

**Federal Systems and Accommodation of Distinct Groups:  
A Comparative Survey of Institutional Arrangements**

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## **Executive Summary**

**This paper employs a comparative analysis to address two sets of questions highly relevant to the work of the Royal Commission on Aboriginal Peoples. First, what can we learn in a general way, from experience elsewhere in applying the federal idea, about how federal political systems generally and federations specifically can accommodate distinct internal groups and provide opportunities for self-government? Second, what specific arrangements have been provided for Aboriginal peoples in countries that are both federal in form and contain substantial Aboriginal populations?**

**The introductory section outlines the purpose, relevance and scope of the study and the utility of comparative analysis and addresses conceptual and definitional issues relating to the use of such terms as federalism, federal political systems, federations, distinct groups, Indigenous peoples, Aboriginal peoples, sovereignty and self-government.**

**The second section of the paper examines the general utility of the federal idea for accommodating distinct groups. The federal form of political organization provides an institutional device by which distinct groups — ethnic, religious or other such groups — are able to achieve their aspirations for self-government and self-determination while, on the other hand, obtaining the benefits and advantages of a wider political organization. In the contemporary world the relevance of federal solutions as structures for reconciling the self-government of distinct groups with wider common interests has been widely recognized.**

**In the third section, variations in federal institutional forms that may facilitate the accommodation of distinct groups are considered. These include the significance of the number, size and resources of constituent units, including the possibility of multiple levels within federations and of federations within federations; the possibility of non-territorial constituent units within federations; the possibility of and limits to asymmetry among the units within federations; the significance of particular forms of distribution of jurisdiction for the character of relations within a federation; possible provisions for special representation of distinct groups within federal institutions; and the degree to which comprehensive or incremental processes are likely to be effective for constitutional**

restructuring. This analysis indicates that the federal idea provides a great variety of possible ways to accommodate distinct groups.

The fourth section provides an overview of specific arrangements for Aboriginal peoples in federations with significant Aboriginal populations. The comparative review encompasses the cases of Argentina, Australia, Brazil, India, Malaysia, Mexico, Pakistan, and the United States. (A federation by federation summary is provided in Appendix 1.) The comparison is made on four bases: (1) provisions for constitutional recognition of Aboriginal peoples; (2) provisions for Aboriginal self-government; (3) federal and state jurisdiction relating to Aboriginal peoples; and (4) special arrangements for Aboriginal representation in political institutions. This survey indicates that in practice few federations have, in the case of their Aboriginal populations, made a significant effort to achieve anything remotely approximating the potential implicit in the federal idea for accommodating the distinctiveness of their Aboriginal populations.

Three general conclusions are reached in the study:

1. There is an enormous variety in both the actual and potential arrangements within federal political systems, federations and federacies for accommodating distinct groups. We should therefore lift our eyes from the confines of our own Canadian experience to consider the full variety of potential arrangements.
2. Actual institutional structures must be adapted to the particular social, economic and political context of the society that they serve.
3. Most federations have so far made little effort to use the potential of the federal idea to accommodate fully the distinctness of their Aboriginal populations in their constitutions.

Within the context of these three general and overriding recommendations a number of more specific conclusions are identified:

1. Federal forms provide ways of reconciling politically both common interests and the particular identity of distinct groups in a form based on consent.
2. Federations are not necessarily limited to two constitutionally recognized orders of government.
3. Within some federations or federal systems there are constituent units that are themselves federations.
4. Non-territorial constituent units within a federation are possible.

**5. Asymmetrical arrangements, including those of 'federacy' and 'associated statehood', are also possible within federations, but may leave the more autonomous partners with a reduced voice in federal institutions.**

**6. Incremental rather than radical or comprehensive constitutional change is likely to prove most fruitful in the long run.**

**Federal Systems and Accommodation of Distinct Groups:  
A Comparative Survey of Institutional Arrangements**

**by Ronald L. Watts**

**Introduction**

*Purpose, Relevance and Scope of the Study*

*The objectives of this study are 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 examines the implications of the federal concept and of comparative experience with federal political systems outside Canada in order to survey the variety of possible federal arrangements that might be adopted in 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 federal systems can accommodate distinct groups and hence Aboriginal peoples with their special interests, the study also surveys arrangements that have been used in other federations containing Aboriginal peoples. The review of arrangements in other federations focuses 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 that 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 how 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 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.*

#### *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 (summarized individually in Appendix 1). Because several studies for the Royal Commission focus specifically on 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 are not set out in this paper, but they are 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 this study therefore does not examine them in detail.*

