

**FEDERAL SYSTEMS AND
ACCOMMODATION OF DISTINCT
GROUPS: A COMPARATIVE SURVEY
OF INSTITUTIONAL
ARRANGEMENTS FOR ABORIGINAL
PEOPLES¹**

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1. INTRODUCTION

(1) Purpose, relevance and scope of this study

The objective of this study is to survey the applicability of federal theory and practice for accommodating the interests and concerns of distinct groups within a political system, and from that analysis to identify the range of possible ways in which federal arrangements might provide Aboriginal peoples self-government within the larger Canadian political framework.

The study will examine the implications both of the federal concept and of comparative experience of federal political systems outside Canada in order to survey the variety of possible federal arrangements that might be employed within Canada in any effort to redefine the relations between the Aboriginal peoples and the Canadian federation. In addition to examining the potential ways in which a *federal* system can accommodate distinct groups and hence Aboriginal peoples with their special interests, the study will also survey arrangements that have been employed within other federations

containing Aboriginal peoples. The review of arrangements within other federations will focus on provisions for constitutional recognition of Aboriginal Peoples, arrangements for Aboriginal self-government (including whether these take the form of a constitutional order of government or embody other institutionalized arrangements), the responsibilities assigned to federal and state or provincial governments for Aboriginal peoples, and special arrangements for representation of Aboriginal peoples in federal and state or provincial institutions if any.

The paper is therefore divided into five parts: (1) the introduction setting out the scope of the paper, the value of comparative analysis, and the basic concepts that will be used; (2) an examination of the utility of the federal concept for accommodating distinct groups and hence the particular interests and concerns of Aboriginal peoples; (3) the range of variations among federal systems which may facilitate the accommodation of distinct groups and hence Aboriginal peoples; (4) an overview of the actual arrangements for Aboriginal populations existing in federations elsewhere; (5) some brief conclusions about the lessons for Canada.

It should be emphasized at the outset that the main value of this study for the Royal Commission will be not in providing specific models to be picked off the shelf but rather in identifying the potential ways in which the Royal Commission might apply the federal idea to think creatively about establishing Aboriginal self-government within Canada. Clearly meaningful self-government would be virtually impossible to achieve within a unitary conception of the state or society. This paper examines the ways in which the federal idea may open up possibilities for Aboriginal self-government. Among the key values implicit in the federal idea are the notions of multiple identities and of shared or divided sovereignty among them. The combination of "shared-rule" and "self-rule" which lies at the

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heart of the federal idea is fundamental here. So too is the idea of “compact” and “covenant” which implies the voluntary nature of association in a federal system and links closely with the tradition of treaties. It is in opening our minds to the possibilities that such ideas offer for achieving Aboriginal self-government within the Canadian federation that a comparative analysis of the federal concept and its application elsewhere may serve a useful purpose.

(2) The Utility of Comparative Analysis

For purposes of comparison, specific reference will be made to a number of federations containing Aboriginal populations: the United States of America, Australia, India, Malaysia, Pakistan, Argentina, Brazil and Mexico (each individually summarized in Appendix A). Because several studies for the Royal Commission focus specifically on the arrangements for Aboriginal peoples in the United States (e.g. R. L. Barsh and T. Julnes), Australia (e.g. H. Reynolds) and India (e.g. D. Sanders) details of the arrangements in these federations will not be set out in this paper but they will be considered in a more general way in relation to the particular issues being addressed. One other federation with a significant Aboriginal population that might have been included in this study is Russia. While some references will be made to it, the authoritarian character of the preceding U.S.S.R. and of the succeeding Russian federation limits the relevance of those examples to the Canadian scene and therefore this study will not examine them in detail.

In addition some other federations or federalizing political systems which do not contain significant Aboriginal populations but whose organization and political experience give insights into ways of accommodating distinct groups will also be referred to. These include Belgium, Germany, Nigeria, Spain and

Switzerland (each individually summarized in Appendix B).

This study does not deal with non-federal unitary systems that contain Aboriginal peoples, such as New Zealand and Scandinavia. These are appropriately of interest to the Royal Commission, but they will not be considered in any detail in this study. There are two reasons for this: first the objective of this study is to examine the potential and actual ways in which *federal* systems can accommodate Aboriginal peoples, and second, the Royal Commission will have the benefit of separate studies focusing directly on arrangements in New Zealand and the Scandinavian countries. Nor since the focus of this paper is on federal rather than unitary systems, does it attempt to deal more generally with consociational arrangements within unitary systems containing diverse populations such as the Netherlands (see Lijphart 1969, 1977 and 1984 for these).

One of the reasons for undertaking this study is that Canadians seem to be preoccupied with what they assume to be their own unique problems and to be reluctant to undertake comparative analyses. Furthermore, when we do undertake comparisons, Canadian comparative work tends to focus on our neighbour to the south and to underestimate the value of comparisons with other federations which, because of their parliamentary institutions or their socio-cultural and ethnic diversity, may be more relevant to the Canadian political context and problems.

Comparative studies have some real benefits in helping us to understand better our own problems and to identify the range of possible solutions. Comparative studies identify options that might otherwise be overlooked, identify unforeseen consequences that may flow from particular arrangements, and through similarities or contrasts draw attention to certain features of

our own arrangements whose significance might otherwise be underestimated. Both positive and negative lessons are useful. Successful arrangements may point to the potential value of particular institutions or to the conditions and processes necessary to make them work. Failures and difficulties elsewhere may alert us to the possible problems that may arise from particular institutional arrangements or the conditions in which they were applied.

But if we are to gain full value from comparative analyses it is important too always keep in mind their limitations. No single pure model of federation is universally applicable. The institutions and processes of existing federal political systems have varied in many ways in order to fit different circumstances (this is discussed further in the next sub-section). One cannot, therefore, simply pick models off a shelf. They have to fit the particular circumstances of each country. Even where similar institutions are adopted, different underlying conditions may make them operate differently.

A classic illustration of this is the operation of the virtually identical procedures for formal constitutional amendment in Switzerland and Australia. Both involve referendums for ratification which require double majorities, i.e. a majority of the federal population and majorities in a majority of the cantons or states. In Switzerland there have been over 90 formal constitutional amendments since 1874 which have met this requirement (over three-quarters of those passed by Parliament being ratified); but in Australia of 42 constitutional referendums since 1901 only eight have succeeded. This points to the dangers of making generalizations about institutions without taking into account the full context in which they operate.

But as long as these cautions are kept in mind, there is a genuine value in undertaking comparisons which can provide positive and

negative examples of political mechanisms that may facilitate the accommodation of distinct groups and particularly Aboriginal peoples.

While this study is directed at institutional arrangements that might accommodate distinct groups and particularly the special interests of Aboriginal peoples, it must be understood that understanding the operation of political institutions requires an examination of more than the formal governmental structures. Indeed, it requires taking account of the interaction of societies, structures and processes. Particularly important is the study of the interaction between the social issues relating to homogeneity and diversity and particular institutional structures. This can provide us with a better understanding of the cooperative and competitive relationships that shape the operation and evolution of federations. Equally important is analysis of the complex relationship between structures and processes expressed in the dynamic interplay of intergovernmental relationships, and particularly of the fiscal arrangements which lie at the heart of these. Understanding the dynamic operation of federations and their institutions also requires awareness of a number of factors: the role and impact of political parties including their number, their character, and relations between federal, regional and local branches; the operation of interest groups at different levels and the multiple points at which they have access; the role of the public services including cooperation and competition between bureaucracies at different levels; the influence of the media and the issues on which they tend to focus; of informal elites and the degree to which consociational processes exist; the part played by individual leaders in mobilizing political opinion; the impact of particular electoral systems and the degree to which they exaggerate regional majorities and encourage division or cohesion. In a paper limited to the length of this one there will not be space to go

into depth on these aspects for each federation, but their significance needs always to be kept in mind.

(3) Conceptual Issues

(a) *The concepts of federalism, federal political system and federation*

If the objective of this study is to examine the applicability of federal theory and practice for accommodating distinct groups and particularly the special concerns and interests of Aboriginal peoples, we must begin with a clear understanding of what we mean by such terms as “federalism”, “federal political system” and “federation”. That is why a substantial portion of this paper is devoted to the introductory clarification of such terms in order to avoid confusion and logical contradictions. But while it is appropriate to seek analytical and theoretical clarity, statesmen and nation-builders (and presumably Royal Commissioners) are more concerned with seeking political arrangements that will work rather than with theoretical niceties or purity. Approaching their problems pragmatically, they may on occasion be willing to consider hybrids. Examples, to cite just a few, are the so-called “quasi-unitary” elements in the original Constitution of Canada in 1867 (e.g. the unilateral federal powers such as reservation, disallowance and the declaratory power), and in the Indian Constitution of 1950 (especially the emergency powers of the Union government), the “quasi-confederal” character of the Bundesrat in the Bonn Constitution of 1949, and the radical asymmetry of jurisdiction applied to the additional states joining the Malaysian Federation in 1963. The analytical work of scholars can be helpful to nation-builders in identifying alternatives and possibilities, but in the realm of practical politics a preoccupation with pragmatic compromise is just as important. Such an emphasis is not at all inconsistent with the spirit of federalism. It was a predominant theme of the negotiations at Philadelphia in 1787

and of *The Federalist Papers* that led to adoption of federation rather than confederation as the form of government in the United States. Federalism is not an abstract ideological model to which political society is to be brought into conformity, but rather a way or process of bringing people together through practical arrangements intended to meet both the common and diverse preferences of the people involved. The application of the federal concept should therefore be seen as flexible and varied. But this flexibility and variety has meant that terms like federalism, federal political system and federation have been notoriously difficult to define with precision.

There has been much scholarly debate on the definition of federalism, a morass in which I myself on occasion have become mired (see comments of Davis 1978)! In scholarly analyses in recent years, however, important distinctions have emerged between the terms “federalism”, “federal political system”, and “federation” which in previous common usage have confusingly been used interchangeably.

The term federalism is increasingly being used by scholars as a term which is primarily normative and philosophical in its meaning (King 1982; Burgess and Gagnon 1993). The normative concept may take two different forms. One is the advocacy of a pragmatic approach that would balance citizen preferences, an approach derived from the original *Federalist Papers* in the United States and typical of the justification of federalism in the English-speaking world (Davis 1978; Wheare 1963). The other is founded on a more ideological basis, typical of many European advocates of federalism (Burgess and Gagnon 1993: xvi) including philosophical advocates of federalism as a utopian system (Marc and Aron 1948). In either form, the basic normative idea that federalism expresses is that political organization should seek to achieve both political integration and

political freedom by combining *shared-rule* on some matters with *self-rule* on others within a system founded on democratic consent (Elazar 1987b). The federal idea is based on the notion that the greatest human fulfilment is to be found through participation in a wider community that at the same time protects and cherishes diversity and regional and individual identity.

The term “federal political system”, on the other hand, is not a normative but a descriptive term. It refers to the genus of political organization, as Daniel Elazar has defined it, which provides for the combination in some form of shared-rule and regional self-rule (Elazar 1987: 5). The genus encompasses within it a variety of species of political organization which Daniel Elazar (1987b and 1993) has identified: federation, confederation, federacy, associated statehood, league, regionalized union, constitutional regionalization, and constitutional home-rule, all of which embody, although in different ways, a combination of shared-rule and self-rule. Thus, the term “federal political system” embraces within it not only *federations* but those *regionalized unitary systems* where the national government is dominant but which contain elements of constitutionalized regional self-government, and also *confederations* where regional governments are dominant but there is an element of shared-rule in the operation of the confederacy.

The term “federal political system” also includes *federacy*. This refers to a fundamentally asymmetrical relationship between a smaller polity and a larger polity whereby, the former has greater internal autonomy than the other segments of the latter, but in return foregoes significant participation in the governance of the larger polity, and where any change in this relationship must be determined by mutual agreement of both parties (Elazar 1987b: 55 and 1991: 190). *Associated statehood* is a similar fundamentally asymmetric

relationship, but one in which either the larger federate power or the associated state may unilaterally dissolve the relationship according to procedures established in the constituting document. Elazar (1987b: 55-57) identifies eleven examples of federacy. These are the Aaland Islands and Finland, the Azores Islands and Portugal, the Faröe Islands and Denmark, Greenland and Denmark, Guernsey and the United Kingdom, the Isle of Man and the United Kingdom, Jammu and Kashmir and India, Jersey and the United Kingdom, the Madeira Islands and Portugal, the Northern Marianas and the United States, and Puerto Rico and the United States. He has also described the 130 Native American Nations (Indian Tribes) within the United States as *de facto* federacies (Elazar 1991: 319-324). In the category of associated states Elazar has identified twelve examples (1987b: 55-57): Bhutan and India, the Cook Islands and New Zealand, the Federated States of Micronesia and the United States, Liechtenstein and Switzerland, Macao and Portugal, the Marshall Islands and the United States, Monaco and France, the Netherlands Antilles and the Netherlands, the Nieu Islands and New Zealand, Palau and United States, San Marino and Italy, and (prior to the reunification of Germany) West Berlin and the German Federal Republic.

Thus, there is quite a variety of species within the broad category of “federal political systems”. The genus could, furthermore, encompass new political innovations yet to be developed for expressing the combination of shared-rule and self-rule. It should also be noted that within each of the different species which belong to this broad genus, there are significant variants and sub-species which comparative analysis may discern. But the basic criterion which is common to all the different species and variants of the genus termed “federal political systems” is that they embody some combination

of shared-rule and regional self-rule. Federal systems do this by constitutionally providing institutions for common policy-making and administration on certain specified matters and also constitutionally protecting the integrity of the constituent units and their authority to act in a specified area of jurisdiction.

