

20. Indigenous peoples and federalism: in or out?

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EXPLANATION OF INDIGENOUS PEOPLES AND FEDERALISM

According to the United Nations Permanent Forum on Indigenous Issues, more than 470 million indigenous people live in 90 countries across the world (UNPFII 2010). Many of those countries are federations. While culturally diverse (they speak more than 4,000 languages), indigenous peoples of the Americas, Africa and Asia share a struggle to maintain their distinctive identities, political systems, and unique relationship with their ancestral lands. Indigenous peoples also have in common an experience with colonialism in its diverse forms, from forced displacements due to pressures from extractive industries, such as mining or hydro-development, to overt discrimination and political violence perpetrated by states that have long sought to assimilate them.

Although they continue to face tremendous challenges, indigenous peoples have shown remarkable resilience. Today, their rights are recognized in a growing number of national constitutions and laws, as well as international legal instruments. Adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 was a key milestone. Although not legally binding, UNDRIP carries considerable moral weight, thanks to its broad support (only four countries voted against it, Australia, Canada, New Zealand and the United States, all of which have since expressed support). Most significantly, UNDRIP establishes the status of indigenous peoples as peoples, in the international sense, with the corresponding right to self-determination (Article 3). Although Article 46 of UNDRIP qualifies this right by reaffirming the territorial integrity of existing states, the principle that indigenous peoples should be free to control their lands, protect their cultures and maintain their pre-existing self-governing institutions is now well established (Lightfoot 2016).

Where does federalism fit in this picture? First, there are sizeable indigenous populations in several federations, including major settler federations such as the United States, Australia, Canada, Brazil, Mexico, and Argentina. Federations in Africa and Asia, including India, also host important indigenous populations. How are federal systems adapting to indigenous self-determination claims? Are federations more, or less, hospitable to such demands than unitary states? After all, federalism, as a system of territorial self-rule and shared rule, should in theory facilitate indigenous peoples' internal self-determination.

Federations have significant variations in the protection of indigenous peoples. Some variations can be traced to historical legacies predating the federal regime; others concern the constitutional division of powers and the protection level afforded to indigenous rights in the constitution. High courts also play a critical role in shaping the nature of relationships between indigenous nations and federal systems. In the United States, for example, indigenous peoples do not benefit from specific constitutional protection. Tribal governments are considered under the plenary power of Congress. However, the U.S. Supreme Court also recognized their status as 'domestic dependent nations' with (limited) residual sovereignty on their tribal lands. While the federal government did not hesitate to limit this residual sovereignty over the years (Pommersheim 2015), the courts have recognized tribal authority in several cases, including in key areas of state jurisdiction such as the administration of justice and criminal law (for a recent example, see *McGirt v. Oklahoma*, 2020). The federal government also adopted measures that have considerably strengthened tribal self-government in recent decades, leading to 'federal-like' intergovernmental relations with both federal and state governments.

Canada has no equivalent recognition of residual sovereignty. That said, 'Aboriginal and treaty rights' have been recognized in the constitution since 1982, affording indigenous peoples a relatively strong safeguard for their rights. Like in the United States, Canada's Supreme Court was instrumental in substantiating these rights, although it has been more reluctant to recognize self-governing powers for indigenous nations. Instead, indigenous autonomy is negotiated through constitutionally protected treaties that created a unique form of 'nested' federalism in parts of Northern Canada (Wilson et al. 2020; Papillon 2020). Whether the Canadian model of treaty-protected self-government affords more autonomy to indigenous nations than the American model of residual sovereignty is debatable, especially given that Canada's federal government is more reluctant than its U.S. counterpart to exercise its constitutional authority to limit provincial encroachment on indigenous lands (Borrows 2016).