*In addition, some other federations or federalizing political systems that do not contain significant Aboriginal populations but whose organization and political experience give*

*insights into ways of accommodating distinct groups are also referred to. These include Belgium, Germany, Nigeria, Spain and Switzerland (summarized individually in Appendix 2).*

*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 are not 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 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 reluctant to undertake comparative analyses. Furthermore, when we do undertake comparisons, we tend to focus on our neighbour to the south and to underestimate the value of comparisons with other federations that, 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 also important to 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 to fit different circumstances (this is discussed further in the next 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 ratification referendums that require double majorities, i.e., a majority of the federal population and majorities in a majority of the cantons or states. In Switzerland, more than 90 formal constitutional amendments have met this requirement since 1874 (more than 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 to institutional arrangements that might accommodate distinct groups and particularly Aboriginal peoples, 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 social issues relating to homogeneity and diversity and particular institutional structures. This can provide a better understanding of the co-operative 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, particularly the fiscal arrangements that lie at their heart. 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 co-operation and competition between bureaucracies at different levels; the influence of the media and the issues on which they tend to focus; the role of informal elites and the degree to which consociational processes exist; the part played by individual leaders in mobilizing*

*political opinion; and the impact of particular electoral systems and the degree to which they exaggerate regional majorities and encourage division or cohesion. In a paper of this length 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.*

### *Conceptual Issues*

#### *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 concerned more with seeking political arrangements that will work 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 with 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 their common and their diverse preferences. The application of the federal concept*

*should therefore be seen as flexible and varied. But this flexibility and variety have 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 have become mired on occasion. (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 being used increasingly by scholars as a term that 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, p. 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, that provides for the combination in some form of shared rule and regional self-rule. (1987b, p. 5) The genus encompasses a variety of species of political organization that 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 not only federations but also regionalized unitary systems, where the national government is dominant but that contain*

elements of constitutionalized regional self-government, as well as *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 forgoes 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, p. 55; 1991, p. 190). Associated statehood is a similar fundamentally asymmetrical 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, pp. 55-57) identifies eleven examples of federacy. These are the Aaland Islands and Finland, the Azores Islands and Portugal, the Farøe 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, pp. 319-324) In the category of associated states Elazar has identified twelve examples (1987b, pp. 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 (before 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 belonging to this broad genus, there are significant variants and sub-species that comparative analysis may discern. But the basic criterion common to all the different species and variants of the genus 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 and federal political system 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, 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, which retain most sovereign powers and control the common institutions through their delegates.*

*To establish a co-ordinate 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; and 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 how 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 1987b, pp. 43-44) Some may dispute whether the authoritarian and highly centralized examples of Russia and, before their breakup, 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 countries 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 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 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 from significantly. Nevertheless, a relationship of federacy between the Canadian federation and some units, such as Aboriginal political units or Quebec, remains within the realm of possibility.*

#### *Distinct groups*

*The notion of distinct groups is not a technical term but has been chosen deliberately for purposes 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 that were sufficiently strong to lead to insistence upon federation as a form of government.*

*In some other federations, however, the distinct groups that 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, also by differences of race.*

*For purposes of this study, the particular form of distinct group that is marked by its cultural distinctiveness will be referred to as an ethnic group. (Werther 1992, p. 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 on provincial autonomy within a federation. This has been the case particularly in the post-colonial world. (Watts 1970a, pp. 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.*

### *Indigenous and Aboriginal peoples*

*This study examines how 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 used most often to denote the original inhabitants and to emphasize their status as a people living in a place before subsequent settlement and the establishment of a modern state. (Werther 1992, pp. 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, pp. 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 on how the facility of federal political systems and federations to accommodate distinct groups is relevant to the desires of Aboriginal peoples for self-government.*

### *Sovereignty, self-government, federation and treaty federalism*

*Aboriginal claims against settler states have usually emphasized their retained sovereignty as the basis for a right of self-determination. (Fletcher 1992; Werther 1992, pp. 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 noted earlier, 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 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 1987b, p. 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 limited jurisdiction from the people, where the ultimate and indivisible sovereignty resided. In practice the confinement of shared rule and self-rule to watertight 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 1970a, pp. 7-13) Thus, the combination of shared rule with self-rule that is the essence of federations entails 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 Aboriginal peoples and non-Aboriginal people defined in a series of treaties since the early 1960s (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, pp. 11-32), it is dealt with only briefly here.*