The term “*federation*” refers to a particular species of “federal political system”. Unfortunately, often in public discussion the terms “federalism”, “federal political system” and “federation” are used loosely and interchangeably, thus contributing to confusion. The term “federation” refers to the specific form of federal system first invented by the founders of the United States in Philadelphia in 1787. What distinguishes “federations” as a group from previous forms of federal political systems which were usually confederal in character and from federacies, or associated statehood, or regionalized unitary systems is that federations involve co-ordinacy (i.e. non-subordination in the exercise of authority) in the constitutional relationship between the federal government and the governments of the constituent units. Each order of government has its own constitutionally specified authority and none can dictate to the others. This contrasts, for instance, with unitary systems which subordinate the governments of the constituent units to the national one, and confederations which subordinate the central institutions to those of the constituent units who retain most sovereign powers and control the common institutions through their delegates.

In order to establish a coordinate relationship between the federal and the constituent unit governments, federations have usually exhibited the following institutional characteristics: two orders of government each elected directly by and acting directly on their citizens; a formal constitutional distribution of legislative and executive authority and an allocation of revenue

resources between the two orders of government, including some areas of autonomy for each order; provision for the guaranteed representation of regional views within the central policy-making institutions, usually through a regionally based second legislative chamber; a written constitution supreme over all other law, not unilaterally amendable by either order of government, and with amendments requiring the consent of at least a majority of the constituent units; an umpire in the form of a court or referendum process to rule on disputes between governments; processes to facilitate intergovernmental relations for those areas where governmental responsibilities inevitably overlap or are interdependent. These are the criteria by which we may judge whether a federal political system falls within the specific category of a full-fledged federation. Such a categorization must be based, however, not solely on the formal constitutional structure but on the way in which the political system actually operates in practice.

The classic examples of federations usually cited are the United States (1789), Switzerland (1848), Canada (1867), Australia (1901) and Germany (1949), although some scholars have drawn attention to the inclusion of some “quasi-federal” features in the original 1867 Constitution of Canada (Wheare 1963). A number of other federal political systems that have at one time or another met nearly all the criteria for full-fledged federations include: India, Pakistan, and Malaysia in Asia; Nigeria and the Comoros Islands in Africa; the United Arab Emirates in the Middle East; Austria and Belgium in Europe; Argentina, Brazil, Mexico and Venezuela in Central and South America; Russia (and before it the U.S.S.R.), and before their fracture Yugoslavia and Czechoslovakia in Eastern Europe (Elazar 1987: 43-44). Some may dispute whether the authoritarian and highly centralized examples of Russia and, prior to their

break-up, the U.S.S.R., Yugoslavia and Czechoslovakia, should be classified as genuine federations. Questions might also be raised about the Federal Military Republic of Nigeria, the Asian federations with their frequent use of emergency powers, and the largely formal character of federation in the Latin American examples. Nevertheless, this latter group of cases have all attempted to create a balance between unity and diversity and have exhibited, if not completely, many of the institutional characteristics typical of federations.

In addition to these examples, some political systems such as Spain, Italy and the European Union, although not yet full-fledged federations, appear to be evolving in this direction.

Within the basic framework of characteristics identified above as common to federations, however, there is considerable scope for variation. These include: variations in the number, relative population and area, and relative wealth of the constituent regional units; variations in the degree of ethnic homogeneity among the regional units and within each regional unit; variations in the degree of centralization or decentralization in the powers and responsibilities exercised by the two orders of government and the resources made available to them; variations in the degree of symmetry or asymmetry in the distribution of jurisdiction or resources among the constituent units; variations in the character of the federal institutions, including whether these are presidential, collegial or parliamentary in form, and in the structure and role of the federal second chambers; variations in the structure and scope of the judiciary and the role of judicial review; and the variations in the institutions and processes through which intergovernmental consultation and collaboration are facilitated. Thus, even within the category of "federation", there is no single pure or ideal model.

This discussion of the concepts of federalism, federal political system, and federation has three implications for this study. The first is to clarify the use of these terms, while recognizing that hybrids are possible. The second is to emphasize the range of variations possible within the common features of the genus represented by "federal political systems" and within the narrower species represented by "federations". The third is to focus the comparative analysis in this study primarily on federations, since that is the basic character of the Canadian polity and one that the result of recent constitutional deliberations indicates Canadians have been unwilling to depart significantly from. Nevertheless, a relationship of "federacy" between the Canadian federation and some units, such as for Aboriginal political units or for Quebec, still remains within the realm of possibility.

(b) *Distinct Groups*

The notion of *distinct groups* used in this paper is not a technical term but it has been deliberately chosen for the purpose of this paper because not all federations are composed of regions representing ethnic groups. Indeed, in the United States, Australia and Germany the constituent units have not been differentiated on an ethnic basis. In these cases the differentiation of states and the sense of distinct state loyalties have been based on historical and economic foundations which were sufficiently strong to lead to the insistence upon federation as a form of government.

In some other federations, however, the distinct groups which have insisted upon federation as the appropriate form of government have been primarily ethnic in character. In Switzerland, in addition to other historical factors, differences of language and religion were fundamental in defining the distinct groups in the different cantons. In India, Pakistan, Malaysia and Nigeria the pressure for

provincial autonomy and the adoption of federation was rooted in the existence of distinct groups marked particularly by linguistic and cultural differences and in some cases, most notably Malaysia, by differences also of race.

For the purposes of this study the particular form of distinct group which is marked by its cultural distinctiveness will be referred to as an *ethnic* group (Werther 1992:6). This refers to a group of people with common customs and social traits usually rooted in a distinct language or religion or both. Historically ethnicity, sometimes reinforced by economic concerns, has been a powerful motive leading to an insistence upon provincial autonomy within a federation. This has been the case particularly in the post-colonial world (Watts 1970(a): 16-28). In these instances, territorially concentrated ethnic differences were seen to be permanent and legitimate bases that had to be taken into account in the process of creating integrating political structures.

(c) Indigenous and Aboriginal peoples

This study examines the ways in which federal systems may accommodate distinct internal groups. It does so, however, with the purpose of considering how the potential facility to accommodate distinct groups might be applicable to meeting the needs of Aboriginal peoples.

The term *indigenous people* is most often used to denote the original inhabitants and to emphasize their status as a people living in a place prior to subsequent settlement and the establishment of a modern state (Werther 1993: 6-7). The term *Aboriginal peoples* adds to the notion of "indigenous" by denoting a specific claimed political, cultural, economic, and legal relationship between an indigenous people and a colonizing state (Werther 1992: 7-10). An Aboriginal people is formed when a non-state-organized, indigenous people with their own values is colonized by a settler state establishing

a political regime based on different values. The claim Aboriginal peoples assert is therefore based on the inherent right to preserve their own values through the primacy of self-government in their relations with the regime of the settler state. This notion emphasizes two elements: historical priority to the settler regime and pre-existing self-governing institutions.

This paper focuses especially upon how the facility of federal political systems and federations to accommodate distinct groups is relevant to the desires of Aboriginal peoples for self-government.

(d) Sovereignty, Self-Government, Federation and Treaty Federalism

Aboriginal claims against settler states have usually emphasized their retained sovereignty as the basis for a right to self-determination (Fletcher 1992; Werther 1992: 7-10). They have pointed to their prior occupancy and non-alienated sovereignty as providing the case for full self-government.

A fundamental issue, however, is the degree to which sovereignty is absolute or can be shared. Indeed, as already noted earlier in section 1(3), shared sovereignty is a defining characteristic of federations. Underlying the establishment of federal political systems has been the recognition that in the contemporary interdependent world absolute sovereignty is in practice no longer viable for any group or state. For smaller political groups sovereignty almost invariably has to be tempered by the unavoidability of interdependence. For larger political units sovereignty has to be tempered by the need to accommodate the internal diversity of distinct groups, making necessary the dispersal of political power. A federation, therefore, represents an effort to reconcile such tensions by an arrangement embodying more than one government exercising powers over the same territory, none of these governments

having absolute sovereignty. Indeed sovereignty is divided so that for certain purposes jurisdiction is placed in the hands of the institutions responsible for shared rule and dealing with common purposes, and for other purposes jurisdiction is left to governments representing distinct territorial groups to manage through self-rule (Elazar 1987: 5). Thus, each government has its sovereignty limited to particular spheres.

In the United States the original rationale for the division of sovereignty among governments in the federation was that the federal and state governments were recipients or agents receiving their own limited jurisdiction from the people where the ultimate and indivisible sovereignty resided. In practice the confinement of shared-rule and self-rule to water-tight compartments within federations has proved impossible because of the inevitable overlaps and interdependence in the activities of the governments performing the functions of “shared-rule” and those performing the functions of “self-rule” (Watts 1970(a): 7-13). Thus, the combination of “shared-rule” with “self-rule” that is the essence of federations entails with it a dispersed sovereignty that is limited for each of the participating governments.

Relevant to this discussion of shared and retained sovereignty is the notion of “Treaty federalism”. The term “Treaty federalism” has been coined to describe the relationship between the Aboriginal and non-Aboriginal peoples defined in a series of treaties (see Brown and Kary 1994; Bear Robe 1992; Henderson 1993; Tulley 1992; Darlene Johnston 1986; Macklem 1991). Since the concept of “Treaty federalism” is discussed at some length in another study for the Royal Commission on Aboriginal Peoples (Hueglin 1994: 11-32) it is dealt with only briefly here.

Just as federation includes both the acceptance of necessary coordination and

regulation on the basis of mutual consent *and* a recognition of a right to self-government, so treaties have a “federal” character because they imply a balance between agreed mutual obligations among the signatories *and* some retained autonomy. Thus, the treaties Aboriginal peoples, tribes or nations concluded with settler regimes themselves created a “treaty federalism” by establishing a common bond of mutual obligations together with self-determination. This has led some to suggest that there are already within Canada two parallel forms of federation: that established by the British North America Act of 1867 defining the relationship between the central government of Canada and the provinces, and that established through the various treaties entered into by Aboriginal and non-Aboriginal parties since the early 1600s, and reaffirmed by the Section 35(1) of the Constitution Act 1982, establishing a parallel relationship between the Government of Canada and the Aboriginal peoples (Sakej Henderson, cited by Hueglin 1994: 11-12). An important task then is to synchronize these two kinds of federal relationships into a practical harmony. In this task, of some relevance is the analysis below in section 3(1) of multi-tiered federations and federations within federations elsewhere, and of Pennock’s suggestion (1959) that multiple levels of government each performing different functions may in fact provide citizens with the greatest utility.

2. THE UTILITY OF FEDERATIONS IN THE ACCOMMODATION OF DISTINCT GROUPS

(1) Introduction

Having reviewed the value of comparative analysis and identified some conceptual issues relating to the use of such terms as federalism, federal political system, federation, distinct groups, indigenous and Aboriginal peoples, sovereignty and self-government, we turn in

sections 2 and 3 to examine the range of possible ways in which federal systems, and particularly federations, can accommodate distinct groups and hence the particular interests and concerns of Aboriginal Peoples through self-government.

This section will focus on the general characteristics of federations that enable the accommodation of distinct groups within them. The following section will review design considerations which arise in the attempt to accommodate distinct groups within federations. In both these sections the examination of federations is not restricted to those containing Aboriginal populations, but is intended to identify the range of possibilities that might be considered in attempting to accommodate the particular concerns and interests of the Aboriginal peoples within Canada.

Then in the fourth section of this study we will add an overview of the specific arrangements that have been adopted in other federations that contain Aboriginal peoples.

Throughout, the text will deal with general issues rather than attempting to portray the full details of each federation. The reader's attention is therefore drawn to Appendices B and C where the salient features of each federation are outlined. Appendix B identifies the major features of each individual federation containing an Aboriginal population, and Appendix C portrays features of some other federations which do not contain Aboriginal populations but which are relevant to the issues involved in accommodating distinct groups.

(2) The relevance of federal solutions in the contemporary world

Federal political systems as we know them today have their origins in the distant past. In the Middle East and Europe an early example was the Hebrew state which according to Daniel

Elazar had all the essential characteristics of a federal system based on a covenantal founding (Elazar 1987: 4-6). The leagues of the Greek cities, most notably the Achaean League, represented an early form of federal system. In the Middle Ages there were the examples of the Holy Roman Empire and the various leagues for mutual assistance among the commercial cities of Germany, Belgium and Italy. In 1291 the Helvetic Confederation was established lasting through various transformations until 1848. From 1579 to 1595 the United Provinces of the Netherlands was another example. All of these, like the later German Confederation in its various forms established on the ruins of the Holy Roman Empire, were primitive, rudimentary and relatively unstable federal systems, largely confederal in character with ultimate sovereignty retained by the constituent units (Freeman 1893; Wheare 1963: 29-32; Elazar 1987: 51).

In North America, indigenous federal traditions preceded the period of European settlement. Aboriginal political and social traditions involved the sharing of power among self-governing nations in a confederal form. The most often referred to example was the Iroquois Confederacy (Haudenosaunee). This was essentially confederal in character in that several independent nations delegated their powers to a confederal council for common purposes, but sovereignty remained with the nation and was not transferred to the confederacy. This example was one of which the "founding fathers" of the Articles of Confederation, which in 1777 established the original confederal union of the United States, were aware (Johansen 1982). It would appear that such confederal relationships went far beyond the Iroquois nations and were a substantial part of Aboriginal tradition in North America (Hueglin 1994: 6-13; Brown and Kary: 27-28).

While previous federal systems had been

predominantly confederal in character with federal institutions subordinate to those of the constituent units, the new constitution of the United States designed at Philadelphia in 1787 to replace the Articles of Confederation of 1777, established a new form of federal system, the modern federation. This was a federal system within which the federal government was made much stronger by not making it dependent for its authority upon the constituent units of government. The two levels of government were constitutionally “co-ordinate” (i.e. non-subordinate) in relation to each other, each deriving their authority by way of the constitution from the people at large (Wheare 1963: 1-5).