The difference is perhaps more striking with Australia, where indigenous peoples were left to the constituent states to deal with in the original federal

constitution. While subsequent court decisions and constitutional amendments gave the Commonwealth government some authority to protect indigenous lands and well-being, their self-government rights remain quite limited (Saunders 2000). In Latin America, indigenous peoples benefit from stronger protection and local autonomy in non-federal Bolivia, where they are demographically the majority, than in federal countries like Brazil and Mexico where constituent states have used their constitutional prerogative to limit indigenous land rights and local autonomy. With some exceptions, courts have not played as prominent a role as in the United States and Canada in shaping indigenous status and rights in Latin American federations. In short, there is no clear pattern suggesting federations are more accommodating to indigenous peoples.

There are important obstacles to recognizing indigenous peoples in federal systems. Federal regimes diffuse sovereignty territorially, but once established, they also create multiple veto points for constituent governments that make it difficult to achieve any realignment of jurisdictions. Indigenous peoples were, for the most part, explicitly excluded from the initial division of powers in existing federations. This exclusion complicates both the recognition of their own self-governing authority as well as their participation in institutions of shared rule at the federal level. Non-federal states like New Zealand (which guarantees seats in Parliament) and the Nordic countries in Europe (which have distinctive elected chambers for the Sami) arguably have stronger mechanisms of indigenous representation in national institutions.

Federalism also empowers regional elites, often to the detriment of local minorities, including indigenous peoples (Riker 1964). The American Supreme Court once described states as the 'deadliest enemies of Indian Tribes' (*United States v. Kagama*, 1886), notably because they tend to favor an expansion of their jurisdiction on indigenous lands for the purpose of economic development. Similar dynamics can be observed in federations around the world, where indigenous peoples rely on federal authorities and the courts to protect them against local or regional interest. The division of powers characteristic of federal systems can also contribute to poor accountability for the comparatively dismal living conditions of indigenous communities. In Canada, for example, social programs such as healthcare and education are provincial jurisdictions. However, the federal government is responsible for these programs in First Nations communities. This creates blurred accountability lines and funding discrepancies that reinforce the well-being gap with other Canadians (Papillon 2020). Similar patterns can be observed in Australia, for example.

While federations may not be more hospitable to indigenous peoples, it is important to distinguish actual federal systems and their specific mode of territorial organization with federalism as a general principle of shared and divided sovereignty. There are a host of highly innovative federal-type

arrangements that have emerged around the world in response to indigenous peoples' challenges to unmediated state sovereignty, from tribal assertion of sovereignty in the United States (Bruyneel 2007) and treaty-based federalism in Northern Canada (Wilson et al. 2020; Papillon 2020) to the bicultural and binational model emerging in New Zealand through the revitalization of the treaty of Waitangi, or Greenland's unique federacy with Denmark (Johansson 2016). These models depart from classical federalism and provide ample evidence for the flexibility of federalism as an organizing principle for deeply pluralistic societies.

REASONS TO STUDY INDIGENOUS PEOPLES AND FEDERALISM

Indigenous peoples are amongst the world's most vulnerable minorities. They are also present in most large federations. However, their rights and status vary significantly across federations. It is important to study and compare the origins, constitutional foundations, and evolution of indigenous–state relations in different federations, first to underscore the diversity of institutional models of incorporation, and second to show how these models continue to shape how indigenous peoples and states conceive their relations today.

A second reason to study indigenous peoples as part of a federalism curriculum is more prospective in nature. How can we best accommodate indigenous claims, considering the complex institutional structure federations create? While the federal principle seems like a logical fit with indigenous demands for greater autonomy without full independence, inclusion in existing federal systems as a constituent unit is not necessarily a workable solution for indigenous peoples. In addition to institutional constraints mentioned previously, the indigenous populations are generally too culturally diverse and territorially dispersed to create the equivalent of indigenous states or provinces. For example, there are 50 states and 574 federally recognized Indian nations in the United States, and more than 630 First Nations communities in Canada. There are, of course, exceptions. The Navajo reservation (70,999 square kilometers) could conceivably become a full-fledged American state, except that the sovereign Hopi nation's reservation (6,558 square kilometers) lies within Navajo territory. The Inuit are the majority population in Nunavut, a territory with powers similar to Canadian provinces (although fiscally much more dependent on the federal government). But in general, a simple extension of existing federal structures is not workable for indigenous peoples because they are neither state or provincial governments nor local governments. Instead of 'wanting in' to existing federal systems, indigenous peoples generally 'want out' through specific asymmetrical arrangements that protect and affirm their

