Indigeneity of multilevel governance: a retrospective view of the framing of the constitution of India

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Conceptualizing indigeneity

The earliest usage of the concept of the indigenous was linked with territorial "firstness", or in other words the first occupants of a piece of land. Eventually, most colonial authorities and early merchants claimed their intention to "civilize" and develop foreign territory[1] through the expansion of landholdings acquired through the conquest of unclaimed land—*terra nullius* or "empty land"—that supported the growth of colonial control, i.e., the process of colonization. Indigenous peoples made an entry into the legal discourse internationally in 1494 when the "unclaimed", non-Christian areas of the Earth were divided between Spain and Portugal in accordance with the Treaty of Tordesillas (Lewallen, 2023).

It is to be noted that the United Nations declines to define *Indigenous* explicitly yet does so implicitly, if only vaguely. It only confines its efforts to the depiction of the widespread image of the indigenous peoples as descendants of "those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived". However, the original definition of indigeneity was accepted in 1972 by the UN Working Group for Indigenous People which was later amended in 1983 to emphasize the Indigenous populations who inhabit the present territory of a country under a state structure that incorporates mainly national, social and cultural characteristics of other segments of the populations who are predominant but tend to live more in conformity with their particular social, economic, and cultural customs and traditions.

However, defining indigeneity has at least two important consequences: firstly, it affects who has access to resources or rights reserved for indigenous peoples; secondly, it shapes the kinds of privileges and resources available to indigenous peoples (Timperly, 2020).

The right to self-identification as an indigenous individual cultural identity and acceptance as an indigenous group is an essential component of indigenous peoples' sense of identity. This essentially enforces the core principle of indigeneity. The usage of the term indigeneity thus emerged to describe the state of being indigenous or related to indigenousness. Indigenous people recognize indigeneity i.e., indigenousness as their identity which may be related to their territory, culture, community, and traditions. Indigeneity tends to reflect (a) The right to self-determine social, political, and economic status; (b) the recognition and respect of ancestral lands and territories; (c) the recovery of traditional health care practices and access to health care, and (d) intellectual and cultural property rights and the right to control the biological diversity of indigenous territories (Gregg, 2019).

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1 territory-and-power-in-constitutional-transitions.pdf accessed on 10th September, 2022.

Understanding indigeneity as "political" in the post-colonial context

The idea of indigeneity in the frame of colonial literature and post-colonial discourse leads to the evolution of the notion of historically and situationally contingent tools for political persuasion and for creating a political identity of a culturally conscious nation-state. Jonas (2020) recently argued that native communities acquire indigenous character when they occupy a paradoxical legal position: native communities (indigenous peoples) will depend on the State for their existence, as they demand the recognition of their identity therefore eventually have to accept the State as the ultimate legal framework within which they can make claims. It also implies the inclusion and recognition of the "indigenous" people by the State as integral to the socio-political framework. This inclusion will transcend the idea of indigeneity beyond merely their cultural and social identity. Indigenous peoples will gradually acquire a "political" character of their own from the perspective of the nation-state. The complexities in the idea of indigeneity are determined by how the idea of being indigenous evolved through history, historical narratives, and particularly in colonial discourse. The recognition and the use of indigeneity as a "political" tool originates from the social construct of the indigenous as an entity that demands its claims within nation-states. The social construct is built around the idea of "outsiders" and "insiders"- the outsiders represented the settlers and colonizers who dominated the indigenous people while they retain some of their traditional social, cultural, political, and economic characteristics, and the insiders remained attached to their colonized territories i.e., land and their natural resources. This self-identification of the insiders with the territory and natural resources may be considered the "fundamental criterion" (UN Permanent Forum) of indigeneity. The indeterminacy in the meaning of the concept of indigeneity facilitates its adoption as a political tool. For the use of the concept in a political context, indigeneity can be defined politically in terms of a contestation of competing values. Self-construction is the foundation of the self-identification of a group as indigenous, and is a goal for achieving the assertion of one's identity through recognition and rights. Self-construction as a political act effectively serves ethnocultural communities and other kinds of groups seeking rights and recognition through identity politics. Groups seeking identity through assertion as "immigration groups, indigenous peoples, racial groups, and national minorities" with differences both narrow and wide in their needs and aspirations typically demand rights of accommodation, legal exemptions, affirmative actions, representation, and self-government. The political act of self-construction may fail but can still leave its own effect on the course of politics. For example, in India "the idea of indigenous people as being those who are native or originating in a place does not help much in the effort to separate out the complex strands of local history that have led to the demarcation of inequalities among different communities". The political deployment of the idea of indigeneity can be best conceptualized within the nation-state. A group that identifies as indigenous tends to choose to identify itself with the confrontation of "colonial practices that appropriate land and attempt to vanquish or shape" the group's cultural identity. This choice is influenced significantly by some