Subsequently, during the nineteenth and twentieth centuries a number of federations, based on principles similar to that of the new American example, came into being. In 1834 the Brazilian constitution converted Brazil from an empire into a federation. In 1848, following a civil war, Switzerland moved from a confederation to a federation. In 1867, Canada was divided into the two provinces of Ontario and Quebec and New Brunswick and Nova Scotia were added to form the Canadian federation. Germany abandoned its confederated structure of 1815-1867 and 1867-1871 to adopt a structure in 1871 closer to that of a federation. In 1901 the six colonies of Australia joined together to form a new federation. Following the break-up of the Hapsburg Empire, Austria constituted itself as a federation in 1920.

Thus by the mid-twentieth century there were a number of federations. But it has been since 1945 that the proliferation of various forms of federal political systems has been most significant.

This popularity is perhaps surprising when we consider that before 1945 such a development was generally unexpected. Indeed, writing in 1939, in an article entitled, “The Obsolescence

of Federalism”, Harold Laski declared: “I infer in a word that the epoch of federalism is over” (Laski 1939). Federal government in its traditional form, with its compartmentalizing of functions, legalism, rigidity and conservatism was, he suggested, unable to keep pace with the tempo of life that giant capitalism had evolved. He saw federations as based on an outmoded economic philosophy, and as a handicap in an era when positive government action was required. Decentralized unitary government was, he therefore concluded, more appropriate in the new conditions of the mid-twentieth century. Even Kenneth Wheare, much more sympathetic to the potential of federations, conceded in the preface written in 1945 for the first edition of his study *Federal Government*, that the trend in existing federations, under pressure of economic crises and war, was towards a concentration of central powers sufficient in some cases to threaten the federal principle (Wheare 1946: iv; also ch. 12).

But while in 1945 the federal idea appeared to be on the defensive, the following decade and a half saw a remarkable array of governments created or in the process of construction that claimed the designation “federation”. Indeed only eight years later, Max Beloff was able to assert that the federal idea was enjoying “a widespread popularity such as it had never known before” (Beloff 1953: 114).

One source of this popularity was the pronounced post-war prosperity of the long-established federations such as the United States, Switzerland, Canada and Australia. The popularity of the federal idea after 1945 stemmed even more, however, from the conditions accompanying the break-up of colonial empires at that time. The units of colonial government were often merely the product of historical accident, of the scramble for empire, or of administrative convenience. As result the colonial political boundaries rarely

coincided with the distribution of the racial, linguistic, ethnic or religious communities, or with the locus of economic, geographic, and historical interests. In these circumstances, the creators of the new states approaching independence found themselves faced with conflicting demands for territorial integration and balkanization. They had to reconcile the need, on the one hand, for relatively large economic and political units in order to facilitate rapid economic development and to sustain genuine political independence, with the desire, on the other hand, to retain the authority of the smaller political units associated with traditional allegiances representing racial, linguistic, ethnic and religious communities. In such situations where the forces for integration and separation were at odds with each other, political leaders of nationalist independence movements and colonial administrators alike found in the “federal solution” a popular formula, providing a common ground for centralizers and provincialists (Watts 1966: 3-7). The result was a proliferation of federal experiments in the colonial or formerly colonial areas in Asia, Africa and the Caribbean. These included India (1950), Pakistan (1956), Malaya (1948) and then Malaysia (1963), Nigeria (1954), Rhodesia and Nyasaland (1953), the West Indies (1958), Indochina (1945-7), French West Africa (A.O.F.) and its successor the Mali Federation (1959), French Equatorial Africa (A.E.F.), and Indonesia (1945-9). In addition, a functional confederation, the East Africa High Commission (1947), was devised to administer common services in that region. During the same period, in South America, where the federal structure of the United States had often been imitated at least in form, ostensibly federal new constitutions were adopted in Brazil (1946) Venezuela (1947), and the Argentine (1949).

Meanwhile in Europe where World War II had shown the devastation that ultra-nationalism

could cause, the federal idea also gained salience, and progress in that direction was begun with the creation of the European Communities. For Jean Monnet this was the first in a series of steps towards European federation (Pinder 1993: 45-47). At the same time within Europe, West Germany in 1949 adopted a federal constitution.

Thus the first decade and half after 1945 proved to be the heyday of the federal idea. In both developed and developing countries the “federal solution” was seen as a way of reconciling two powerful, interdependent, yet distinct and often strongly opposed motives: the desire, on the one hand, for the larger political unit required to build an efficient and dynamic modern state, and, on the other, the search for identity through smaller self-governing political units more responsive to the individual citizen and the desire to give expression to primary group attachments - distinctive religious, linguistic, cultural, social and historical traditions (Watts 1981: 3-5).

From the 1960s on, however, it became increasingly clear that federal systems were not the panacea that may have imagined them to be. Most of the post-war federations experienced difficulties and a number were abandoned or temporarily suspended (Franck 1966; Watts 1977; Hicks 1978). Examples were the continued internal tensions and the frequency of resort to emergency rule in India, the secession of Bangladesh from Pakistan, the separation of Singapore from Malaysia, the civil war and the subsequent prevalence of military regimes in Nigeria, the early dissolutions of the Federation of the West Indies and the Federation of Rhodesia and Nyasaland, the disintegration of the federal efforts in the former French colonial areas of Indochina, West Africa and Equatorial Africa, and the eventual demise even of the confederal East African Common Services Organization. These experiences suggested that even with the

best of motives, there were situations where federal solutions were inappropriate (Carnell 1961). Furthermore, the experience of Latin America, where many of the constitutions were federal in form but in practice operated in an essentially unitary manner, added further to the scepticism about the utility of federation as a practical approach in countries lacking a long tradition of respect for constitutional law. In Europe, the slowness of progress towards integration, at least until the mid 1980s, also seemed to make the idea of an eventual European federation more remote.

More recently the disintegration of the former authoritarian centralized federations, the Union of Soviet Socialist Republics, Yugoslavia and Czechoslovakia, has shown the limitations of such federal facades, and has led also to a reluctance to maintain nominal federations which in their past experience were associated with centralization and authoritarianism.

Even in the classical federations of the United States, Switzerland, Canada and Australia, renewed internal tensions and the loss of economic momentum have in recent decades reduced their attraction as examples for others to follow.

In the United States, the centralization of power through federal preemption of state and local authority and the shifting of costs to state and local governments through unfunded and underfunded mandates has created a trend towards what has been described as “coercive federalism”. (Kincaid 1990) Furthermore, the abdication by the Supreme Court of its role as an umpire within the federal system, exemplified by the *Garcia* case, has raised questions about the protection available to the states against a progressively dominant federal government (*Garcia v. San Antonio Metropolitan Transit Authority* 105, S. Ct. 1005 (1985)).

While Switzerland has remained relatively

stable, the long-drawn crisis over the Jura problem prior to its resolution, the need to shift from defensive to effective federalism (that is from the traditional emphasis upon resistance to external domination and to federal intrusions upon cantonal autonomy, and instead to the need for effective external alliances and internal social policies), and the defining of Switzerland's future relationship with the European Community have raised new questions about the Swiss federation.

In Canada the Quiet Revolution in Quebec in the 1960s and the ensuing four rounds of mega-constitutional politics has produced three decades of internal tension. Aboriginal land claims and pressures for effective self-government, the crisis in fiscal arrangements, and defining the relative roles of the federal and provincial governments under free-trade agreements with the U.S. and later NAFTA have all contributed additional stresses.

Australia experienced in 1975 a constitutional crisis which raised questions about the fundamental compatibility of federal institutions and responsible cabinet government, and since then several efforts at comprehensive constitutional review have in the end come to naught. The result has been a revival in some quarters within Australia of debate about the value of federation.

Through most of the period Germany remained relatively prosperous, but increasing attention has been drawn to the problems of revenue sharing and of the “joint decision trap” (Scharpf 1988) entailed by its unique form of interlocked federation. He has pointed out that the wide range of areas which in Germany require joint Federal-Land agreement has in practice introduced a degree of inflexibility and rigidity making it difficult for either level of government to respond quickly and effectively to policy problems. More recently the reunification

of Germany, possible Lander boundary adjustments, and defining the relationship of the *Bund* and the *Laender* to the European Community and Eastern Europe have become a focus of attention.

Nevertheless, despite all these developments, there seems in the 1990s to have been a revival of interest in federal political systems and federations (Kincaid 1993: 3-6). Conferences, seminars, and workshops are being organized by many prominent institutions around the world which previously had no interest in federal political systems. Political leaders, leading intellectuals and even some journalists increasingly speak of federation as a healthy, liberating and positive form of organization. Belgium, Spain and Italy appear to be emerging towards new federal forms and in a number of countries such as Georgia (in the former USSR) and South Africa, some consideration has been given to the efficacy of incorporating some federal features to accommodate distinct internal groups, although not necessarily all the characteristics, of a full-fledged federation. Furthermore, following the adoption of the Maastricht Treaty, the European Union seems to have regained some of its lost momentum in the evolution towards a federal Europe.

To what can this renewed interest in federal political systems and in federation be attributed? One major factor has been the recognition that an increasingly global economy has unleashed centrifugal economic political forces weakening the traditional nation-state and strengthening *both* international and local pressures (Kincaid 1993: 4-5). Global communications and consumership have been awakening desires in the smallest and most remote villages around the world for access to the global marketplace of goods and services. As a result national governments are faced increasingly with the desires of their populaces to be both global consumers and local citizens at the same time.

Furthermore, the spread of market-based economies is creating socioeconomic conditions conducive to support for the federal idea: emphasis upon contractual relationships; recognition of the non-centralized character of a market economy; entrepreneurial self-governance and consumer rights consciousness; the thriving of markets on diversity, not homogeneity; interjurisdictional mobility and competition as well as cooperation; and recognition that people do not have to like each other in order to benefit each other.

A second factor is that changes in technology are generating new more federal models of industrial organization with decentralized and “flattened hierarchies” involving noncentralized interactive networks and thereby influencing the attitudes of people about noncentralized political organization.

A third factor has been the collapse of the totalitarian regimes in Eastern Europe and the former Soviet Union. These developments have undermined the appeal of ideologies aiming to transform society as a whole, and have exposed the corruption, poverty and inefficiency characteristic of massive authoritarian centralization. Following their collapse, the outbreak in a number of cases of violent ethnic and religious conflict has also demonstrated that a transformative ideology institutionalized by a centralized regime cannot produce human peace and unity through coercion and indoctrination (Kincaid 1993: 3-4).

A fourth factor has been the spread of human rights values undermining traditional forms of elite governance and increasing pressure for citizen participation through meaningful regional and local self-government.

A fifth factor is the resurgence of confidence in Europe's federal evolution as a result of the recent progress with the Single European Act and with the Maastricht Treaty, despite the

hurdles that these had to surmount.

A sixth factor has been the resilience of the classical federations such as the United States, Switzerland, Australia and Germany, which despite the problems they have experienced over the past three decades, have nevertheless shown a degree of flexibility and adaptability in responding to changing conditions.

All these factors have contributed to the renewed interest in federal political systems and federations, not as an ideology, but in terms of practical questions about how to organize and distribute political powers in a way that will enable the common needs of people to be achieved while accommodating the diversity of their circumstances and preferences. In the search for the middle ground that would permit the mutual accommodation of the powerful concurrent pressures both for larger political units and for smaller autonomous regional entities, federations, despite their complexities and rigidities, continue to appear to provide a promising technique that permits the closest political approximation to contemporary reality.

This revival of interest in federal political systems differs however from the enthusiastic proliferation of federations that occurred in the first decade and a half after 1945. Experience since has led to a more cautious, sanguine and realistic approach. In many areas, experience with earlier difficulties or failures and concern about possible consequences for local autonomy has led certain groups, such as opponents of European integration in Europe and especially in Britain, or those in former Soviet territories, to see federation as a trojan horse for centralization. Alternatively in other areas, such as South Africa, some have feared that federation might be a way of permanently institutionalizing the fragmentation of political power.

The experience since 1945 has taught us four

major lessons which have a bearing on the subject of this study. First, federations do provide a practical way of combining, through representative institutions, the benefits of unity and diversity, but they are no panacea. Second, the degree to which a federation can be effective will depend upon the degree to which there is acceptance of the need to respect constitutional norms and structures. Third, equally important for the effective operation of federations has been mutual faith and trust among the groups within a federation and an emphasis upon the spirit of compromise and tolerance. Fourth, the extent to which a federation can accommodate political realities is likely to depend not just on the adoption of federal arrangements but upon whether the particular form or variant of federation that is adopted or evolved gives adequate expression to the demands and requirements of the particular society in question. As we have already noted earlier, many variations are possible in the application of the federal idea in general or even within the more specific category of full-fledged federations. Ultimately, federation is a pragmatic, prudential technique whose applicability may well depend upon the particular form in which it is adopted or adapted or even upon the development of new innovations in its application.

(3) Federations as structures for reconciling common interests and ethnic and national self-government

Given the dual pressures throughout the contemporary world for larger political units capable of fostering economic development and improved security on one hand, and for smaller political units more sensitive to their citizens and capable of expressing local distinctiveness on the other hand, it is not surprising that federation as a form of government should have considerable appeal. Federation provides a technique of political organization that permits common action

for certain purposes carried out through the institutions responsible for shared-rule, together with self-government for distinct groups through the autonomous action of regional governments. Federation, by its emphasis upon the balance between these two thrusts has the advantage of allowing a close political approximation to the multiple levels of social and economic reality in the contemporary world. It makes it possible to reconcile the need for large-scale political organization for some purposes with the recognition and protection of diversities based on historical, economic, linguistic, ethnic or Aboriginal foundations.