inherent sovereignty, traditional governance systems, and relations to the land (Borrows 2016; Deloria 1988).

Studying established or emerging indigenous self-governance models in the United States, Canada or Greenland, for example, allow us to compare these models, assess their workability and better understand their potential (and limits) for addressing indigenous self-determination claims beyond classical federalism. How are territorial sovereignty and political membership redesigned in these models? What kinds of powers are allocated to indigenous governments? What kinds of institutions of shared rule are developed? How are jurisdictional conflicts arbitrated? What about intergovernmental relations and fiscal relations between indigenous governments and federal as well as sub-federal units? As we can see, all the classic questions we ask when studying federalism also apply to relations between indigenous governments and states, federal or not.

The study of indigenous peoples' own legal traditions and political systems can also teach us about federalism. Some indigenous nations, including the Haudenosaunee in Northeastern United States and Canada, have political traditions of shared sovereignty that resemble what we call federalism today (Williams 1997). Indeed, some observers contend that the Haudenosaunee confederacy influenced the founders of American federalism (Johansen 1982), although this view is highly contested (e.g., Payne 1996). The study of indigenous constitutional traditions and conceptions of federalism exposes us to a whole new set of political philosophies, legal and political traditions, and possibilities for rethinking democratic constitutionalism (Borrows 2016; Williams 1997).

HOW INDIGENOUS PEOPLES FIT INTO FEDERALISM RESEARCH AND STUDY

The study of federalism is not traditionally associated with indigenous peoples, but their political struggle for self-determination simultaneously questions the limits of federations as a system for accommodating diversity and mobilizes some of the key concepts associated with federalism.

First, the institutional configuration of federal systems can be considered an 'independent variable' that facilitates or hinders how states respond to indigenous autonomy claims. Second, and reversing the equation, we can also study indigenous–state relations and the emerging institutions governing these relations through a federalism lens. The distribution of powers and its evolution over time, the allocation of fiscal resources, conflict-resolution mechanisms, the role of courts, intergovernmental relations and representation in shared rule institutions are all relevant questions when looking at relations between indigenous and non-indigenous governments.

The study of indigenous self-government also perfectly illustrates the difference between federations, as a specific institutional model, and federalism as a set of principles and values. While a classic federation may not be the most adequate model for indigenous peoples, federalism as a general organizing principle is critical to rethinking how they relate to existing states, federal or not.

LEARNING OBJECTIVES

Several learning objectives can be achieved, depending on the level of study. The following are basic guidelines. Students should

- Learn about the unique history, cultural specificity, and resilience of indigenous peoples in the face of colonial expansion and assimilation policies in their own countries and/or in multiple countries;
- Become familiar with some of the key demands indigenous peoples have in terms of cultural protection, land ownership and self-government;
- Be able to explain how federalism, as a general principle for organizing pluralistic societies, can contribute to accommodating these demands;
- Be able to identify some of the institutional obstacles indigenous peoples face in federal systems;
- In more advanced courses, identify key national and international legal instruments protecting indigenous rights, including UNDRIP, and, depending on the level, critically assess their value;
- Be able to discuss some of the examples of federal-like institutions that have emerged to establish some (limited) levels of self-rule and shared rule for indigenous peoples.