*Just as federation includes both the acceptance of necessary co-ordination and regulation on the basis of mutual consent and recognition of a right of 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 section 35(1) of the Constitution Act, 1982, establishing a parallel relationship between the government of Canada and the Aboriginal peoples. (Henderson quoted in Hueglin 1994, pp. 11-12) An importance task then is to synchronize these two kinds of federal relationships into a practical harmony. Of some relevance in this task is the analysis, later in this paper, 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.*

### *The Utility of Federations in Accommodating Distinct Groups*

*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 the next two sections to examining the range of possible ways for federal systems, and particularly federations, to accommodate distinct groups and hence the particular interests and concerns of Aboriginal peoples through self-government.*

*This section focuses on the general characteristics of federations that enable the accommodation of distinct groups within them. The next section reviews design considerations that arise in the attempt to accommodate distinct groups within federations. In both 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 Aboriginal peoples within Canada. Then in the fourth section we add an overview of the specific arrangements adopted in other federations that contain Aboriginal peoples.*

*Throughout, the text deals with general issues rather than attempting to portray the full details of each federation. The reader's attention is therefore drawn to Appendices 1 and 2 where the salient features of each federation are outlined. Appendix 1 identifies the major features of each federation containing an Aboriginal population, and Appendix 2 portrays features of some other federations that do not contain Aboriginal populations but that are relevant to the issues involved in accommodating distinct groups.*

### *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. (1987b, pp. 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, pp. 29-32; Elazar 1987b, p. 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 example referred to most often was the Iroquois Confederacy (Haudenasaunee). 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 authors of the Articles of Confederation,*

*which established the original confederal union of the United States in 1777, 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, pp. 6-13; Brown and Kary 1994, pp. 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 in 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, pp. 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 to 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 breakup 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 unexpected. Indeed, writing in 1939, in an article entitled "The Obsolescence of Federalism" (1939), Harold Laski declared: "I infer in a word that the epoch of federalism is over". Federal government in its traditional form, with its compartmentalizing of functions, legalism, rigidity and conservatism, was, Laski suggested, unable to keep pace with the tempo of life that giant capitalism had spawned. 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, to the first edition of his study, Federal Government, that the trend in existing federations, under pressure of economic crises and war, was toward a concentration of central powers sufficient in some cases to threaten the federal principle. (1946, p. iv; also chapter 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'. (1953, p. 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 breakup of colonial empires at that time. The units of colonial government were often merely the product of historical accident, the scramble for empire, or administrative convenience. As a result, the colonial political boundaries rarely coincided with the distribution of 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 for relatively large economic and political units, in order to facilitate rapid economic development and sustain genuine political independence, with the desire 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, pp. 3-7) The result was a proliferation of federal experiments in 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 (1945-49). 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 constitutions were adopted in Brazil (1946), Venezuela (1947), and the Argentine (1949).*

*Meanwhile in Europe, where the Second World War had shown the devastation that ultra-nationalism can 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 toward European federation. (Pinder 1993, pp. 45-47) At the same time within Europe, West Germany adopted a federal constitution in 1949.*

*Thus the first decade and a 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 for the larger political unit required to build an efficient and dynamic modern state, and the search for identity through smaller self-governing political units more responsive to individual citizen and the desire to give expression to primary group attachments — distinctive religious, linguistic, cultural, social and historical traditions. (Watts 1981, pp. 3-5)*

*From the 1960s on, however, it became increasingly clear that federal systems were not the panacea that many had imagined them to be. Most of the post-war federations experienced difficulties, and a number were abandoned or suspended temporarily. (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 federal efforts in the former French colonial areas of Indochina, West Africa and Equatorial Africa, and the eventual demise even of the 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 operated in practice in an essentially unitary manner, added further to*

*scepticism about the utility of federation as a practical approach in countries lacking a long tradition of respect for constitutional law. In Europe, the slow pace of progress toward 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 also led to reluctance to maintain federations, which in their 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 pre-emption of state and local authority and the shifting of costs to state and local governments through unfunded and underfunded mandates has created a trend toward 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 before its resolution, the need to shift from defensive to effective federalism (that is, from the traditional emphasis on resistance to external domination and from federal intrusions upon cantonal autonomy 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 three rounds of mega-constitutional politics have 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 United States and later Mexico have all contributed additional stresses.*

*Australia experienced a constitutional crisis in 1975 that 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 in 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. Scharpf has pointed out that the wide range of areas that require joint federal-Länder 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 Länder boundary adjustments, and defining the relationship of the Bund and the Länder to the European Community and Eastern Europe have become the focus of attention.*