degree of autonomy within a nation-state. It might self-identify toward "creating political unity" or rights within its community. It is likely to combine some of these goals consistently or pursue others with the objective of determining their social construct as a political tool as well. The use of the ideas of indigenous and non-indigenous are dynamic and fluid categories of a world diverse in ethnicity, culture, historical experience, and identity.

The construction of indigeneity as a political tool may be dominantly shaped by "powerful historical and emotional content" by recognizing "oppositional relations between native peoples and their others" in ways that tend to make the indigenous and the concept of indigeneity politically powerful. The 2007 UN Declaration on the Rights of Indigenous Peoples emphasizes a vision of self-determination as the "reconfiguration of political relations within the existing state", moving from domination of indigenous peoples by settlers to a "form of political 'mutuality'". One of the significant ways of conceiving indigeneity is to pursue it as a means to the indigenization of post-colonial states. Self-identified indigenous peoples are likely to use the concept of indigeneity as a means to challenge the State in a definite and purposive way. In such cases, the governments tend to assume that "indigenous peoples simply are one of the many stakeholders", a perspective "fundamentally incompatible with the concept of indigenous peoples as existing within self-determining nations". Thus, a claim to indigeneity as a claim to self-determination emerges in the form of indigenous governments designing social and administrative policies to correct historical wrongs as well as to accommodate the post-colonial reconstruction of the State. Stefan Andreasson uses the word indigenization to describe a "preferred strategy for reconstructing post-colonial states in Africa". Indigeneity effectively constitutes a political project as a claim to political power, a right to self-determination, a right to stakeholder status in national projects and policies as an integral part of the state-building and nation-building processes as a means to indigenizing post-colonial States.[2] Nation-states provide the most appropriate platform for the role of "indigeneity" as a political tool. The "indigenous" is found in the context of the nation-states rather than in secession from it. The indigenous group, in asserting their right to self-determination within a nation-state, challenges the perception of the nation-state itself which eventually emphasizes the need for redefining the idea of nation-states. Indigenous rights tend to bind the state not just as a legal entity but also in terms of the community's political culture and moral self-understanding. Indigeneity encourages the States to be more pluralistic in the legal recognition of the groups i.e., both indigenous and non-indigenous within the framework of the nation's political culture and moral self-understanding. It is the involvement of indigeneity which tends to make the State more pluralistic in terms of legal recognition as well as in the distribution of rights among the citizens at large. It is indigeneity's role as a political tool that constantly compels the

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TABLE 1 The contexts of constitutional moments in various political transitions.

Antecedent context	Power distribution	Political geometry multidimensional territorial cleavages	Majority-minority territorial configuration	Small, distinct peripheral regions	Mixed territorial and non-territorial cleavages
Violent	Victory	Ethiopia Nigeria		Croatia Sri Lanka (2009)	
	Stalemate		Bosnia and Herzegovina Cyprus	North East India Aceh/Indonesia Moro/Philippines Sri Lanka (2002)	Nepal South Africa Iraq
Non-violent	Dominant	India (linguistic states)	Pakistan (1956)	Corsica	Russia
	Divided	Spain	Belgium	Scotland Ukraine	Bolivia Kenya Yemen

nation-states to simultaneously hold the indigenous and the non-indigenous to the same legal standards. The need for recognition and accommodation in democratic States makes indigeneity in politics discernible and significant.

