

# North American Federalism And Its Legal Implications

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## ABSTRACT

The future of continental cooperation within North America remains uncertain. However, if the three principal countries of this continent intend to deepen the ties that have brought them together under the North American Free Trade Agreement, they will need to navigate the process of further international accords, both in terms of treaties and negotiated changes to domestic laws. An important but overlooked feature of this process is the fact that each of the three countries has a federal system different from that of the others in terms of relative overall institutional strength and degrees of centralization and decentralization. Like the European Union (particularly in relation to the German federal system and the principle of subsidiarity), the North American countries will need to take federalism into account when negotiating and implementing any future legal agreements and institutions among themselves. A strongly centralized federal system with a weak institutional presence can facilitate the negotiation and imposition of new legal arrangements that will provide for further economic and political cooperation. However, a more strongly decentralized system with a strong overall institutional presence (resembling the Canadian model) could potentially provide the impetus for more effective implementation of these legal agreements as well as foster a greater sense of acceptance and involvement in a broader North American community among regions and local communities.

**Key words:** federalism, constitutional law, subsidiarity, comparative politics, North American legal cooperation

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## INTRODUCTION

A particularly understudied aspect of the continental integration of North America has been the subject of federalism. The legal consequences of this system of shared sovereignty in relation to the North America Free Trade Agreement (NAFTA), evolving treaty relationships, other commercial agreements, and the overall goal of greater continental legal harmonization are, potentially, much more profound than most observers might perceive. It is imperative that the effect of the very different federal systems of Canada, Mexico, and the United States on their relationship within North America be better understood. Otherwise, those differences and the very concept of shared sovereignty that is an integral part of the political systems of these three countries could hinder or even undermine that continental legal, political, and economic development. This relationship has not been addressed in these precise terms but the general theme of North American integration and the effect of federalism on it have been addressed in other, related areas (O'Brien, 1995: 693-724).

It is important to consider, therefore, whether a particular federal system will be conducive to the process of future legal cooperation (including in terms of the introduction of any supra-national legal institutions) within North America. These three federal systems of North America differ from each other. Whether or not those differences might matter in the broader scheme of reconciling and harmonizing the laws and legal systems of Canada, Mexico, and the United States under future treaties or other agreements depends upon gaining a meaningful appreciation of the effect that federalism and its shared sovereignty might have on that process.

So, first, each federal system needs to be examined within a comparative context. Then, the significance of the comparisons and contrasts should be considered in terms of any practical effect they might have upon negotiation and implementation of any future legal agreements and institutions that will be required for continental cooperation to advance, especially in terms of enhanced legal harmonization and integration. The degree to which these countries' central governments are able to negotiate and impose a North American system upon their respective states or provinces is determined by these characteristics, while the capacity to implement and sustain them at the regional and local levels also is subject to these fundamental conditions.

The primary distinctions among these three federal systems may be identified in terms of two broad, yet distinct, characterizations: 1) the relative institutional and political strength of the federal system itself; 2) the relative degree of centralization or decentralization of sovereign authority within the federal system. A strongly centralized federal system (such Mexico's and the United States') can facilitate the negotiation and imposition of new legal arrangements that will provide for further

economic and political cooperation. However, a more strongly decentralized system (such as Canada's) could potentially provide the impetus for more effective implementation of these legal agreements as well as foster a greater sense of acceptance and involvement in a broader North American community among regions and local communities. Furthermore, constitutionally stronger and better defined federal institutions overall (such as are found within Canada and the United States) could also facilitate long-term legal implementation, though they could frustrate negotiations at the same time.

### **THE NORMS AND PRINCIPLES OF FEDERALISM MOST RELEVANT TO LEGAL COOPERATION**

This article will, first, identify the theoretical norms and principles of federalism that are most relevant to advancing legal cooperation. Then, it will examine each of the three federal systems in terms of these central characteristics. The next section will use the two most pivotal federal characteristics of institutional strength and degree of centralization to evaluate the relative effect of each federal system on the process of negotiation and implementation of future legal agreements, including a comparison with the practices that have been adopted in this respect by the European Union (and especially in relation to the federal system of Germany), particularly the concept of "subsidiarity." Finally, it will offer a brief assessment of the potential for success in this area. Ultimately, the article will conclude that federalism could actually enhance the process of legal harmonization and integration within North America, even though it also could create certain institutional hurdles that would need to be negotiated along the way.

This analysis is therefore influenced by neo-institutional considerations that affect rational choice decisions (Scheurer, 2008: 1-10). The relative institutional strength of federalism affects the creation and performance of other legal institutions designed to advance continental cooperation. An underlying assumption of rational choice preferences in terms of each country's relatively easy adoption of negotiated settlements in this area can be offset by fears and resentment of participants at the regional and state levels. Concerns about sovereignty and sovereign status are assumed within that analysis and reflect larger concerns about sovereign authority that have been raised in relation to the overall status of each country that has participated in this process and will negotiate potential future changes to their relationship in this respect. That has been an overriding theme, especially regarding concerns and challenges to increased North American cooperation (Clarkson, 2008: 26-42).