*Nevertheless, despite all these developments, there seems to have been a revival of interest in federal political systems and federations in the 1990s. (Kincaid 1993, pp. 3-6) Conferences, seminars, and workshops are being organized by many prominent institutions around the world that previously had no interest in federal political systems. Political leaders, leading intellectuals and even some journalists speak increasingly of federation as a healthy, liberating and positive form of organization. Belgium, Spain and Italy appear to be emerging toward new federal forms, and in a number of countries, such as Georgia (in the former u.s.s.r.) 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 toward 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 and political forces, weakening the traditional nation-state and strengthening both international and local pressures. (Kincaid 1993, pp. 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 desire of their populaces to be*



*both global consumers and local citizens at the same time. Furthermore, the spread of market-based economies is creating socio-economic 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 co-operation; 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 non-centralized interactive networks, and thereby influencing people's attitudes about non-centralized 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, pp. 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 recent progress with the Single European Act and the Maastricht Treaty, despite the hurdles they had to surmount.*

*A sixth factor has been the resilience of 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 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 people's common needs to be met while*

*accommodating the diversity of their circumstances and preferences. In the search for a middle ground that would permit mutual accommodation of the powerful concurrent pressures for both larger political units and 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 with 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 on 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, many variations are possible in applying 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 innovations in its application.*

***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*, and for smaller political units more sensitive to their citizens and capable of expressing local distinctiveness, 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 on 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 u.s.s.r., has even led to some commentators, such as Daniel Elazar (1993, p. 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 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. 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, meaning 'covenant'. (Elazar 1987b, p. 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 that gives the institutions of both shared rule and self-rule assurance 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 autonomy among the participants. (Hueglin 1994, pp. 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).*

### *Conditions for Success or Failure of Federations*

*While an in-depth analysis 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 considering the utility of federal solutions. There is an extensive literature on the subject (see, for instance, Watts 1966, 1970, 1977; Elazar 1987, 1993; Wheare 1963; Riker 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 are underlying social and economic factors. Where there have been serious disparities in the relative area, population, economic development and resources of constituent units, these have often had a corrosive effect on 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, p. 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 federal institutions are important (and are discussed later in this section, beginning on pages and respectively). 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 the 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, p. 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 and the rise of predominantly regional parties operating within 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 co-operation and reconciliation of differences among governments within federations. (Watts 1991a, pp. 332-335)*

*Ultimately, perhaps the most important factor in 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, pp. 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 various groups, including Aboriginal peoples, does not diminish, but rather enriches us. At the same time, since recognition of differences and of the aspirations of 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 accommodate distinct groups, and particularly Aboriginal peoples, within Canada is to be realized, it will be necessary to keep in mind these conditions, which are necessary for a stable and effective federation.*

## *Design Considerations in the Accommodation of Distinct Groups in Federations*

### *Units and Tiers Within Federations*

*In considering how 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, has a population of more than 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. They 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 variations in the relative population, area and resources of 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 centred 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 varied enormously in practice 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 depended to a large extent on the strength of the sense of local community and the strength of the people who are community leaders. In these cases, as in Australia, however, where many states are dominated by a state capital serving its hinterland, state politics tend to dominate those of local government. Furthermore, in some federations direct intergovernmental 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. 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 recently in Germany, India and Nigeria. In*

*Australia, although the constitution does recognize local governments, representation for local governments has been included in the intergovernmental council established in 1992 for consideration of economic development policies.*



*Although the Canadian Constitution does not 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 level of government. Indeed, writing more than thirty years ago, Pennock (1959) suggested that multiple levels of government, each performing different functions at the scale most appropriate to it, might prove the most effective in overall cost-benefit terms when the ability to maximize voter preferences (or reduce voter frustrations) is balanced against the cost of increased governmental complexity.*

*A different sort of multi-tiered federal arrangement has been that developed within the European Union, where two federations, Germany and Belgium, and one emerging federation, Spain, are themselves constituent members of 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, p. 27), or at least of grouping the smaller distinct First Nations into several larger units.*

### *Non-Territorial Constituent Units in Federations*

Traditionally federal political systems, including federations, have divided authority on a territorial basis. (Duchacek 1987; Elazar 1993, pp. 192-193; Gagnon 1993, pp. 21-26) *Such systems have usually involved meeting the desire of distinct groups to retain 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 those south of 60, concentrated on reserves, where Aboriginal people 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 Métis. 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 people are dispersed so that they are in a territorial minority, solutions involving distinct territorial units do not provide a way to accommodate 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 the distribution of responsibilities among territorial political units and refer to those involving non-territorial groups by other terms, such as consociational political arrangements (for example, 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 suggested the possibility of an Aboriginal province or provinces with a basis that is non-territorial, at least in part. (1992; 1993) The Althusian idea of a corporative order may have some relevance here too. (Althusius 1964; Hueglin 1993, pp. 43-62)*

*While recognition of non-territorial distinct groups for power sharing within a federation is not common — and is associated more commonly with a consociational form of political organization — Belgium does provide an interesting precedent. The Belgian combination of expressly recognizing, in 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 1). In Belgium the constitution distributes exclusive powers between the central government and two other kinds of governments. The constituent units of the federation consist of three territorially delineated regions (the Flemish, Walloon and Brussels regions) and three non-territorial consociational 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 co-operation 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 case 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.*

### *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 of the constituent units under the law. In Canada this view has been echoed during the past decade by the advocates of provincial equality. (Milne 1991) However, differences in size, population, resources and political interests have 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.**

*Moreover, some federations and federal systems have also been marked by de jure asymmetry in the formal constitutional powers assigned to the constituent units, most notably Canada, Malaysia and Spain. (Watts 1991b, pp. 133-138) Although in the recent Canadian constitutional deliberations 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, pp. 287-291; 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 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 Aboriginal affairs (see Appendix 1 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 2). The Spanish approach has been to recognize variations in the pressure for autonomy in different regions by granting each region its own statute of autonomy tailored to a 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 88 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 federal institutions. Should representatives from the more autonomous constituent units be able to vote within the federal legislature or cabinet on 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 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 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 that 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 1), 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 forgoing certain forms of participation in the governance of the larger country (see discussion in the first section of this study, beginning on page ). Elazar (1991, pp. 319-324) has defined the 130 Native American nations as *de facto* federacies in their relationship with the American federation (see Appendix 1). 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.*

### *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 earlier discussion beginning on page ). In considering 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 taken by the distribution of powers has varied considerably.*

*In Canada under the current Constitution, the emphasis has been on the exclusive jurisdictions of the federal and provincial governments as set out in sections 91 and 92 of the Constitution Act, 1867. Currently only three subjects are identified formally as areas of concurrent jurisdiction (sections 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 those cases there are also significant lists of exclusive federal and state jurisdiction. Experience in other federations suggests that the sharing of powers through concurrent jurisdiction may contribute to intergovernmental co-operation for service delivery, a point that might be borne in mind in designing the jurisdiction of units of Aboriginal self-government. However, when federal powers are paramount in 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 way of allocating powers is found in Germany and Austria. There, co-operation in 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 state governments (see Appendix 2). Indeed, in Germany about 60 per cent 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 distributing powers in federal political systems that has attracted a good deal of attention recently, especially in the European Union, is 'subsidiarity'. This is the idea that smaller, decentralized government is a virtue and that, as a result, responsibilities in 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 is a two-edged sword, since ultimately the scope of subsidiarity will be determined by the adjudicating body. (See the 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, however, and of the role of self-governing constituent units within it, the notion is worthy of attention.*

*Adequate financial resources that 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 does not require modification and adaptation over time. This is so because the value of different taxing powers and of expenditure needs tends 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 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.*

### *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 least because of the inevitable interdependence of the two or more levels of government, is the character of representation within federal institutions for the distinct groups represented by the constituent units of government. This is the dimension that 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 interregional consensus on functions designated for shared rule. (Smiley and Watts 1988, p. 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 (sections 7, regarding the Senate, 20, regarding the Supreme Court, and 22, regarding the House of Commons). In view of the failure of those proposals to achieve ratification, the question remains open.*

*Regional interests can be represented in federal institutions in a variety of ways. (For comparative surveys, see Smiley and Watts 1985, pp. 37-61; Watts 1991a, pp. 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 federal institutions has a critical impact on how regional interests are 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 first two provide examples of the separation of powers between executive and legislature, while the third is based on the fusion of the executive and the 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 toward much tighter party discipline. Furthermore, cabinet dominance within both levels of government has tended to give intergovernmental relations the character of executive federalism 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 of whether attention should be focused on Aboriginal representation in the Senate, in the House of Commons, or both.*

*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 flexible enough to adapt to changing conditions.* (Wheare 1963, chapter 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 restructuring, however, has proved much more difficult in almost all federations.*

*In Canada comprehensive constitutional change was partially successful in 1981-82, but subsequent efforts at comprehensive constitutional change — in the Aboriginal Round of 1984-87, the Quebec (Meech Lake) Round of 1987-1990, and the Canada (Charlottetown) Round of 1991-92 — all failed. Peter Russell (1993) has analyzed 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. In the past decade and a half Australia also undertook comprehensive constitutional reviews, but the resulting four proposals were all rejected in the ensuing referendums. In the United States, the failure of the Equal Rights Amendment to achieve ratification by the required number of states provides yet another illustration. These examples reinforce what Canadians learned from their own most recent effort at constitutional change in 1991-92: comprehensive constitutional change is always difficult and frequently fails, not least because of the array of vested interests likely to resist any substantial change.*

*This leads to two conclusions regarding adaptation of the Canadian federation to meet Aboriginal interests and concerns and to implement and give better expression to the 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 prove more fruitful in the long run 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.*

### ***Specific Arrangements for Aboriginal Populations in Federations***

*In the preceding section we 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 peoples. We also examined some of the central design issues that arise and the variations that are possible within federal structures. We turn now to an overview of actual arrangements in existing federations with Aboriginal populations and the experience of Aboriginal people located within them. The focus is on how countries organized federally have dealt in practice with their Aboriginal populations.*

*The section addresses 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 1.*

*Intensive research into the details of 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 by the Royal Commission on Aboriginal Peoples. The details in those other studies for the Royal Commission have not been duplicated here, 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, that was well beyond the scope and budget of this study. In these cases it has been necessary to base comparisons on what limited literature is available.*

### ***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 before 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., articles 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 responsibility to the federal government for demarcating Indian lands within five years (article 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 implemented effectively. 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 more than 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, that Elazar has described as one of *de facto* federacy. (1991, pp. 319-324) In addition, Congress has enacted the Indian Civil Rights Act as a rider to the Civil Rights Act of 1968 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 of 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. (Mabo 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 that recognize the special position of Aboriginals in Australian society.*

### *Provisions for Aboriginal Self-Government*

*As noted earlier, federal systems provide a potential device for exercising Aboriginal self-government if the constituent units are designed to correspond to 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, the policy has been largely assimilationist in practice. There is no real Aboriginal self-government. In Brazil the Fundação Nacional do Índio (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 toward 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 on federal government concessions rather than 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. The commission 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, pp. 15-16)*

*In the United States, the Indian tribes were not identified as part of the federation in the constitution of 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 the interior 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 a continuing 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 Northwest Territories in Canada, 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), the political party that has been in power constantly since 1929 and that has generally subverted genuine state autonomy. Thus, to date, the potential opportunities that 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 illustrated dramatically in the New Year's 1994 insurrection of the Zapatista National Liberation Army in the southern state of Chiapas. Elsewhere in Mexico, more than 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 1,872 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, p. 163)*

*In Malaysia, too, there is no specific constitutional guarantee of Aboriginal self-government. But in the east Malaysian states of Sabah and Sarawak, 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, however, they do not constitute a majority. It is significant that in Sarawak the Penans and Dayaks, who constitute 45 per cent of the population, have been agitating for improved representation in the state government for the past decade.*

*India is the one example among these federations where Aboriginal peoples have in some instances achieved, after considerable agitation, self-government under the constitution through the establishment of their own distinct states within the federation. Four small states, ranging in population from 495,000 to 1.4 million, and together constituting only about 0.35 per cent of the total 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 that 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 northeastern states. (Sanders 1992)*

#### *Federal and State Jurisdiction Relating to Aboriginal Peoples*

*Apart from the issue of providing Aboriginal self-government by establishing distinct Aboriginal constituent units within a federation, there remains the issue of how federal and state jurisdiction directly affecting Aboriginal groups has been allocated in existing federations with Aboriginal populations. This may be significant, especially in situations where federal majorities are more tolerant of federal minorities than state majorities are in*

*relation to their own minorities, as has often been the case, for instance, 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 less diverse than the federal population as a whole.*

*In Argentina and Mexico, Aboriginal and Indigenous peoples are not identified specifically 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 (article 20(ix)) and jurisdiction over Indian populations (articles 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 an 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 asymmetrical distribution of powers within the Malaysian federation.*

### *Special Arrangements for Aboriginal Representation in Political Institutions*

*Earlier in this paper we considered general issues relating to special arrangements for the representation of distinct groups in federal institutions. Here we examine the extent to which existing federations have provided special representation for Aboriginal peoples.*

*In five of the federations with 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) 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 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 per cent of the seats in the Lok Sabha (the popularly elected chamber) are reserved specifically for scheduled tribes (another 15 per cent 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 Aborigines to compete in, with all citizens in those constituencies participating in the voting. In the Rajya Sabha, the second chamber, most members are elected indirectly by state legislatures, and therefore representation of Aborigines 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 Sabha, 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.*