HOW TO STRUCTURE AND TEACH INDIGENOUS PEOPLES AND FEDERALISM

Teaching indigenous peoples and federalism should start with a discussion of indigenous peoples themselves, who they are, where they live, what their histories are and, especially, their struggle to maintain their cultures and distinctive political systems. It should also pay attention to colonial policies and their ongoing impacts on indigenous peoples and their lands.

There are numerous resources, but a good starting point is the Indigenous Working Group on Indigenous Affairs website (<https://www.iwgia.org/en/>). It offers country profiles, annual reports on the state of indigenous peoples and their rights as well as topic-specific resources in English and Spanish. The Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples, two United Nations bodies

promoting indigenous rights have very comprehensive websites in multiple languages. Several national and international NGOs provide country-specific information about the status and rights of indigenous peoples, including Amnesty International and OXFAM.

One effective way of introducing the topic to students of all levels is to present a documentary or a film about indigenous peoples and their struggles for lands. There are documentaries on many recent conflicts over land and water rights in Canada, the United States, Australia and the global South. Better yet, invite an indigenous person to speak to your class.

Also consider having students read the United Nations Declaration on the Rights of Indigenous Peoples and discuss its content with students. Focus on political and land rights, which are the most salient in a course on federalism. Students can discuss what the right to self-determination in UNDRIP entails and how it can be implemented. Another highly topical aspect of UNDRIP is the participation of indigenous peoples in land and resources management (Article 32).

After looking at global standards, consider the situation in your country (if relevant) or comparatively. What kinds of policies were historically adopted to limit indigenous peoples' political autonomy or to assimilate them into the majority population? Are indigenous peoples recognized in the constitution today, and does that recognition make a difference? What rights do they have and, most important, how are these rights interpreted by the courts over time? What kinds of political institutions and autonomy do they benefit? If indigenous peoples benefit from some level of political autonomy, how are intergovernmental relations organized?

Once students have a general idea of the reality of indigenous peoples, their status, rights and governance, you can look at the specific obstacles indigenous peoples face in federal systems, given institutional constraints and demographic realities.

A final section could move beyond federal systems and focus on the federal principle as a solution to indigenous claims. Consider looking at case studies of self-rule and shared rule mechanisms that are being developed around the world in federal and non-federal systems. The self-determination model of American Indian tribes, modern treaties in Northern Canada, the federacy model of Greenland, the non-territorial plurinational model of Bolivia, the Treaty of Waitangi in New Zealand and the Sami parliaments in Norway, Sweden and Finland are well-documented examples. If time allows, also consider looking at indigenous federalist traditions. The Two-Row Wampum and the Haudenosaunee confederacy are well-documented examples (e.g., Fenton 2005), but there are many more.

QUESTIONS FOR CLASS DISCUSSIONS OR ESSAYS

Some questions can bring students to discuss the overall realities of indigenous peoples:

1. Discuss some of the common struggles indigenous peoples face around the world and why it is important to protect their rights.
2. Discuss the various strategies that states (federal or not) have used to dislodge indigenous peoples from their lands and assimilate them into the majority society.
3. What is the right to self-determination and what are the obstacles for implementing this right?
4. Explain why federalism is both an obstacle and a response to indigenous peoples' claims.
5. Indigenous peoples also have federal traditions. Identify one such tradition and compare it to contemporary forms of federalism.

Some questions can also focus on specific countries or cases:

6. Indigenous tribes in the United States are considered 'domestic dependent nations'. What does that mean and how does it affect their status and relationships with American federalism?
7. In Canada, some indigenous nations negotiated extensive self-government agreements through treaties. Discuss how these treaties reshape Canadian federalism.
8. Indigenous peoples in Australia face challenges in asserting their territorial rights and political autonomy. Why is that so?