Some critics have noted that multi-ethnic and multi-national federations have been among the most difficult to sustain, as experience in Nigeria, India, Malaysia and Canada and difficulties in the effort to federalize Europe have illustrated. This, and the examples of Yugoslavia and the USSR, has even led to some commentators, such as Daniel Elazar (1993: 94), to suggest that federations composed of different distinct ethnic or national units may accentuate differences and therefore be doomed to eventual civil war. He has gone on to suggest that in such situations modernized variants of confederal arrangements may be more appropriate. There is no doubt that federations where the constituent units do not differentiate particular ethnic groups, such as the United States, Australia and Germany (although the first two do contain Aboriginal minorities) have faced fewer difficulties than federations composed of large ethnic and national units. Nevertheless, the persistence for well over a century of the federation in Switzerland, where most of the cantons are distinct and internally homogeneous in terms of language or religion, and the reorganization of states within India and Nigeria along primarily linguistic and ethnic lines which occurred some time after federation in order to assuage internal pressures, suggest that in

certain conditions federations based on distinct ethnic or national units can be sustained and may help to reduce tensions. Indeed, there is as yet no evidence that any other form of political organization has successfully reconciled political integration and territorially based ethnic diversity for any extended length of time except by the imposition of force. Furthermore, the only really significant example of a modernized confederal system, the European Union, embodies in fact a hybrid of confederal and federal features and many of its proponents (except in Britain) regard it as only a way-station on the road to a European federation.

The implication for this study to be drawn from this experience elsewhere is that federations composed of at least some distinct ethnic, national or Aboriginal constituent units can be sustained. Although they may be more difficult to operate and require careful attention to the design of arrangements to bridge the interests of the distinct groups, there are few examples of effective alternatives for the consensual and democratic reconciliation of territorially concentrated ethnic interests within a larger political organization.

One feature that some authors have emphasized is the covenantal character of federations. Indeed, the word federal is derived from the Latin *foedus*, "covenant" (Elazar 1987: 5). The essential point is that federation as a form of political structure depends upon prior consent to a constitutional framework defining the jurisdiction and functions of the various governments within it. Acceptance of constitutionalism is therefore a prerequisite, but it is that constitutionalism which provides to the institutions of both shared-rule and of self-rule the assurance and security of their continued existence as political entities. In this sense the constitutional framework has the same characteristics as a treaty in defining the scope of mutual obligations and of autonomy among

the participants (Hueglin 1994: 11-12). Any redefining of the Canadian federation relating to the role of distinct Aboriginal units of government will therefore require consensus and agreement on *both* sides about the constitutional framework that is to apply. It is also worth noting that the same applies to the establishment of or change in a relationship involving federacy (as defined earlier in section 1(3)(a)).

(4) Conditions for success or failure of federations

While an analysis in depth of the conditions that contribute to the success or failure of federations is outside the terms of reference for this study, some brief comment seems appropriate as part of the consideration of the utility of federal solutions. There is an extensive literature on the subject (see for instance, Watts 1966, 1970, 1977; Elazar 1987b, 1993; Wheare 1993; Reker 1975; Duchacek 1987; Friedrich 1968; and Sawyer 1969).

The first point to note is that many of the longest-standing constitutional systems in the world today are federations. Among the federations still operating under their original constitutions are the United States (1789), Switzerland (1848), Canada (1867) and Australia (1901). A number of authors have attributed their prosperity, stability and longevity to the effectiveness of federation as a form of multi-level organization (Pennock 1959; Landau 1973).

But it is equally significant that during the past four decades a number of other apparently stable federal constitutional systems have experienced the secession of some regions or total disintegration. Less has been written about the pathology of federations, although there is some comparative literature (Franck 1968; Watts 1977; Hicks 1978; and Elazar 1993).

Every federation is to a large extent the product of a unique conjunction of conditions and

institutions, but some common patterns can be discerned. Among factors that have often been significant have been underlying social and economic factors. Where there have been serious disparities in the relative area, population, economic development and resources among constituent units, these have often had a corrosive effect upon relations between different regional units. Furthermore, as we have already noted federations containing units differentiated ethnically or nationally have often faced greater divisiveness (Elazar 1993: 94), although the severity of internal contentiousness has depended on the degree to which the particular institutions have failed to provide the opportunity for different groups to feel secure in their distinctiveness.

Structural factors have also been important. The most stable federations have been those where federal institutions have at one and the same time encouraged both a sense of effective self-government for distinct internal groups and a sense of federal cohesion serving as the glue to hold these groups together. Both over-decentralization and over-centralization can undermine the federal equilibrium necessary to sustain a federation and its attendant benefits. In this respect the balance in the distribution of responsibilities among governments and the opportunities for all major groups to have a significant role in policy-making within the federal institutions are important (hence the significance of sections 3(4) and 3(5) below). Ultimately a federal system must be based on a consensus of its constituent groups. An autocratic or imposed federation by its very self-contradiction is doomed to eventual failure, as the experience of the U.S.S.R. and collapse of Yugoslavia and Czechoslovakia have illustrated. To be successful a federation must therefore be based on democratic institutions that give the various groups encompassed by it a sense of democratic participation.

Federal processes are also important. Indeed, comparative studies have suggested that a critical factor in the survival of federations has been the existence of political parties or a system of continuing party coalitions that bridge the different communities that make up the federation (Riker 1975; Watts 1977: 52). A study of the disintegration of federations indicates that a tell-tale sign of imminent dissolution has been the demise of federation-wide parties or coalitions of parties and the rise of predominantly regional parties operating within the federal institutions. Such situations have generally led to a failure to moderate regional cleavages and to a cumulative polarization of internal differences.

Also important are effective intergovernmental institutions and processes enabling cooperation and reconciliation of differences among governments within federations (Watts 1991a: 332-335).

Ultimately, perhaps the most important factor for the success of federations has been the existence of public attitudes that not only tolerate but cherish diversity and that recognize that only through compromises among different groups can a federation of diverse peoples be held together (on this see Task Force on Canadian Unity 1979: 4-6). In the Canadian setting this means that we must recognize the need to accept and live with internal differences. Canadians generally must better understand that constitutionally recognizing the differences of our various groups, including the Aboriginal peoples, does not diminish but, rather, enriches us. At the same time, since the recognition of our differences and of the aspirations of our diverse groups will not by itself hold the federation together, Canadians will also need to articulate and develop a wider sense of shared values and of the destiny of Canada as a country where different groups can live in harmony under a common government to the benefit of

all.

If the full utility of federation as a means to accommodating distinct groups, and particularly Aboriginal peoples, within Canada is to be realized, it will be necessary to keep in mind the conditions outlined above that are necessary for a stable and effective federation.

3. DESIGN CONSIDERATIONS IN THE ACCOMMODATION OF DISTINCT GROUPS IN FEDERATIONS

(1) Units and tiers within federations

In considering ways in which Aboriginal self-government might be expressed within a federation, an important issue is that of defining the appropriate units for Aboriginal self-government. There is enormous variation among federations in the size of their constituent units. For example the largest Indian state, Uttar Pradesh, contains a population of over 110 million people, while the largest canton in Switzerland, Zurich, contains only just over 1.1 million people. Obviously, the population, territory and resources of a constituent unit will determine the range of functions it can perform effectively. It will determine the extent to which it can cohesively represent the interests of a homogeneous population or whether it is likely to contain within itself further minorities. The Swiss example and the trend to more numerous smaller states within Nigeria illustrate the pressures for units that are relatively homogeneous internally.

Also significant are the variation in the relative population, area and resources among the constituent units in a federation. Canada, India, Australia and, in its early days after independence, Nigeria have illustrated the tensions that can be provoked by sharp disparities in the size of constituent units. This too is a consideration that will have to be borne in mind in the design of units for Aboriginal self-

government.

One possible solution is to consider a multi-tiered federation. Traditionally, the constitutions of federations have centered upon relations between two levels of government, the federal and the state or provincial governments, leaving the scope and powers of the third level, e.g. local authorities, to be determined, not by the constitution, but by the state or provincial governments. The autonomy of local governments as a third tier has in practice varied enormously from federation to federation. It is most prominent in Switzerland and the United States and least so in Australia. The strength of the third tier has to a large extent depended upon the strength of the sense of local community and the strength of the people who are community leaders. In those cases, as in Australia, however, where many states are dominated by a state capital serving its hinterland, state politics have tended to dominate those of local government. Furthermore, in some federations direct intergovernmental financial relations between federal and local governments have been considerable, whereas in others such relations are all funnelled through the state or provincial governments as intermediaries. It is noteworthy that in recent years some federations have recognized formally the position of local governments as a third constitutional level. Examples of such constitutional recognition of local government as a third tier within a federation have occurred in Germany, India and Nigeria. In Australia, although the constitution does formally recognize local governments, representation for local governments has been included in the intergovernmental council established in 1992 for the consideration of economic development policies.

Although the Canadian Constitution does not formally recognize local governments as a third tier, it can be seen from these other examples that there is nothing in the concept of federation that is necessarily antithetical to the idea of more

than two levels of government, or that would preclude establishing Aboriginal units of self-government as an additional level of government with its powers constitutionally specified, i.e. as a new third order of government. Indeed, Pennock writing more than thirty years ago (1959) suggested that multiple levels of government each performing different functions at the scale most appropriate to them, might prove in overall cost-benefit terms the most effective in terms of the ability to maximize voter preferences (or reduce voter frustrations) as balanced against the cost of increased governmental complexity.

A different sort of multi-tiered federal arrangement has been that developed within the European Union. Two federations, Germany and Belgium, and one emerging federation, Spain, are themselves each constituent members within the wider union. These provide examples of federations within federations. In India in some cases a state or union territory provides a framework for a local federation of tribes each of which still exercises powers of self-government. Such precedents point to one possible way of reconciling the diversity of distinct first nations within a single First Nations Province as advocated by some (Courchene and Powell 1992; Elkins 1993: 27) or of at least grouping the smaller distinct first nations into several larger units.

(2) Non-territorial constituent units in federations

Traditionally federal political systems including federations have divided authority on a territorial basis (Duchacek 1987; Elazar 1993: 192-3; Gagnon 1993: 21-26). Such systems have usually involved meeting the desires on the part of distinct groups for retaining autonomous self-government over certain matters, by recognizing *regional* units of government within the wider polity. This approach might be applicable in Canada to Aboriginal peoples who live "north of 60" and to those "south of 60" concentrated on

reserves where Aboriginal peoples are territorially concentrated and self-government could be applied to distinct territorial units, whether in the form of new provinces or smaller units. But this form of territorially-based self-government would be difficult to apply to Aboriginal people who live off reserves or in urban centres and to the Metis. There is a parallel to this in the fact that French-speaking Canadians concentrated in Quebec can form a majority in their own provincial government, but in other provinces where French-speaking peoples are dispersed so that they are in a territorial minority solutions involving distinct territorial units do not provide a way for accommodating their distinctiveness.

We need, therefore, to consider whether non-territorial federal arrangements for power-sharing might be possible within federations. Traditional definitions of federal political systems have insisted that federal arrangements refer to distribution of responsibilities among territorial political units and refer to those involving non-territorial groups by other terms such as consociational political arrangements (e.g. Lijphart 1977, 1984). More recently, some writers have expanded the scope of the federal concept to include its adaptation to non-territorial contexts. This notion has been explored by David Elkins in several papers including one for the Royal Commission on Aboriginal Peoples where he has suggested the possibility of Aboriginal Province(s) with a basis that is non-territorial at least in part (Elkins 1992 and 1993). The Althusian idea of a corporative order may have some relevance here too (Althusius 1964; Hueglin 1993: 43-62).

While the recognition of non-territorial distinct groups for power-sharing within a federation is rare and is more commonly associated with a consociational form of political organization,

Belgium does provide an interesting precedent. The Belgian combination of expressly recognizing within the 1993 “federal constitution” both territorial regions and non-territorially based communities as constituent units within the federation appears to break new ground (see Appendix B). In Belgium the constitution distributes exclusive powers between the central government and two kinds of other governments. The constituent units of the federation consist of three territorially delineated regions (the Flemish, Walloon and Brussels Regions) *and* three non-territorial units: the French-speaking, Dutch-speaking and German-speaking Communities. The former have exclusive or partial jurisdiction over matters related to land use, environment, economic policy and energy policy, while the latter have responsibility for cultural affairs, language use, education, and personalized matters including international cooperation in such matters. It is still rather early to judge the efficacy of this double and overlapping arrangement of constituent units. Nevertheless, this example does show that a non-territorial form of distinct governmental unit can be made part of a federation. The main problems exemplified by the Belgian example lie in the complexity of such an arrangement and in the need to work out the interrelations between the territorial Regional governments and the non-territorial Community governments with their different jurisdictions and responsibilities. Given the overlaps in their scope and focus, there has been some pressure in Belgium to simplify the arrangement by merging the regional and community units of government. Nevertheless, the continuation of the two categories of constituent units has had sufficient political salience to be retained thus far, and their continued existence may be rendered necessary if only to deal with the complexities of the composition of the Brussels

capital region.

(3) Asymmetry within Federal Political Systems

In most federations the formal allocation of constitutional powers to the constituent units has been symmetrical. Indeed, purists who define the federal concept in terms of the American model have sometimes argued that federal arrangements require parity or equality under the law of the constituent units. In Canada this view has been echoed during the past decade by the advocates of provincial equality (for analysis of equality and asymmetry see Milne 1991). However, differences in size population, resources and political interests has meant that in practice significant variations in the political influence and actual powers of the constituent units have been common in federations. The result is that most federations have been marked by *de facto* asymmetry among their units (Tarlton, 1965).

Moreover, some federations and federal systems have been marked also by *de jure* asymmetry in the formal constitutional powers assigned to the constituent units, most notably Canada, Malaysia and Spain (Watts 1991 b: 133-8). Although in the recent constitutional deliberations in Canada the degree to which asymmetry among the provinces might be increased in order to accommodate Quebec's concerns became one of the central issues of contention, some asymmetry among the provinces has been a feature of the Canadian federation right from its inception (Milne 1991: 287-291 and Watts 1994).

When the Malayan Federation was expanded into Malaysia in 1963, a key feature was the asymmetry in the powers distributed between the federal government and the eleven peninsular states on the one hand, and that between the federal government and the two

east Malaysian states on the island of Borneo on the other. The latter, with their geographic separation and more diverse population and culture, were allocated considerably greater legislative, executive and financial autonomy, particularly in the realm of native affairs (see Appendix B and Constitution of Malaysia 1963, 9th Schedule, List IIA Supplement to State List for States of Sabah and Sarawak).

Spain too has been marked by asymmetry in the jurisdiction exercised by its 17 autonomous regions (see Appendix C). The Spanish approach has been to recognize variations in the pressure for autonomy in different regions by granting to each region its own statute of autonomy tailored to its particular set of compromises negotiated between Madrid and the regional leadership (Agranoff 1993).

The European Union has also found it necessary to accept a measure of asymmetry in the application of the Maastricht Treaty, most notably in the cases of Britain and Denmark. Perhaps the most complex current example of asymmetry within a federal political system occurs in the variety of powers of the 89 constituent units, republics, oblasts, okrugs, etc., that currently constitute the Russian Federation.

One difficult issue that has sometimes been raised in Canada is whether greater jurisdiction for some constituent units should affect negatively their representation in the federal institutions. Should representatives from the more autonomous constituent units be able to vote within the federal legislature or cabinet on those matters over which the federal government does not have jurisdiction in their own unit? Such limitations would appear reasonable, but they would complicate the operation of a parliamentary cabinet since its ability to stay in office would depend on different majorities on different issues. Interestingly,

except in the case of federacies (see below), only in Canada has this trade-off between the relative powers of the unit and the influence of its representatives in the federal institutions been raised seriously. There was, however, some discussion about the implications for voting arrangements in the Council of Ministers and the European Parliament when asymmetrical arrangements were agreed to in the European Union.

Despite such considerations, Canada, Malaysia and Spain do not appear to have found their current degrees of asymmetry to be dysfunctional, and it could be argued that there have been cases where asymmetry was the only way of resolving differences in the impulses for centralization and decentralization existing in different parts of a federation. This is a possible approach to be borne in mind, therefore, in designing the functions and powers of units of Aboriginal self-government. Such units do not necessarily need to be uniform although beyond a certain degree asymmetry is likely to become increasingly contentious (Watts 1994).

Another form of asymmetry exists in federal systems which combine federation for most constituent units with a relationship of federacy or associated statehood for some. The most notable examples of such arrangements are in the United States and India, (see Appendix B), although Liechtenstein's relation to Switzerland also belongs in this category. These asymmetrical arrangements represent the linking of a smaller and usually peripheral polity to a larger one with the smaller polity maintaining substantially greater autonomy in return for foregoing certain forms of participation in the governance of the larger country (see section 1(3)(a) above). Elazar (1991: 319-324) has defined the 130 Native American nations as *de facto* federacies in their relationship to the

American federation (see Appendix B). While the precise form of these Aboriginal federacies in the United States may be inappropriate for the Canadian situation, the possibility of some form of federacy relationship adapted to Canadian circumstances is an approach that should not be overlooked.

(4) Significance of the form of the distribution of jurisdiction

The constitutional distribution of legislative and executive jurisdiction and of financial resources is a key characteristic of federations (see section 1(3)(a) above). In the consideration of possible arrangements for Aboriginal self-government the form of the powers allocated to the units of self-government may be as important as their scope. Among federations the form which the distribution of powers has taken has varied considerably.

In Canada under the current federal constitution, the emphasis has been upon the exclusive jurisdictions of the federal and provincial governments as set out in ss. 91 and 92 of the *Constitution Act 1867*. Currently only three subjects are identified formally as areas of concurrent jurisdiction (ss. 94A and 95). This contrasts with most other federations where large areas have been placed under concurrent jurisdiction. This enables both orders of government to share responsibilities in those areas, with federal law prevailing only when there is a direct conflict. The United States, Australia, Germany and the Latin American federations are all marked by substantial areas of constitutionally assigned concurrent jurisdiction and very few areas of exclusive jurisdiction. There are also substantial areas of constitutionally assigned concurrent jurisdiction in India and Malaysia, although in these federations there are also significant lists of federal and state exclusive jurisdiction.

Experience in other federations suggests that the sharing of powers through concurrent jurisdiction may contribute to intergovernmental cooperation for service delivery, a point that might be borne in mind in designing the jurisdiction of units of Aboriginal self-government that are created. However, when federal powers are paramount within areas of concurrent jurisdiction, concurrency may prove to be a recipe for progressive centralization. The United States, Australia and Germany have provided examples of this.

An alternative mode for allocating powers is found in Germany and Austria. There, cooperation in the administration of federal law and delivery of services has been further encouraged by a constitutional requirement that a large portion of federal laws must be administered by the state governments (see Appendix C). Indeed in Germany about 60 percent of federal legislation is administered by the Länder, enabling federal laws to be adapted in their administration to differing regional circumstances. Such an arrangement does exist in Canada on a much more limited scale, notably in the area of criminal law.

A principle for the distribution of powers within federal political systems that has attracted a good deal of attention recently, especially within the European Union is that of “subsidiarity”. This is the idea that smaller, decentralized government is a virtue, and that as a result responsibilities within a federal system should be assigned to the smallest feasible political unit. The burden of proof should be on the centralizer. As a legal principle for judicial review this has proved difficult to implement, and the concept can prove to be a two-edged sword if ultimately the scope of subsidiarity will be determined by the central government (see special issue on subsidiarity of the *National*

Journal of Constitutional Law 3(3), December 1993). As a principle for the general design of a federal system and of the role of self-governing constituent units within it, however, the notion of putting the burden of proof on the centralizer is one worthy of attention.

Adequate financial resources which provide a measure of autonomy are crucial to the effective functioning of constituent units in federations. Rarely has it been possible, however, to design a federal constitution in such a way that the allocation of revenue resources to each level of government will not require modification and adaptation over time. This is so because the value of different taxing powers and of expenditure needs tend to change over time. Fiscal arrangements lie at the heart of many of the most contentious issues in intergovernmental relations (for a full comparative analysis of federal fiscal arrangements see Bird 1986; Hunter 1977). The issues involved in federal fiscal arrangements and in financing self-government are complex and require a more detailed analysis than is possible here. It is appropriate, therefore, that the Royal Commission has commissioned specific detailed studies of these questions. What needs to be emphasized here in this paper is that experience elsewhere suggests that financial arrangements that are *both* adequate *and* flexible are essential to the operation of all constituent unit governments within a federation.

(5) Representation in Federal Institutions

Much analysis of federal systems and of federations has focused on the distribution of powers and resources between the federal and regional governments and on the interaction between them. Nevertheless an equally important aspect for the effective operation of a federation, not the least because of the inevitable interdependence of the two or more levels of

government, is the character of representation within the federal institutions for the distinct groups represented by the constituent units of government. This is the dimension which in Canadian scholarly literature has sometimes been referred to as the “intrastate” dimension of federation by contrast with the “interstate” dimension which deals with relations between the orders of government (Smiley and Watts 1988). These two dimensions are complementary rather than mutually exclusive. Every federation has found it necessary to have federal institutions designed to include the representation of distinct regional interests as part of the process of achieving inter-regional consensus on functions designated for shared-rule (Ibid. 38).

It is not surprising then that the issue of Aboriginal self-government is often also coupled with that of ensuring the representation of Aboriginal peoples within the institutions of the federal government. The Charlottetown Consensus Report of 1992 consequently included provisions for this (section 7 regarding the Senate, section 20 regarding the Supreme Court, and section 22 regarding the House of Commons). In view of the failure of those proposals to achieve ratification, the question remains open.

There are a variety of ways in which regional interests may be represented within federal institutions (for comparative surveys see Smiley and Watts 1985: 37-61 and Watts 1991 a: 309-336). But the most common, found in virtually all federations, has been the establishment of a second legislative chamber to serve as the primary body for the input of regional views. The method of selection, the composition and the powers of the second chamber have varied from federation to federation, but the existence of such a chamber has been common to all

federations.

The design of the federal institutions has a critical impact on how regional interests will be expressed in those institutions. Here the basic distinction is between the presidential-congressional form in the United States, the Latin American federations and Nigeria, the collegial form found in Switzerland, and the parliamentary form found in Canada, Australia, Germany, India and Malaysia. The presidential-congressional and collegial forms provide examples of the separation of powers between executive and legislature while the parliamentary form is based on the fusion of the executive and legislature. In the latter regional input into federal policy-making has been limited by the primacy of the lower house to which the cabinet is responsible and by the inherent tendency for much tighter party discipline. Furthermore, within parliamentary federations cabinet dominance within both levels of government has tended to give intergovernmental relations the character of “executive federalism”, a process typical of all the federations with parliamentary executives (Watts 1989). Both these characteristics of a parliamentary federation apply to Canada. This should be borne in mind in relation to arrangements for Aboriginal representation in Canadian federal institutions. It raises the question whether attention should be focused on Aboriginal representation in the Senate, or in the House of Commons or both.

(6) Processes for constitutional restructuring

Federations must be both sufficiently rigid to provide a sense of security to the diverse distinct internal groups they protect, and be flexible enough to adapt to changing conditions (Wheare 1963: ch. 11; Livingston 1956). Much adaptation may occur through incremental adjustments over time by means of judicial review, minor

constitutional amendments, changes in fiscal arrangements, formal intergovernmental agreements, and development of new practices and conventions. Fundamental and comprehensive restructuring has, however, in almost all federations proved much more difficult.

In Canada comprehensive constitutional change was partially successful in 1981-2, but subsequent efforts at comprehensive constitutional change - in the Aboriginal Round of 1984-7, the Quebec (Meech Lake) Round of 1987-90, and the Canada (Charlottetown) Round of 1991-2 - have all failed. Peter Russell (1993) has analysed the dynamics of "mega-constitutional" politics and the unlikely prospect of achieving major changes by that route.

The difficulty of achieving comprehensive constitutional change with public support is not limited to Canada. Switzerland, where there are distinct provisions for 'partial' and 'total' revision of the constitution illustrates this. There have been more than 110 partial revisions since 1848, but only one of four efforts at total revision has succeeded (1874). The most recent effort, begun in the mid-1960s, was abandoned in the early 1980s. Australia in the past decade and a half also undertook comprehensive constitutional reviews but the resulting four proposals were all rejected in the ensuing referendums. The failure of the Equal Rights Amendment in the United States to achieve ratification by the required number of states provides yet another illustration. These examples reinforce what Canadians have learned from their own most recent effort at constitutional change in 1991-2: comprehensive constitutional change is always difficult and frequently fails, not the least because of the array of vested interests likely to resist any substantial change.

This leads to two conclusions relating to the

adaptation of the Canadian federation to meet Aboriginal interests and concerns and efforts to give implementation and better expression to the already existing inherent right of self-government asserted by the Royal Commission on Aboriginal Peoples. First, once the objectives have been identified, a strategy of incremental changes to achieve them may in the long run prove more fruitful than proposals for a single comprehensive change. Second, in any process of constitutional change, but especially a comprehensive one, as much attention will have to be given to ways of winning public approval as to the design of specific proposals.

4. SPECIFIC ARRANGEMENTS FOR ABORIGINAL POPULATIONS IN FEDERATIONS

(1) Introduction

In the preceding section we have discussed the relevance of the federal idea to the concept of self-government and the potential ability of federal systems and federations to accommodate distinct groups and hence to accommodate Aboriginal minorities. We have also examined some of the central design issues that arise and the variations that are possible within federal structures. We now turn in this section to provide an overview of actual arrangements employed within existing federations which contain Aboriginal populations and the experience of Aboriginal people located within them. The focus is upon how countries organized federally have in practice dealt with their Aboriginal populations.

This section will address four issues: provisions for constitutional recognition of

Aboriginal peoples; provisions for Aboriginal self-government; the allocation of federal and provincial jurisdiction relating to Aboriginal peoples; and special arrangements for Aboriginal representation in political institutions. For a federation by federation summary, the reader is referred to Appendix A.

Intensive research into the details for the arrangements in each of these federations has not been possible within the time and resources provided for this study. In some cases there is already a considerable literature about provisions relating to Aboriginal Peoples and this has been augmented by specific studies regarding the United States, Australia and India commissioned for the Royal Commission on Aboriginal Peoples. The details in those other studies for the Royal Commission have not been duplicated here in this study, but these examples have been drawn upon to identify significant points of comparison and contrast. In other cases such as Argentina, Brazil, Malaysia, Mexico and Pakistan, the literature on arrangements relating to Aboriginal peoples is scanty, and a full analysis would have required an extensive research program including field research which was well beyond the mandated scope and budget of this study. In these cases it has been necessary to base comparisons on what limited literature is available.