Indigeneity in politics is a developing theory of justice and political strategy in the native population to carve out their own terms of belonging to the nation-state (Tully, 1999; Invison et al., 2000; O'Sullivan, 2005; Shaw, 2008; Maaka and Fleras, 2010). The idea of the nation-state for the native people of a territory in a colonial and post-colonial context is largely "foreign" or "other"; western, i.e., something imported from outside their culture. The perception of the "other" or extra culture generates a sense of claiming extra rights to preserve their traditional assumptions of State authority. The creation of exclusive substantive and sustainable political space through self-determination and a claim over a sizeable share in the sovereign authority of the new (modern) State. (Shaw, 2008; Maaka and Fleras, 2010; O'Sullivan, 2017). Indigeneity in politics can be of various dimensions: as a means to constitute the self-identifying group and to integrate its members; as a claim to political power; as a claim to a right of self-determination; as a basis for asserting a group's stakeholder status in national programs which involve control and ownership of land and resources. Significantly, an indigenous group's political potential is shaped directly by the nation-state.

Multilevel governance

Multilevel governance is simply understood as the dispersion of authority to jurisdictions within nation-states.[3] Political scientists theorize the concept of multi-level governance with reference to the effects of territorial (land and resources) identity on governance. Since World War II a tremendous growth of multilevel governance is noticeable which facilitates the exploration of multi-dimensional structures of governance. Multilevel governance is a response to functionalist pressures for the efficient provision of public goods at various levels within and beyond the borders of a nation-state. It is generally conceived as a response to the demand for self-rule by

a group that seeks to assert its identity on the basis of indigeneity or any other distinctness. Ethno-territorial identity is one of the prime drivers of multi-level governance as it reflects the demand for self-rule by territorially concentrated groups from the central states through the decentralization of authority. Democracy is one of the potent conditions which influences the need for self-rule. Multilevel governance superseded centralization in the second half of the twentieth century (Hooghe et al., 2021).[4] Multilevel governance has scaled up subnational governments significantly. Subnational governance has become more differentiated as individual regions or localities acquire distinct powers, and at the same time, the scale of subnational governance has changed the role of governments in both larger and smaller regions. When the community acquires a significant role, regional and local governance involves not just public policy but reflects the underlying structure of contestation. Mobilization of the community for achieving self-rule has serious implications for multilevel governance with a complex interplay of factors like nationalism, territorial governance, immigration, etc. Governance thus acquires diverse expressions such as custodian of the public interest; as an instrument for private gains or as an expression of community. Multilevel governance has expanded the reach and impact of democracy through subnational governments. It is specifically interesting in the context of the present paper to analyze the role of multilevel governance in ethno-territorial conflicts and demands. It can transform national minorities into regional majorities with the institutional capacity to intensify autonomy demands. It curbs secessionist demands; at the same time, it might institutionalize identity politics.

Multi-level governance in constitutional framework

In most cases the demand for political and legal recognition as a path to consolidate the continuity of indigeneity was based on the determination of territorial identity. The relative size, number, and character of salient political cleavages had an impact on political

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3 Understanding multilevel dynamics in India constituent power and multilevel governance.pdf accessed on 13th September, 2022.

4 2020_hooghe-marks-schakel_multilevel-governance_reduced-size-Caramani.pdf accessed on 16th May, 2023.

mobilization. Socio-political cleavages reflect the demography and political narratives which constituted a complex political geometry. The case close to the present context of the discussion is the presence of multiple politically salient territorial cleavages with a widespread interest in devolved or federal governance. The identification of the linkages between indigeneity and political recognition eventually leads to the constitution-making process and if the process is broadly peaceful and in accordance with the principle of constitutional order it will accept a constitution with a definite amendment procedure to retain flexibility of the constitution. The Constitutional framework is determined by the constitution-making processes which involve debates and deliberations on finalizing the design of the constitution. The process is likely to be trapped into certain patterns when specifically dealing with territorial cleavages. The initial stage of agenda setting will be critical in laying down the framework of power-sharing with the objective of accommodation through autonomy (Table 1). The stage of agenda setting will combine procedural and substantive principles to strengthen the commitment to the form of arrangement and may be specifically the principle of federalism.