READINGS FOR STUDENTS

- Ashley, Jeffrey S. (2017), 'American Indians and federalism,' in Joseph Marbach, Ellis Katz and Troy Smith (eds.), *Federalism in America: An Encyclopedia*, Center for the Study of Federalism. Available at: https://encyclopedia.federalism.org/index.php/American_Indians_and_Federalism.
- International Work Group for Indigenous Affairs (IWGIA). *The Indigenous World 2021*. Available at: <https://www.iwgia.org/en/resources/indigenous-world.html>.
- Johansson, Peter (2016), 'Indigenous self-determination in the Nordic countries: the Sami, and the Inuit of Greenland,' in Corinne Lennox and Damien Short (eds.), *Handbook of Indigenous Peoples' Rights*, New York and London: Routledge, pp. 424–42.
- Lightfoot, Sheryl (2016), *Global Indigenous Politics: A Subtle Revolution*, London and New York: Routledge.
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- Federalism: Performance, Effectiveness and Legitimacy*, 4th edn., Toronto: University of Toronto Press, pp. 395–426.
- Saunders, Cheryl (2000), ‘The implications of federalism for indigenous Australians,’ in Yash Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, Cambridge: Cambridge University Press, pp. 266–86.
- Steinman, E. (2004), ‘American federalism and intergovernmental innovation in state–tribal relations,’ *Publius: The Journal of Federalism*, **34** (2), 95–115.
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TEST/EXAMINATION QUESTIONS

1. Explain why indigenous peoples seek greater self-rule on their traditional lands.
2. What is the right to self-determination and how can it be implemented in the context of indigenous peoples living in federations?
3. In most federations with an indigenous population, the latter were excluded from the original federal compact. Explain why and discuss the consequences of this exclusion.
4. Explain why federalism is both an obstacle and a response to indigenous peoples’ claims.
5. Instead of ‘wanting in’ to existing federal systems, indigenous peoples generally ‘want out’ through specific asymmetrical arrangements that protect and affirm their inherent sovereignty. Discuss this affirmation and its implications for federalism thought.

POINTS FOR EVALUATION

Students should be able to identify the defining elements that distinguish indigenous peoples from other minorities, most significantly the cultural relationship to the land. They also should be able to discuss historical and contemporary forms of colonialism and how it still structures relations between indigenous peoples and settler federal states.

Students should also be able to discuss some of the key elements of the emerging international indigenous rights regime and understand the meaning and scope of the right to self-determination as defined in UNDRIP. They should be able to describe if and how the status and rights of indigenous peoples are protected in their own country or comparatively. They should also be able to identify the kind of institutional and political mechanisms that have emerged in response to indigenous peoples’ autonomy claims.

In more advanced classes, they should be able to discuss some of the obstacles indigenous peoples face in existing federal systems. Students should be able to distinguish between obstacles linked to self-rule and shared rule. They should also be able to make the distinction between federal systems and the federal principle as a foundation for implementing indigenous self-determination claims.

In more advanced classes, students should also be able to discuss notions of legal pluralism and indigenous legal and political traditions, notably federal traditions like the Two-Row Wampum.

SUGGESTIONS FOR FURTHER READING

- Borrows, John (2016), *Freedom and Indigenous Constitutionalism*, Toronto: University of Toronto Press.
- Bruyneel, Kevin (2007), *The Third Space of Sovereignty: The Postcolonial Politics of US–Indigenous Relations*, Minneapolis: University of Minnesota Press.
- Brysk, Alison (2000), *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America*, Stanford, CA: Stanford University Press.
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- Johansen, Bruce (1982), *Forgotten Founders: Benjamin Franklin, the Iroquois, and the Rationale for the American Revolution*, Ipswich, MA: Gambit.
- Payne, S. B. Jr. (1996), 'The Iroquois League, the Articles of Confederation, and the Constitution', *William and Mary Quarterly*, **53** (3), 605–20.
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United Nations Permanent Forum on Indigenous Issues (UNPFII) (2010), *The State of World Indigenous Peoples*, United Nations Secretariat, Department of Economic and Social Affairs, ST/ESA/328. Available at: https://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf.