share of justice. Federalism already incorporates a domestic version of self-determination into its framework through the origins of its evolution as a system of government. Not only is it associated with different forms of community autonomy and regional self-government but it also supports different constitutional levels of authority and power-sharing among the 'special' regions and territories of our respective federations. Constitutionally, federalism offers an ideal set of structures for the purpose of incorporating indigenous interests into the framework of government. Politically, indigenous self-determination relies for its survival on reaching a balance between the international and domestic interpretation of the principle.

For the aboriginal peoples, the effectiveness of federal institutions will be measured by how well the system responds to their demands.

Suggested Reading

Anaya, James, 1996, *Indigenous Peoples in International Law*, Oxford University Press.

Henderson, James, 1994, 'Treaty Federalism', in *University of Saskatchewan Law Journal*

Kymlicka, Will and Raviot, Jean-Robert, 'Living Together: International Aspects of Federal Systems', in *Canadian Foreign Policy*, vol. 5/1 (1997) 1–50.

Said, Edward, W. 1993, *Culture and Imperialism*, Vintage books, Random House, New York.

Walzer, Michael, 1995, *The Civil Society Argument*, in R. Beiner (ed), *Theorizing Citizenship*, State University of New York Press, Albany, USA.

Forum of Federations / Forum des fédérations
forum@forumfed.org