*Conclusions: Lessons for Canada*

*Accommodating the aspirations of 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 with Aboriginal populations provides three broad lessons for Canada.*

*First, this comparative survey has demonstrated that there is enormous variety in both actual and potential arrangements within federal political systems, federations, and federacies for accommodating distinct groups. These open up a number of possibilities for accommodating the special interests and concerns of the Aboriginal peoples in Canada. There is not a single ideal model for Canadians to follow, either in terms of concepts of federal political systems, federations or federacies, or in terms of actual examples. 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 shown that actual institutional structures must be adapted to the particular social, economic and political context of the society 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 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 in their constitutions. Most of the federations considered here 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, rather 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 the second part of this study, of arrangements that have existed in federations and federal systems generally (not just those with Aboriginal populations) to accommodate distinct groups did 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 discussion beginning on page ).*

*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 beginning on page ).*

*Third, within some federations such as India and or federal systems such as the European Union, there are examples of constituent units that are themselves federations, an arrangement that might enable the smaller First Nations to be grouped into larger political units while still retaining their own distinctiveness (again, see discussion on page ).*

*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 page ). 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 discussion beginning on page ). 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 that requires careful consideration. Two forms of asymmetrical federal relationship noted earlier in the paper 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 be linked in Canadian minds 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 asymmetry would give certain greater autonomy without a corresponding reduction in influence in central policy making. Furthermore, as noted earlier, 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 the discussion beginning on page , 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 experience of constitutional deliberations since 1982 and that of other federations that have attempted comprehensive constitutional change suggest that incremental constitutional change is likely to prove the most fruitful in the long run in achieving significant change (see section beginning on page ). 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 1*

### *Federations with Significant Aboriginal Populations<sup>i</sup>*

#### *Argentina*

##### *Basic federal structure and population*

- *federated 1853*
- *22 provinces + national territory + 1 federal district*
- *presidential/congressional federation patterned in formal terms on U.S. model; federal right of intervention in provincial affairs gives central government extensive powers*
- *area: 1,068,302 square miles*
- *population: 31,928,519*

##### *Aboriginal population*

- *population: 500,000 (less than 2%), most of whom live in remote areas in the north and south*

##### *Constitutional recognition of Aboriginal peoples*

- *in matters of government no special recognition: Aboriginal peoples have same rights as other Argentine citizens*

##### *Provisions for self-government*

- *government policy largely assimilationist: directed at improving social conditions rather than recognizing special status*

##### *Federal and state jurisdiction relating to Aboriginal peoples*

- *not specifically identified; therefore comes under general distribution of jurisdiction and responsibilities*

##### *Special arrangements for Aboriginal representation in political institutions*

- *none*

#### *Australia*

##### *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 square miles*
- *population: 15,531,900*

##### *Aboriginal population*

- *227,645 (about 1.5%) Aboriginal Australians and Torres Straits Islanders*

### *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*

### *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, pp. 15-16)*

### *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*

### *Special arrangements for representation in political institutions*

- *no special arrangements in Parliament or state legislatures for representation of Aboriginal or Torres Strait Islander peoples*
- *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 department of Aboriginal affairs*

## *Brazil*

### *Basic federal structure and population*

- *federated 1891*
- *25 states + 1 federal capital district*
- *presidential/congressional federation patterned in formal terms on U.S. 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 square miles*
- *population: 144,428,000*

#### *Aboriginal population*

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

#### *Constitutional recognition*

- *1988 constitution recognized for 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 (article 69)*
- *in practice implementation has been subordinated to competing social economic and industrial interests*

#### *Provisions for self-government*

- *not constitutionally established*
- *Fundação Nacional do Índio (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 toward self-government in the face of policy and resource demands of social, economic and industrial development*

#### *Federal and state jurisdiction relating to Aboriginal peoples*

- *federal legislative jurisdiction over lands traditionally occupied by Indians (article 20(ix)), and Indian populations (articles 22(xiv), 69(v))*
- *federal courts' jurisdiction over disputes over rights of Indians (articles 109(xi), 129(v))*

#### *Special arrangements for Aboriginal representation in political institutions*

- *none*

### *India*

#### *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 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 used frequently, but the federation functions within an ethno-political context that preserves 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 toward the constitutionalization of local government as a third tier of government.*
- *area: 1,269,219 square miles*



