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How federalism constrains Indigenous self-determination

By Zachary Jericho Couture

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Topic and importance

This article examines the way in which Canadian courts undermine Indigenous legal jurisdiction through the doctrine of federalism. The author establishes that, despite federalism's potential in promoting legal pluralism, adjudicative bodies use it in a manner that disregards Indigenous legal orders and prevents self-determination.

Main arguments

The article begins with a theoretical exploration of the relationship between federalism and Indigenous sovereignty. Federalism is presented not merely as a division of powers between levels of government, but also as a framework that determines the distribution and exclusion of authority within the state. The author questions why Indigenous legal systems are excluded from this framework, arguing that such exclusion contradicts federalism's commitment to pluralism and political diversity.

The next section deals with the notion of “jurispathy,” a mechanism through which judges in settler-colonial legal systems affirm the authority of one legal framework while disregarding other worldviews, such as Indigenous legal orders. The author claims that this feature is exclusive to Western legal systems and is embedded in jurisprudence and Canadian federalism law.

The article then examines a 2024 decision of the Supreme Court of Canada, Dickson v. Vuntut Gwitchin First Nation. The analysis of this case represents Canadian courts’ overt rejection of Indigenous constitutionalism. The decision ties into the author’s thesis by showcasing a situation where federalism was used to undermine Indigenous knowledge systems. Despite an agreement recognizing the independence of the Vuntut Gwitchin First Nation from the Canadian government, the court still decided that the Canadian government has a partial source of authority in Indigenous governance.

Finally, the author describes how courts have applied section 91(24) of the Constitution (which holds that the federal government has jurisdiction over “Indians and lands reserved for Indians”) in a paternalistic way. Not only does the provision confer power upon the government over Indigenous land, but courts have used it in a way that replicates violence and oppression during colonial times. The author proposes instead to interpret this section through the Royal Proclamation and the Treaty of Niagara, which would enable greater consideration for Indigenous perspectives.

Conclusion and additional considerations

The article calls for a rethinking of federalism to better support legal pluralism and recognize Indigenous legal traditions. It encourages more meaningful approaches to self-governance and reconciliation while challenging assumptions of settler legal superiority.