(2) Provisions for constitutional recognition of Aboriginal peoples

Specific constitutional recognition of the rights of Aboriginal peoples does not occur in any federations where the constitutions were adopted prior to the middle of the twentieth century. However the four federations with constitutions adopted more recently do include specific reference in some form or other to the status of the Aboriginal peoples. The constitution of India (1950), for example,

includes in addition to a set of fundamental rights and directive principles, special guarantees for “scheduled castes and tribes” including provision for special development programs for them. The various constitutions of Pakistan since independence, those of 1956, 1962 and 1973 and the further constitutional reforms of 1985, also recognized the existence of tribal groups, and the current constitution recognizes the existence of specific tribal areas. The constitution of the Malaysian federation (1963) sets out specific safeguards relating to the languages, religion and education of “natives” in the states of Sabah and Sarawak (e.g. arts, 161, 161A, 161C and 161D). The most recent of these federal constitutions, that of Brazil (1988), recognized for the first time in that country the rights of Indians in relation to social organizations, customs, languages, beliefs and traditions, and possession of lands and resources (article 231). It also assigned to the federal government responsibility to demarcate Indian lands within five years (art. 69). However, the Brazilian experience along with that of the other federations listed above, indicates that the mere statement of such rights in the constitution does not always ensure that they will be effectively implemented. Constitutional protection without the will to implement it is likely to be a mere facade behind which exploitation occurs unchecked.

Two federations with older constitutions, Argentina and Mexico make no reference to special recognition of Aboriginal peoples or their rights. In these instances Aboriginal peoples simply have the same rights under the constitution as other citizens. This is also true of the United States and Australia, although in both cases judicial interpretation has modified the situation by providing some basis for the recognition of Aboriginal rights.

In the United States for example, the over 130

North American Indian tribes have been recognized by the courts as “domestic dependent nations” existing in a relationship with the United States, often as the result of a treaty, which Elazar has described as one of *de facto* federacy (Elazar 1991: 319-324). In addition, Congress has by legislation enacted the Indian Civil Rights Act as a rider to the Civil Rights Act of 1968 in order to guarantee certain constitutional rights to Indians.

In Australia no treaties were ever signed with any of the Aboriginal peoples, and there is no constitutional recognition of the special rights or status for Aboriginal and Torres Island Straits peoples. Nevertheless, the High Court has recently rejected the doctrine of *terra nullius* which had for so long been presumed to prevail as the foundation for Australian law in relation to Aboriginal peoples (*Mábo v. Queensland*, 1992). This is likely to contribute to significant developments in the rights of Aboriginal peoples. Recently, too, some state and federal laws have been passed which recognize the special position of Aboriginals in Australian society.

(3) Provisions for Aboriginal Self-Government

As we have noted earlier, federal systems provide a potential device for providing Aboriginal self-government, if the constituent units are designed to correspond to the concentrations of Aboriginal populations and are assigned significant autonomy. In practice, among the eight federations with Aboriginal populations there is an enormous range in their provisions for Aboriginal self-government. These have been shaped by differences in their circumstances.

In the two Latin American federations, Argentina and Brazil, policy has in practice been largely assimilationist. There is no real Aboriginal self-government. In Brazil the Fundacio Nacional do Indio (Funai) is responsible for administering the federal government's Aboriginal policy, but competing interests within the government have often led to subordination of Aboriginal interests. Progress towards Aboriginal self-government has been fully blocked by interests pressing for social, economic and industrial development, and exploitation of Aboriginal peoples has continued.

In Pakistan, six tribal areas are specifically delineated by the constitution but these are federally administered. Any self-government is therefore dependent upon federal government concessions rather than on constitutional guarantees.

In Australia official federal policy is directed at a devolution of political powers, but that process is still evolving. An Aboriginal and Torres Islanders Commission (ATSIC) was established in 1990 composed entirely of Aboriginals and Islanders elected by Regional Councils across the country. It and the regional Councils have increased the direct involvement of Aboriginals and Islanders in the administration of programs and the delivery of services, thus providing a significant degree of self-management, but not of self-determination or full self-government (Reynolds 1993: 15-16).

In the United States, the Indian tribes were not identified as part of the federation in the constitution in 1787. Consequently their right to self-government is not constitutionally protected. The Indian Reorganization Act 1934 gave Indians some opportunities for self-government within an assimilationist context through modernized tribal governing institutions. This included authorization for tribes to adopt their

own constitutions subject to ratification by a majority of their members and by the Secretary of State of the United States. As a result, the reservations operate in practice something like separate nation-states within the federal union, although they are often subject to some state laws and taxes. The executive and legislative organization usually takes the form of an elected tribal council to pass ordinances consistent with the tribal constitution. Tribal courts have also been recognized, but their scope is limited and there has been an ongoing legal battle between state and tribal courts and governments over jurisdiction.

In Mexico, there are no specific units of indigenous self-government. But, in a situation somewhat analogous to the Canadian Northwest Territories, the predominance of indigenous populations within certain Mexican states has *de facto* given them the *potential* opportunity for self-government through the normal operation of these states as constituent units in the federation. For example, Yucatan, Chiapas and Oaxaca states have predominantly indigenous populations. They are, thus, in a position potentially to dominate politics in these states. The significance of self-governance through this means has been severely blunted, however, by the historical dominance of the centralized PRI (Partido Revolucionario Institucional) party which has been in power constantly since 1929 and which has generally subverted genuine state autonomy. Thus, to date, the *potential* opportunities which the Mexican federal system might have provided for Aboriginal self-government in some states where they are a majority, has in fact remained totally unrealized. The resulting frustration was dramatically illustrated in the New Year's 1994 insurrection of the Zapatista National Liberation Army in the southern state of Chiapas. Elsewhere in Mexico, over two dozen Indian tribes enjoy

some self-government within their home areas, although it has no constitutional protection. It is noteworthy that the consciousness of their specific Indian distinctiveness has been growing sharply. One unique case is that of the Yaqui Indians concentrated in eight villages with a population of 22,000 who in 1936 were given title to 1872 square miles of land by the federal government and operate almost as an independent state within the state of Sonora. Since that time they have had little outside assistance and have rejected any assertion of authority by the Mexican government. The political independence of the Yaqui is being slowly undermined, however, by their poverty and need for assistance (Elazar 1991:163).

In Malaysia, too, there is no specific constitutional guarantee of Aboriginal self-government. But in the east Malaysian states of Sabah and Sarawak the indigenous peoples form a substantial proportion of the state populations. This means that they wield significant political influence through the normal operation of state politics. Unlike some Mexican examples they do not, however, constitute a majority. It is significant that in Sarawak the Penans, and Dayaks who constitute over 40 percent of the population have during the past decade been agitating for improved representation in the state government.

India is the one example among these federations where Aboriginal peoples have in some instances achieved, after considerable agitation, full-fledged self-government under the constitution through the establishment of their own distinct full-fledged states within the federation. Four small states ranging in population from 495,000 to 1.4 million, and together constituting only about .35 percent of the federal population, have been recognized as full-fledged states with all the normal

constitutional powers of a state within the federation. These are Nagaland, Meghalaya, Arunachal Pradesh, and Mizoram each populated by its own distinct Aboriginal population.

In addition to these, several of the federally administered Union territories are populated by Aboriginal populations, and these territories form frameworks for local federations of tribes which exercise some powers of internal self-governance with minimal outside interference. Tribal autonomy or self-governance also occurs elsewhere in India in areas of tribal concentration, particularly in parts of Rajasthan, Madhya Pradesh, Gujarat, West Bengal, Orissa, Bihar, Assam and the smaller north-eastern states (Sanders 1992).

(4) Federal and state jurisdiction relating to Aboriginal peoples

Apart from the issue of providing Aboriginal self-government through the establishment of distinct Aboriginal constituent units within the federation, there remains the issue of how in existing federations with Aboriginal populations federal and state jurisdiction directly affecting Aboriginal groups has been allocated within the federal scheme. This may be significant, especially in those situations where federal majorities may be more tolerant of federal minorities than state majorities in relation to their own minorities, as for instance has often been the case in the United States in relation to black minorities. It does not necessarily follow that federal majorities will always be more tolerant than state majorities, but this has usually been the case simply because individual state populations have usually been marked by less diversity than the federal population as a whole.

In Argentina and Mexico, Aboriginal and indigenous peoples are not specifically identified

in the federal constitution. Consequently, matters relating to those peoples fall under the jurisdiction of whichever level of government has been assigned jurisdiction in the specific area. It is worth noting, however, that in practice both are highly centralized federations.

In four federations, however, all or significant aspects of jurisdiction over Aboriginal peoples are placed specifically under exclusive federal jurisdiction. This is the case in Brazil with respect to jurisdiction over lands traditionally occupied by Indians (art. 20(IX)), and jurisdiction over Indian populations (arts. 22(XIV) and 69). In Pakistan the federal legislature retains exclusive authority to legislate for the federally administered tribal territories. In Malaysia, the federal government has been given exclusive jurisdiction over the Aboriginal peoples in the eleven peninsular states, although the states are given some jurisdiction over land. This exclusive federal jurisdiction over Aboriginal peoples does not extend to the two East Malaysia states of Sabah and Sarawak, however.

In the United States, the Indians as “domestic dependent nations” have been deemed by the courts to have retained internal sovereignty, but external sovereignty has been considered to be vested in Congress. Therefore, tribes are seen as being able to control their own internal affairs, but their powers are subject to treaties and to express legislation by Congress. This Congressional authority is deemed to be derived from Article I, section 8 of the constitution. Thus, the Indian nations come under the general supervision of Congress and are not subject to state authority unless specifically rendered so by Act of Congress.

In three federations, Australia, India and Malaysia (in regard to East Malaysia) the states do have some jurisdiction over Aboriginal

peoples. In Australia between 1901 and 1967 the Aboriginals came under state jurisdiction except in the centrally administered Northern Territory. In 1967, however, a constitutional amendment gave the Commonwealth government concurrent jurisdiction to legislate for the Aboriginal people, with Commonwealth legislation prevailing in cases of conflict. In India, legislative responsibility for Aboriginal peoples located within states lies primarily with the states, although some responsibilities are assigned to the Union government. There are constitutional provisions for a federal commissioner assisted by regional commissioners to report on the condition of the scheduled castes and tribes and to recommend necessary Union or state action including, where necessary, state intervention. In East Malaysia (Sabah and Sarawak), unlike peninsular Malaya, jurisdiction over native law, custom, courts and reservations is placed under state jurisdiction in recognition of the different character of the indigenous peoples in those states, an illustration of the significantly asymmetric distribution of powers within the Malaysian federation.

(5) Special arrangements for Aboriginal representation in political institutions

Earlier in section 2(8) general issues relating to special arrangements for the representation of distinct groups within federal institutions were considered. Here we turn to examine the extent to which existing federations have provided special representation for their Aboriginal peoples.

In five of the federations containing Aboriginal populations there are no special constitutional arrangements for Aboriginal representation in the federal legislature, government or courts. In this category are Argentina, Brazil, Australia, Mexico and the United States. The latter three, however, require some further comment.

In Australia the Aboriginal and Torres Islander Commission (ATSIC) established in 1990 and composed entirely of Aboriginal and Islander Commissioners elected by Regional Councils across the country, has the special role of advising the Commonwealth Minister of Aboriginal Affairs and has taken over the budget allocation and responsibilities previously exercised by the Department of Aboriginal Affairs. It does therefore have a direct input into Commonwealth policies affecting the Aboriginals and Islanders, although its relationship to the Minister ultimately is only advisory. There is no formal right of representation in Parliament.

In Mexico, there is no constitutional provision to ensure representation of indigenous peoples in the National Congress. But the fact that indigenous peoples are in a majority in three states, and form a significant part of the population in others, means that they obtain some representation through the portion of seats filled by proportional representation in the elections to the Chamber of Deputies and through the two seats assigned to each state in the Senate.

In the United States there is no special provision for representation of Indians in Congress, but the state of Maine does provide for specific representation of Indians in its state legislature.

In the other three federations, India, Pakistan and Malaysia, the constitutions specify some special arrangements to ensure Aboriginal representation.

In India about 6 percent of the seats in the Lok Sabha (the popularly elected chamber) are reserved specifically for scheduled tribes (another 15 percent of the seats are similarly reserved for scheduled castes). These

arrangements were originally intended to last only for 10 years but they have been repeatedly extended. Under the arrangement for reserved seats, specific constituencies are reserved for Aboriginals to compete in, with all citizens in those constituencies participating in the voting. In the Rajya Sabha, the second chamber, most members are indirectly elected by state legislatures and therefore representation of Aboriginals is provided through the representatives of the four Aboriginal states and also through some of the representatives from the Union Territories. There is an additional small group of centrally appointed members in the Rajya Sabah but most of these are chosen for their national eminence rather than to represent minorities. It is worth noting that in India, in addition to these arrangements, places are also reserved under the constitution for the scheduled castes and tribes in the civil service and in the universities.

In Pakistan, of the 237 seats in the National Assembly, 207 are directly elected, 20 are guaranteed for women and 10 are guaranteed for Christians, Hindus and minorities. Of the 87 seats in the Senate, there are 19 from each of the four provincial assemblies, 8 from the federally administered tribal areas, and 3 from the federal capital territory.

In Malaysia the Senate consists not only of two representatives elected by each state legislature, but a substantial number are appointed by the federal government to represent special communities and interests, including Aboriginal peoples. In addition, Sabah and Sarawak have been given favourable weighting in the number of seats assigned to them in the House of Representatives to take account of their area, difficulty of internal communications and substantial indigenous populations. At the state level, the state

legislatures of these two states include nominated officials to ensure representation of minorities that might not otherwise be represented.

5. CONCLUSIONS: LESSONS FOR CANADA

The accommodation of the aspirations of the Aboriginal peoples is a major task facing Canadians. The comparative analysis in this study of the nature of federal political systems and federations in general and of the specific experience in federations elsewhere containing Aboriginal populations provides three broad lessons for Canada.