- *population: over 875 million*

#### *Aboriginal population*

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

#### *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*

#### *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 that 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 northeastern states (Sanders 1933)*

#### *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*

#### *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*

#### *Basic federal structure and population*

- *federated 1963*
- *13 states*
- *a parliamentary federation formed by adding to the highly centralized Federation of Malaya (independence constitution 1957) three additional states in 1963: Singapore*

*(which subsequently was separated in 1965) and the two Borneo states of Sabah and Sarawak. A distinctive feature of the Malaysia federation is the asymmetrical relationship to the central government of the eleven peninsular Malayan states, which remain highly centralized, and 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 square miles*
- *population: 16,921,000*

#### *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, Negi Sembelan and Johore; Negritos mainly in Perak and Kelantan*
- *population in East Malaysia: numerous tribal groups in Sabah and Sarawak*

#### *Constitutional recognition*

- *constitutional safeguards are set out relating to languages, religion and education of "natives" in the states of Sabah and Sarawak (constitution, articles 161, 161A, 161C and 161D)*

#### *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*

#### *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*

#### *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 size, 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*

##### *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 square miles*
- *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*

#### *Aboriginal populations*

- *population: 9,500,000 (12%) estimated. Most indigenas are concentrated in the Yucatan peninsula. Of the old native languages, 82 Indian groups with about 270 different dialects have remained.*
- *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*

#### *Constitutional recognition*

- *no formal constitutional recognition*

#### *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) tends to subvert state autonomy, however. The resulting frustration and political consciousness was illustrated in Chiapas state by the 1 January 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.*
- *more than 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*
- *Yaqui Indians given title to 1,872 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, p. 163)*

#### *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*

#### *Special arrangements for Aboriginal representation in political institutions*

- *none*

## *Pakistan*

### *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 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 square miles*
- *population: 105,000,000*

### *Aboriginal population*

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

### *Constitutional recognition*

- *recognized in constitution by identification of tribal areas*

### *Provisions for self-government*

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

### *Federal and provincial jurisdiction relating to Aboriginal peoples*

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

### *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*

### *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 state 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*

#### *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 square miles (2.25% of U.S.A.)*

#### *Constitutional recognition*

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

#### *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)*
- *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*

#### *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.*

#### *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 2*

### *Other Federal Political Systems that Accommodate Distinct Groups*

#### *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.<sup>ii</sup>*

#### *Belgium*

- *founded as unitary constitutional monarchy in 1830 and composed of Walloon (French) and Flemish populations; since 1970 has been going through a process of devolutionary federalization culminating in 1993 in a complex federation*
- *constituent units: 3 regions (consisting of unilingual Flemish and Walloon regions) + 1 bilingual capital region (Brussels) + 3 non-territorial cultural communities (Flemish, French and German)*
- *area: 11,783 square miles*
- *population: 9.9 million*
- *particularly significant feature of the Belgian federation is the distribution of exclusive powers among the central government and two other kinds of government: the three territorially delineated Flemish, Walloon and Brussels-Capital regions and the three non-territorial consociational French-speaking, Dutch-speaking and German-speaking communities*

#### *Germany*

- *West Germany adopted a federal constitution in 1949 creating a federation composed of 10 Länder plus one associated state (West Berlin); in 1990 with German reunification it became a federation of 16 Länder*
- *constituent units: 16 Länder, ranging from relatively large regions to some city-states*
- *area: 137,231 square miles*
- *population: 78 million*
- *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 (population, 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)*
- *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 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*
- *third significant feature has been the move toward 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 military regimes have had to respect them by labelling their administrations Federal Military Governments*
- *constituent units: originally 3 regions in 1960 but subsequently subdivided 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 square miles*
- *population: more than 100 million. There are no Aboriginal people, as Nigeria was not a settler community under imperial rule*
- *particularly significant feature of the Nigerian federation for this study is that although there are no Aboriginal people, 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', later 'states') has increased over three decades from three to thirty. This has assuaged some ethnic groups but has also led to fresh problems as new ethnic minorities have emerged from within the larger former regional 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 square miles*
- *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), many of them are 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 historical autonomous communities + 1 special statute autonomous community + 12 ordinary autonomous regions + 1 federal capital region*
- *area: 194,897 square miles*
- *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 pressure being strongest in the historical communities in the Basque country, Catalonia and Galicia. The Spanish approach as a result has been to grant 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 have a range of exclusive powers but also function jointly in several spheres.*

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*i*This appendix draws on various sources; see bibliography, page .

*ii*This appendix draws on various sources, but note especially Elazar 1991.