There are broadly three alternatives to implementing territorial accommodation for ensuring autonomy.

Symmetrical federalism or devolution with a majoritarian central government

The model covers many varieties and degrees of decentralization particularly in highly territorialized political cleavages. The commonly discernible issues in designing include the number and boundaries of the constituent units, the comprehensive protection of minority rights, territorial representation in central (national) institutions, the form of the legislature and the executive, the nature of devolved powers, and special arrangements for autonomy.[5] In this model, the majoritarian government at the center is broadly accepted as a legitimate one with the upper house of the national parliament (legislature) giving extra weight to smaller constituent units.

Highly devolved federal government with a consociational central government

The political amalgamation of two or even three territorially separate communities of significant size to ensure their cohabitation within a single state may give rise to a complicated arrangement. In this model of arrangement, there would be a highly devolved federal government with a consociational central government. Usually, mutual mistrust favors maximum devolution for each community inhabiting a territorial unit but to maintain important functions there must remain a central government's control with an agreement on power-sharing.

The power-sharing structure in this model is challenging because it can lead to extended periods of blockage with a weakening impact on the State. However, in certain situations, this may be the only model which can be accepted by the communities.

Special autonomy for territories in a federal or non-federal state, with a majoritarian central government

In territories in which political geometry consists of very small, peripheral populations with a strong identity that is distinct from the majority this model would seem to be more appropriate. This model can work if the population of a territory is small relative to the total population and/or where the extent of the special status is not too extensive. The special powers are likely to be very extensive which will likely make the functions of the national institutions difficult.

These three models may be considered as "ideal types" and depending on political geometry there arises the need for a hybrid model which will have its own challenges. Federalism, decentralization, or devolution can be implemented in countries with highly territorialized political geometries depending on country-specific contexts. Democratization (Whitehead, 2003) is a "complex, dynamic, long-term and open-ended process" which involves coordinated collective action over generations. There are three significant contextual factors that shape the structure and dynamics of the constitutional moment and define the agenda for the choice of the constitution-making/framing process which determines the constitutional design. These may be identified as—(a) the political geometry of territorial and other salient political cleavages in the country; (b) the antecedent circumstances of peaceful, legal, and institutionalized means or violent, extra-legal means which are used to advance demands for territorial accommodation; (c) the relative power of the key actors which are shaped by the tests of strength which may be peaceful or violent.

Countries will have their own moments of constitutional consolidation which will be identified in terms of how relate to three dimensions of contextual factors constituted by four categories of political geometry—two regarding the means of the antecedent contest and two with respect to power distribution, with a dominant actor vs. a divided or diffused power arrangement. The political contexts will contain an inherent logic related to the constitutional goals as pursued and set by the leading political actors. These variations shape the agenda, process, and design of the constitutional framework in different countries.

Evolution of federalism in India: a retrospective view

The earliest occasion which raised the issue of federalism in the context of India was at the First Round Table Conference