First, this comparative survey has demonstrated that there is an enormous variety in both the actual and potential arrangements within federal political systems, federations, and federacies for accommodating distinct groups. These open up a number of possibilities for ways in which the special interests and concerns of the Aboriginal peoples within Canada might be accommodated. Neither in terms of the concepts of federal political systems, federations or federacies, nor in terms of the actual existing examples is there one ideal model for Canadians to follow. Rather the value of the comparative review is that it points to the issues that need to be considered and to the variety of federal arrangements that are possible. A first recommendation arising from this study, therefore, is that we should lift our eyes from the confines of our own Canadian experience to consider the full variety of potential arrangements compatible with the idea of a federal political system.

Second, this comparison has indicated that actual institutional structures must be adapted to the particular social, economic and political context of the society which they serve. Simply to shop for institutional items off the shelf and

combine them without relating them to the particular circumstances of Canada will not work. The second recommendation of this study, therefore, is that in taking account of the first recommendation, i.e. lifting our eyes to consider the range of possibilities a comparative survey suggests, we should keep our feet firmly rooted in the particular circumstances of Canada so that the consideration of these possible institutional arrangements takes full account of Canadian realities.

Third, in terms of actual practice, most federations have so far made little effort to use the potential of the federal idea to accommodate fully the distinctiveness of their aboriginal populations within their constitutions. Most of the federations considered in Part 4 have in fact made inadequate and in some cases no specific provisions for their Aboriginal populations. In some of those cases this has been a source of considerable tension. Nevertheless, in India and to a lesser degree Malaysia, Australia and the United States, there have been some efforts to provide for constitutional recognition of Aboriginal peoples, to provide for a measure of Aboriginal Self-Government, to take account of the needs of Aboriginal peoples in the constitutional formulation of jurisdiction relating to Aboriginal peoples, and in some cases to make special arrangements for Aboriginal representation in political institutions. We may conclude then, that generally speaking it is the ideas and concepts underlying federal systems and the potential solutions these point to that are most useful to Canadians than the specific arrangements relating to Aboriginal peoples found in other federations.

Within the context of these three general and overriding conclusions, a number of more specific conclusions arising from this study can be identified.

The broader review undertaken in Part 2 of this study relating to arrangements that have existed within federations and federal systems generally (not just those that contain Aboriginal populations) for accommodating distinct groups within them, does indicate that federal arrangements open up the possibility of a variety of solutions that might be applicable to accommodating the aspirations of the Aboriginal peoples within the Canadian federation.

First, within the realities of the contemporary world, federal forms of political organization can and do provide practical ways of reconciling common interests and the particular identity of distinct groups in a form based on consent (see sections 2(2) and 2(3)).

Second, federations are not necessarily limited to two constitutionally recognized orders of government and have in a number of cases constitutionally recognized three or more orders of government (see section 3(1)).

Third, within some federations such as India and federal systems such as the European Union there are examples of constituent units that are themselves federations, an arrangement which might enable the smaller first nations to be grouped into larger political units while still retaining their own distinctiveness (see section 3(1)).

Fourth, the possibility of non-territorial constituent units within a federation is not only conceivable but is exemplified by the arrangements that have evolved in Belgium during its federalization over the last three decades (see section 3(2)). At the same time, the Belgian experience provides a cautionary note, indicating that while non-territorial constituent units can be combined with territorial ones within a federation, the result is likely to be extremely complex and the interrelationship

between them for the delivery of services and for political accountability would need to be worked out very carefully.

Fifth, the possibility of asymmetrical arrangements in the jurisdiction assigned to different constituent units is also confirmed by the fact that such arrangements have in fact worked in a number of federations and federal systems (see Section 3(3)). Nevertheless, given the concerns expressed in the recent Canadian constitutional deliberations about the appropriate extent of asymmetry within the federation, and the recognition in other federations that asymmetry beyond certain limits may create problems, this too is an area which requires careful consideration. Two forms of asymmetrical federal relationship noted in section 1(3)(a) are *federacy* and *associated statehood* of which there are currently a considerable number of examples in the world. Given the likelihood that the latter concept would in Canadian minds be linked to that of “sovereignty-association”, advocacy of such a relationship is likely to raise complications. On the other hand, federacy might meet the concerns of Canadian critics of asymmetrical arrangements who complain that asymmetry would give certain greater autonomy without a correlative reduction in influence in central policy-making. Furthermore, as noted in section 3(3) above, federacy does exist in one *de facto* form for Aboriginal peoples in the United States. A different adaptation of the concept of federacy to the Canadian context might provide one form of asymmetrical federal relationship at least worth examining.

Sixth, as noted in section 3(5), appropriate representation and participation in the institutions of the federal government is one way of accommodating distinct groups within a

federation. The Charlottetown Agreement addressed this issue, and it will need to be re-considered in deliberating the place of the Aboriginal peoples within the Canadian federation. At the same time, it should be noted that the more asymmetry in the relationship of the Aboriginal peoples to the federation, and particularly if a relationship of *federacy* is advocated, the more a corresponding reduction in entitlement to representation and participation in the central institutions of the federation is likely to follow as a corollary.

Seventh, both our own recent Canadian experience of constitutional deliberations since 1982, and that of other federations that have attempted comprehensive constitutional change suggests that incremental constitutional change is likely to prove the most fruitful in the long run in achieving significant change (see section 3(6)). That, of course, must not be allowed to become an excuse for inaction, but rather the basis for progressive and meaningful advance. Experience elsewhere also indicates that where problems within a federation have been allowed to fester unresolved for long periods, the situation can become explosive. The American Civil War was just one such example, but there have been other cases where serious tensions or even fragmentation have followed the failure to resolve major problems.

These conclusions and recommendations are intended to draw attention to possible ways in which our Canadian federal system might accommodate the aspirations of the Aboriginal peoples. Their application needs to take full account of the particular circumstances that relate to the Canadian federation and to the Aboriginal peoples in Canada.

APPENDIX A: FEDERATIONS WITH SIGNIFICANT Aboriginal POPULATIONS

(Sources: various)

Argentina

- (a) *Basic Federal Structure and Population*
- federated 1853.
 - 22 provinces + national territory + 1 federal district.
 - presidential/congressional federation patterned in formal terms on U.S.A. model; federal right of intervention in provincial affairs gives central government extensive powers.
 - area: 1,068,302 sq. mi.
 - population: 31,928,519.
- (b) *Aboriginal population*
- population: 500,000 (less than 2%), most of whom live in remote areas in the north and south.
- (c) *Constitutional recognition of Aboriginal peoples*
- in matters of government no special recognition: Aboriginal peoples have same rights as other Argentinean citizens.
- (d) *Provisions for self-government*
- government policy largely assimilationist: directed at improving social conditions rather than recognizing special status.
- (e) *Federal and state jurisdiction relating to Aboriginal peoples*
- not specifically identified; therefore comes under general distribution of jurisdiction and responsibilities.
- (f) *Special arrangements for Aboriginal representation in political institutions*
- none.

Australia

- (a) *Basic Federal Structure and Population*
- federated 1901.
 - 6 states + 4 administered territories + 3 territories + 1 capital territory.
 - parliamentary federation with large areas of concurrent jurisdiction and residual powers assigned to states; during history of federation federal government has attained dominance, increasingly intruding into fields of state responsibility, but states have nonetheless remained strong political entities; intergovernmental relations marked strongly by “executive federalism”.
 - area: 2,966,150 sq. mi.
 - population: 15,531,900.
- (b) *Aboriginal population*
- 227,645 (about 1.5%) Aboriginal Australians and Torres Straits Islanders.
- (c) *Constitutional recognition*
- no constitutional recognition of special rights or status for Aboriginal and Torres Strait Islander peoples.
 - no treaties were ever signed with any of the Aboriginal peoples, but High Court in *Mabo v. Queensland*, 1992, has rejected doctrine of *terra nullius*.
 - some state and federal laws have been passed recognizing the special position of Aboriginals in Australian society.
- (d) *Provisions for self-government*
- official federal policy is directed at devolution of political and economic powers, but process is still evolving.
 - Aboriginal and Torres Strait Islanders Commission established 1990 and Regional Councils have increased direct Aboriginal

and Islander involvement in administration of programs and delivery of services, providing a significant degree of self-management, but does not provide for self-determination (Reynolds 1993: 15-16).

(e) *Federal and state jurisdiction*

- 1901-1967: state jurisdiction except in the Northern Territory.
- 1967 constitutional amendment gave Commonwealth government concurrent jurisdiction to legislate for Aboriginal people with Commonwealth legislation prevailing in cases of conflict.
- national, state and local governments in practice all have a hand in policy-making and service delivery affecting Aboriginal peoples.

(f) *Special arrangements for representation in political institutions*

- no special arrangements in Parliament or state legislatures for representation of Aboriginal or Torres Strait Islander peoples.
- the Aboriginal and Torres Islander Commission (ATSIC) established in 1990 and composed entirely of Aboriginal and Islander Commissioners elected by Regional Councils across the country advises the Commonwealth Minister of Aboriginal Affairs and has taken over the budget allocation and responsibilities previously exercised by the Department of Aboriginal Affairs.

Brazil

(a) *Basic Federal Structure and population*

- federated 1891.
- 25 states + 1 federal capital district.
- presidential/congressional federation patterned in formal terms on U.S.A. model

with a history of strong executive power vested in the federal President; 1988 constitution devolved some federal powers to state and local governments but significant powers were reserved for federal executive; federal, state and municipal governments have concurrent powers in most fields, enabling actual powers exercised by each state and local government to vary.

- area: 3,286,488 sq. mi.
- population: 144,428,000.

(b) *Aboriginal Population*

- Aboriginal population: 260,000 (2%).
- includes 180 indigenous nations speaking 140 languages.
- Indian jungle population: 45,429 (0.3%).

(c) *Constitutional recognition*

- 1988 constitution recognized for the first time rights of Indians in relation to social organizations, customs, languages, beliefs and traditions, and possession of lands and resources (article 231).
- federal government was assigned responsibility to demarcate Indian lands by 1993 (art. 69).
- in practice implementation has been subordinated to competing social economic and industrial interests.

(d) *Provisions for self-government*

- Not constitutionally established.
- Fundacio Nacional do Indio (Funai) is responsible for implementing federal government's Aboriginal policy but competing interests within government have often led to subordination of Aboriginal interests and of progress towards self-government in the face of policy and resource demands of social,

economic and industrial development.

(e) *Federal and state jurisdiction relating to Aboriginal peoples*

- Federal legislative jurisdiction over lands traditionally occupied by Indians (art. 20(ix)), and Indian populations (arts. 22(xiv), 69(v)).
- Federal courts' jurisdiction over disputes over rights of Indians (art. 109(xi), 129(v)).

(f) *Special arrangements for Aboriginal representation in political institutions*

- none.

India

(a) *Basic Federal Structure and Population*

- became independent federation in 1947; new independence constitution became operative 1950.
- 25 states + 7 union territories + 1 federacy (Jammu and Kashmir) + 1 associated state (Bhutan).
- a parliamentary federation with relatively centralized distribution of powers set out in three lists: Union exclusive list, concurrent list and state exclusive list for assignment of jurisdiction. Formally the central government possesses very substantial powers, especially emergency powers which have been frequently used, but the federation functions within an ethno-political context that preserves the predominantly federal character of Indian politics. States were reorganized on an ethno-linguistic basis in 1956 and there have been further adjustments since. There has also recently been a move towards the constitutionalization of local government as a third tier of government.
- area: 1,269,219 sq. mi.

- population: over 875 million.

(b) *Aboriginal population*

- population: over 60,000,000 (about 8% of federal population) comprising 427 tribal communities, many of which are geographically isolated.

(c) *Constitutional recognition*

- constitution includes in addition to fundamental rights and special guarantees for linguistic minorities and for Anglo-Indians, special guarantees for "scheduled castes and tribes" and provisions for special developmental programs for them.

(d) *Provisions for self-government*

- four small states, Nagaland, Meghalaya, Arunachal Pradesh and Mizoram in the north-east are tribal majority states.
- Union territories which are generally small are federally administered, but several provide frameworks for local federations of tribes which exercise some powers of internal self-government with minimal outside interference.
- Tribal autonomy or self-government has developed in areas of tribal concentration, particularly in parts of states of Rajasthan, Madhya Pradesh, Gujarat, West Bengal, Orissia and Bihar in the central north and in Assam and the smaller north-eastern states (Sanders, 1933).

(e) *Federal and state jurisdiction relating to Aboriginal peoples*

- legislative jurisdiction is primarily with the states although some responsibilities and jurisdiction are assigned to the Union government.
- constitutional provisions for federal commissioner assisted by regional

commissioners to report on condition of schedule castes and tribes and recommend necessary central or state action including where necessary central intervention.

(f) *Special arrangements for Aboriginal representation in political institutions*

- provision for “reserved seats” in Lok Sabha (popularly elected chamber) for scheduled tribes (about 6% of seats) was originally intended to be temporary but has been repeatedly extended. Specific constituencies are reserved for this category and also for scheduled castes (about 15% of seats) with all voters within the constituency participating in the election.
- provision in Rajya Sabha (most members indirectly elected by state legislatures) of small group of members centrally appointed for their national eminence or to represent special interests.
- places are also reserved for scheduled castes and tribes in the civil service and the universities.

Malaysia

(a) *Basic Federal Structure and Population*

- federated 1963.
- 13 states.
- a parliamentary federation which was formed by adding to the highly centralized Federation of Malaya (independence constitution 1957), three additional states in 1963: Singapore (which subsequently was separated from the federation in 1965) and the two Borneo states of Sabah and Sarawak. A distinctive feature of the

Malaysia federation is the asymmetric relationship to the central government of the eleven peninsular Malayan states which remain highly centralized and of the two east Malaysian states, Sabah and Sarawak with their geographic separation and more diverse population and culture, which have considerably greater legislative, executive and financial autonomy.