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in 1930.[6] The outcomes of the Conference were minimal but it recognized the need for India to develop into a federation. However, little was done to implement the recommendation and it was only under the Government of India Act of 1935 based on the White paper published by the Simon Commission, 1930, when the British government provided certain subjects regarded as "provincial" as these were to be legislated upon by the provinces. According to the Report of the Joint Parliamentary Committee, the government at the center under the 1935 Act would mainly cease to have authority over matters within the provincial sphere but in effect, the power of supervision will be in the Governors to seek directions from the Governor-General which he may find necessary to give. The British government's reliance on central powers defined the course of federalism in India. Nehru in 1936 said, "It is likely that free India may be a Federal India, though in any event there must be a great deal of unitary control". At the same time the Indians who were emotionally motivated had a strong demand for recognition of community rights and status as equally politically significant as the need for independence. The Indian leaders who were at the helm of the affairs prioritized the significance of unity in the face of the challenges of a fragmented society. Thus, when introducing the Draft Constitution, Dr. B. R. Ambedkar said: "The proposed Indian Constitution is a dual polity with a single citizenship. There is only one citizenship for the whole of India … There is no State citizenship."[7] However, deliberations continued in favor of a centralized federal structure to be based on the devolution of powers as was provided by the Indian Councils Act, 1919. The Sapru committee members were trapped between what was necessary for India and what was politically feasible. The members reached a consensus to recommend the establishment of a loose federal system that would have residuary powers which would be vested in the provinces. The outbreak of World War II set aside the demands of Indians and it was again in the Cabinet Mission Plan of 1946 that the proposal for a "federal union" was revived. Under the proposal, the Center was to have three subjects of legislation—defense, external affairs, and communication—while the states or the provinces would keep all the remaining powers. The Cabinet Mission Plan carried forward the discussion to the point of proposing a political system closer to the confederation than to federalism. The turn of events consequently made it obvious that the soundest framework for the constitution was to be a federation with a strong Center. It was expected that a strong government at the center would survive the perils of partition, transfer of powers, the resettlement of the refugees, and the integration of the territorial units. It was strongly affirmed by the political leadership that a strong national government would respond well to the challenges of nation-building and state-building. The pressing goals of the social revolution in India were sufficient enough to consolidate the grounds for a strong central government. It was all the more essential to ensure that the central government was recognized as the national government. With the Mountbatten Plan or the June 3rd Plan which announced the Partition on 3 June 1947, the Constituent Assembly initiated the process of adopting a centralized federal union. The members of the Constituent Assembly reached a tentative decision which mentioned:

That the Constitution would be federal with a strong center; That there should be three "exhaustive" legislative lists, and that residuary powers should vest in the Union Government; That the Princely States should be on a par with the provinces regarding the Federal list, subject to special matters; and That generally speaking the Executive authority of the Union should be co-extensive with its legislative authority.

The reports of the Union Constitution Committee treated federal matters with reference to the distribution of powers, distribution of revenue, amendment, and the powers of the Union Executive which contributed to the consolidation of the power of the central government.

The retrospective view of federalism in the Indian context resembles the idea of shared and multi-layered sovereignty to accommodate diverse communities within the defined framework of political institutions. The federal arrangement deliberately designed the multi-level governance to recognize the autonomy of the communities simultaneously with the maintenance of territorial sovereignty of the national government. However, the deliberate adoption of a decentralized federal model with a strong central government was the reflection of the accommodation of autonomy and diversity. The flexibility inherent in the constitutional framework of India distinguishes it from existing models of federalism. The unique federal model of India symbolizes its indigeneity. The indigeneity of the model makes Indian federalism original rather than a derivative or diminished form.[8] The permissive approach to constitutional amendments relates to the accommodation of diversity while preserving a strong central government as an expression of hybridity.[9]

The preservation of the element of indigeneity in India's federal structure is evident through the linguistic reorganization of states among other accommodations. The territorial organization through the integration of the 560-odd erstwhile princely states with the provinces of British India was an attempt in that direction. However, state reorganization was not confined to linguistic demands only. India's northeast region since the 1970s has been substantially reorganized to recognize the autonomy claims of members of various tribal communities such as the Nagas, Mizos, and others. This phase of reorganization involved asymmetric devices that have given a measure of security to some larger ethnic minorities within the Northeast to emphasize recognition by other groups in the region. Subsequently to address the issue of backwardness and ethnic identity new states have been included into the Indian Union. The intrinsic indigeneity of the multi-level decentralized structure of Indian federalism has only evolved over time into a model which all the more upholds the indigeneity of the federal system of India.

6 https://indianexpress.com/article/political-pulse/federalism-debate-constituent-assembly-speeches-to-centre-vs-state-relations-independent-india-8098117/ accessed on 16th September, 2022.

7 Austin G. The Indian Constitution. Oxford Publication, 234–241.

8 Tillin L. Indian Federalism. Oxford Publication, 2–23.

9 https://johansandbergmcguinne.wordpress.com/official-definitions-of-indigeneity/ accessed on 20th April, 2023.

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The author confirms being the sole contributor of this work and has approved it for publication.

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