- area: 127,320 sq. mi.
- population: 16,921,000

(b) *Aboriginal population*

- population of orang asli in peninsular Malaya: about 110,000 (8.5%) estimated, consisting of 3 groups: Senoi mainly in Perak, Pahang and Kelantan; Proto-Malays mainly in Pahang, Selangor, Negri Sembelan and Johore; Negritos mainly in Perak and Kelantan.
- population in East Malaysia: numerous tribal groups estimated at 522,500 (39.5%) in Sabah of which largest group are Dusun 423,300 (32%), and at 759,500 (49%) in Sarawak of which largest group are Dayak 620,000 (40%).

(c) *Constitutional recognition*

- constitutional safeguards are set out relating to languages, religion and education of “natives” in the states of Sabah and Sarawak (constitution, arts. 161, 161A, 161C and 161D).

(d) *Provisions for self-government*

- no specific constitutional provision.
- the Penans and Dayaks in Sarawak where the latter represent 45% of the state population have during the past decade been agitating for improved representation in the state government.

(e) *Federal and state jurisdiction relating to Aboriginal peoples*

- in peninsular Malaya, central government has exclusive jurisdiction over Aboriginal peoples, although the states are given some jurisdiction over land.
- in east Malaysia (Sabah and Sarawak) jurisdiction over native law, custom, courts and reservations is placed under state jurisdiction,

(f) *Special arrangements for Aboriginal representation in political institutions*

- the Senate consists not only of 2 representatives elected by each state legislature, but a substantial additional number are appointed by the central government to represent special communities and interests including Aboriginal representatives.
- the favourable weighting of representation for Sabah and Sarawak in the House of Representatives has been intended to take account of the area, difficulties of internal communications and substantial indigenous populations of these two states.
- the state legislatures of Sabah and Sarawak include nominated officials to represent minorities that would otherwise not be represented.

United Mexican States(a) *Basic Federal Structure and Population*

- federation established 1824, but following political turmoil during most of nineteenth century, new constitution was brought into force in 1917.
- 31 states + federal district.
- federation was adopted partly in imitation of United States but also to accommodate basic divisions within Mexican society, in particular the different indigenous groups

inhabiting the different states and the mixture of languages resulting. In practice federation in Mexico has been more a matter of rhetoric with decentralization within a system dominated by one party rather than true power-sharing.

- area: 756,066 sq. mi.
- population: 82,759,000. About 75% consists of mestizos (people of mixed blood predominantly a mingling of Indian and Spanish), 10-12% of Indians, and 10% of whites, mostly of Spanish descent.

(b) *Aboriginal Populations*

- population: 9,500,000 (12%) estimated. Most of *indigenas* are concentrated in the Yucatan peninsula. Of the old native languages, 82 Indian groups with about 270 different dialects have remained.
- The Yaqui population of 22,000 concentrated in 8 villages has been engaged in intermittent war with the Mexican government and continues to resist any participation or assertion of authority by the Mexican government.

(c) *Constitutional recognition*

- no formal constitutional recognition.

(d) *Provision for self-government*

- Yucatan, Chiapas and Oaxaca states within the federation have predominantly indigenous populations, who thus are in a position potentially to dominate politics in those states. Yucatan, Chihuahua, Oaxaca, Jalisco and Mihoacan states represent different Indian nations from the pre-conquest period and their people use their own native languages as well as Spanish. The historical dominance of the centralized PRI (Partido Revolucionario Institucional) party has tended to subvert state autonomy,

however. The resulting frustration and political consciousness was illustrated in Chiapas state by the 1 January 1994 insurrection of the Zapatista National Liberation Army which on behalf of the poor and indigenous peoples took over San Cristobal de las Casas until driven back into the hills by the Mexican army.

- over two dozen Indian tribes enjoy some measure of self-government within their home areas, and the consciousness of their specific Indian distinctiveness has been growing rapidly and in intensity.
 - the Yaqui Indians were given title to 1872 square miles of land by the federal government in 1936 and operate almost as an independent state within the state of Sonora. Since that time they have had little outside assistance and have resisted any participation or assertion of authority by the Mexican government (Elazar 1991: 163).
- (e) *Federal and state jurisdiction relating to Aboriginal peoples*
- no formal constitutional designation but most major decisions in all areas are made by the national government and carried out by state agencies.
- (f) *Special arrangements for Aboriginal representation in political institutions*
- none.

Pakistan

- (a) *Basic Federal Structure and Population*
- became independent federation in 1947; new constitutions 1956 and 1962; secession of East Pakistan (Bangladesh) in 1971; new constitution 1973 and further constitutional reforms 1985.
 - 4 provinces + federal capital territory + 6 federally administered tribal areas.

- presidential federation; since independence there have been alternating periods of parliamentary rule and of military dictatorship. Since the first military regime took power in 1958, the federation has had a highly centralized character but the 1985 constitutional reforms granted a measure of renewed provincial autonomy. Since that time the long subordinated provinces have developed into independent political bases for launching political attacks on the federal government, thereby reducing the historical imbalance that had favoured the central government.
- area: 310,403 sq. mi.
- population: 105,000,000.

(b) *Aboriginal population*

- population in federally administered tribal areas: 2,467,000 (2.5%).

(c) *Constitutional recognition*

- recognized in constitution by identification of tribal areas.

(d) *Provisions for self-government*

- the degree of self-government in the 6 tribal areas is limited by the exclusive federal power to administer them.

(e) *Federal and provincial jurisdiction relating to Aboriginal peoples*

- the federal legislature retains exclusive authority to legislate for the federally administered tribal territories.

(f) *Special arrangements for Aboriginal representation in political institutions*

- of 237 seats in National Assembly, 207 are directly elected, 20 are guaranteed for women and 10 are guaranteed for Christians, Hindus and other minorities.

- of 87 seats in Senate, there are 19 from each provincial assembly, 8 from the federally administered tribal areas and 3 from the federal capital territory.
- in provincial legislatures separate seats are designated for Muslims and non-Muslims, with members of each community electing their own representatives.

United States of America

(a) *Basic Federal Structure and Population*

- constitution drafted 1787; federation inaugurated 1789.
- 50 states + 2 federacies + 3 associated states + 3 local home-rule territories + 3 unincorporated territories + 130 Native American nations (*de facto*) federacies.
- a presidential/congressional federation based on a separation of powers between the executive, a bicameral legislature, and the judiciary within federal government; and a distribution of powers between the federal and state governments with a large area of concurrency (where in cases of conflict the federal power prevails) and residual authority assigned to the states. The structure is built on a principle of checks and balances among dispersed centres of power. Beginning historically as a decentralized federation, over two centuries the federal government has consolidated its position in relation to the states into a dominant one, although its dependence upon states and local governments to implement many of its programs and the loose national party structure ensures the continued vitality of state and local interests.
- area: 3,618,770.
- population: 248,709,873.

(b) *Aboriginal population*

- population: in 1990 census just under 2 million (below 1%), of which 1,878,285

were American Indian, 57,152 were Eskimo (U.S. Census category), 23,797 were Aleut.

- lands: Indian lands amount to 81,662 sq. mi. (2.25% of U.S.A.).

(c) *Constitutional recognition*

- while not so defined in the constitution, the courts have recognized the over 130 Native American Indian tribes as “domestic dependent nations” which exist as *de facto* federacies within the United States.
- the Indian Civil Rights Act enacted as a rider to the Civil Rights Act of 1968 guaranteed certain constitutional rights to Indians.

(d) *Provisions for self-government*

- Indian tribes are not identified as part of the federal system in the constitution and consequently their right to self-government is not constitutionally protected. It is derived from judicial interpretations (Barsh 1993: executive summary).
- the Indian Reorganization Act 1934 gave Indians some opportunities for self-government through modernized tribal governing institutions including authorization for tribes to adopt their own constitutions (to be ratified by a majority of members and by the Secretary of the Interior).
- generally reservations operate as separate nation-states within the federal union, often, however, subject to some state laws and taxes.
- executive and legislative organization usually takes the form of an elected tribal council authorized to pass ordinances consistent with the tribal constitution. Tribal courts have also been recognized.

(e) *Federal and state jurisdiction relating to Aboriginal peoples*

- as “domestic dependent nations” these have been deemed by the courts to possess

residual sovereignty, but come under general supervision of Congress and are not subject to state authority unless specifically rendered so by Act of Congress. This authority of Congress is derived from Article I, section 8 of the constitution. Congress has from time to time provided for state authority in relation to Indians.

(f) *Special representation for representation in political institutions*

- none at federal level.
- at state level, Maine provides for specific representation of Indians in the legislature.

APPENDIX B: SIGNIFICANT FEATURES IN OTHER FEDERAL POLITICAL SYSTEMS FOR ACCOMMODATING DISTINCT GROUPS

(Sources: various but note especially Elazar 1991)

Introduction

This appendix briefly summarizes arrangements in other federations and federal political systems not containing Aboriginal groups but having significant features for accommodating distinct groups.

Belgium

- Belgium founded as unitary constitutional monarchy in 1830 and composed of Walloon (French) and Flemish populations, has since 1970 been going through a process of devolutionary federalization culminating in 1993 in a federation.
- constituent units: 3 regions (consisting of 1 unilingual Flemish and Walloon region + 1 bilingual capital region (Brussels)) + 3 non-territorial cultural communities (Flemish, French and German).
- area: 11,783 sq. mi.
- population: 9.9 million.
- the particularly significant feature of the Belgian federation is the distribution of exclusive powers between the central government and two kinds of other governments: the three territorially delineated Flemish, Walloon and Brussels-Capital Regions mainly responsible for regional economic matters, and the three non-territorial French-speaking, Dutch-speaking and German-speaking communities mainly responsible for linguistic and cultural matters.

Germany

- West Germany adopted a federal constitution in 1949 creating a federation

composed of 10 Länder plus one associated state (West Berlin) and in 1990 with German reunification it became a federation of 16 Länder.

- constituent units: 16 Länder; these range from relatively large regions to some city-states.
- area: 137,231 sq. mi.
- population: 78 million.
- the particularly significant features of the federation in relation to the representation of distinct groups is the variation in relative size among the constituent units from large Länder like North Rhine-Westphalia (17 million), Bavaria (11 million) and Baden-Württemberg (9.4 million) to city states like Bremen (650,000), Saarland (1 million) and Hamburg (1.6 million). A second significant feature is the form of the distribution of powers whereby legislative jurisdiction is relatively centralized but the constitution requires that much of federal legislation must be administered by the Länder so that the application of federal legislation is adapted to specific Land needs. This has led to the need for closely interlocking relations between the two levels of government with a federal second chamber, the Bundesrat, composed of Land cabinet ministers and with a veto on more than half of federal legislation at the pinnacle of the intergovernmental processes.
- a second significant feature has been the move towards the constitutionalization of local government as a third tier of government.

Nigeria

- became independent as a federation in 1960 and since that time has alternated between civilian and military rule. The federal form was made necessary by Nigeria's ethnic and regional diversity

which even under military regimes have had to respect them by labelling their administrations as “Federal Military Governments”.

- constituent units: originally 3 regions in 1960 but subsequently sub-divided into 4 regions in 1967, 12 states in 1968, 19 states in 1976, 21 states in 1987, and 30 states in 1991 to represent more precisely ethnic concentrations.
- area: 356,669 sq. mi.
- population: over 100 million. There are no Aborigines since Nigeria was not a settler community under imperial rule.
- the particularly significant feature of the Nigerian federation for this study is that although there are no Aborigines, the number of distinct ethnic groups campaigning for ethnic self-determination has meant that to accommodate them as distinct groups the number of constituent units (originally “regions” and later “states”) has increased over three decades from three to thirty. This has assuaged some ethnic groups. At the same time, it has also led to fresh problems as new ethnic minorities have emerged from within the larger former regional units groups. As a result the states as units have become highly unstable.
- a second significant feature has been the revitalization of local governments by giving them constitutional recognition, autonomy, responsibilities and revenues.

Switzerland

- following a brief civil war in 1847, the preceding confederation was replaced in 1848 by a federation.
- constituent units: Switzerland is composed of 20 “full” cantons and six “half” cantons (the main distinction being that “full” cantons have two seats each in the federal second chamber and “half” cantons have

only one). In addition the Principality of Liechtenstein is an associated state.

- area: 15,943 sq. mil.
- population: 6.6 million.
- the significant feature is that most of the cantons are relatively small, ranging in population size from 13,140 (Appenzell Inner Rhodes) to 1.2 million (Zurich) most of them being internally predominantly unilingual and uniconfessional. This has enabled the cantons to maintain their distinctiveness and autonomy. At the same time, the existence of different cantons that are predominantly German-Protestant, German-Catholic, French-Protestant, French-Catholic, or Italian-Catholic has created cross-cutting cleavages and shifting alliances avoiding sharp polarization within federal politics.

Spain

- formally a “unitary regional state”, Spain has become a federation in all but name as the result of a process of political devolution redistributing power between Madrid and the 17 autonomous regions.
- constituent units: 3 historic autonomous communities + 1 special statute autonomous community + 12 ordinary autonomous regions, + 1 federal capital region.
- area: 194,897 sq. mi.
- population: 39 million.
- the significant feature of the current political structure in Spain is the varying degree of pressure for regional autonomy in Spain with the pressure being strongest in the historic communities in the Basque country, Catalonia and Galicia. The Spanish approach as a result has been to grant to each region its own statute of autonomy tailored to its particular situation or based upon a particular set of

compromises negotiated between Madrid and the regional leadership. This illustrates the conscious adoption of asymmetry in the autonomous powers allocated to regional units. In each case, the central government

and the autonomous regions each have a range of exclusive powers but also function jointly in several spheres.

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