The status of federalism within each of these countries is, indeed, a reflection of the underlying political conditions that have shaped them. It is therefore curious that so little attention has been devoted to the subject of federalism as it relates to NAFTA and the further evolution of a North American union, although there have been occasional exceptions that have considered the challenge posed to local and regional authority within international trade agreements as they relate to federal systems (Weiler, 1994: 113-133). Federalism may be a single concept but its relationship to each of the constituent members of NAFTA is significantly different. Therefore, a legal and political overview of the status of federalism within Canada, Mexico, and the United States (particularly in relation to the process of political approval and implementation of future legal agreements among these principal North American countries) is necessary before this effect can be reduced to the analytical characterizations that have been proposed in this respect.

It is very important at the outset to place this discussion within a firm theoretical context. Federalism is a system of shared sovereignty and not merely a system of delegated authority. Especially for the purpose of this analysis, it is important to identify those features deemed essential for establishing an institutionally true and viable federal system of shared sovereignty within a permanent union. The unifying theme of these features is the capacity of the subunits of a federal system to exercise meaningful –rather than merely nominal– sovereign powers. A true federalism divides power into meaningful realms of sovereign control. It creates an indestructible identity of sovereign subunits that enjoy significant powers. However, the extent of those powers is not the same for every federal system. Nonetheless, these conditions are essential for a true federalism to exist (Duchacek, 1970: 234-244; Elazar, 1987: 166-168; Wheare, 1963: 15-32).

It has been argued that the emphasis on the constituent subunits of a federal system is critical to its economic –as well as its political– success because it emphasizes its core principles and advantages, especially within the context of democratic government. These principles include the cooperation and competition of dual sources of jurisdiction that promote innovation and options in public policy. That same principle of cooperation and competition lies at the core of the sort of regional union that is gradually being sought within North America. That sort of relationship among sovereign partners gives its inhabitants options for supporting variations on public policy. To succeed, all partners within this sort of arrangement must possess sovereign authority over the areas of governmental responsibility that particularly matter to public policy, including fiscal and social policy –an understanding of federalism that is essential to “Tiebout model” of the conditions under which local markets are created and sustained (Tiebout, 1956: 416-424; Qian and Weingast, 1997: 83-92).

A meaningful form of “checks and balances” among the different levels of sovereign government is also vitally important to the sustenance of a genuine federal system. Again, it requires that the subunits possess not only sovereign authority but authority that relates to meaningful dimensions of public policy. Therefore, some form of mutual influence over key features of the economic, political, legal, and social life of a country (which can include a division between the initiation and implementation of policies) must be shared for a federal system to be authentic in its purpose and performance. Without that sort of coordination and cooperation, the system lacks coherence as a whole (Elazar, 1967: 14-27; Sundquist, 1969: 13-31, 246-278).

A greater perception of political accountability to the electorate occurs when meaningful units of government are more locally positioned. Distrust of distant centers of government can be alleviated through shared sovereignty associated with more familiar authority that is more reflective of a local or regional population. However, the subunit must possess and exercise truly sovereign authority regarding truly meaningful areas of policy and governance. Otherwise, a sense of autonomy among members of that electorate will remain elusive and an attitude of support (and, perhaps, a sense of legitimacy) toward the overarching government will be denied (Rondinelli, McCullough, and Johnson, 1989: 57-87).

True federalism is intended to advance greater efficiency in government and administration through specialization of the different levels of government, creating a sense of diverse competencies. Again, a meaningful division of genuinely sovereign authority must be enacted in order for this benefit to be achieved. Furthermore, specialization can lead to greater competence in governmental functions, thus reinforcing public support for all levels of government within a federal system (Shah, 2006: 1-40; Garman, Haggard, and Willis, 2000: 205-236).

The predominance of the “top-down” model of federalism could be a problem for achieving this sort of effective federal system. The imposition of a central vision of a country, like the imposition of a regional vision by a single, dominant international state, can undermine the entire purpose of such a venture, let alone its popular support and practical efficacy. Federalism has tended to work best as the result of sovereign states uniting and agreeing to delegate, permanently, some of their sovereign authority to a central government. A system that is dominated from the “top” can result in an erosion of the effective –if not the actual– sovereign scope of the subunits and, thus, of the very purpose of having a federal system (Williams and Tarr, 2004: 3-24).

These criteria are not the only important features of an effective federal system. However, they do reflect principles that are particularly relevant to the maintenance of an effective union, especially among diverse subunits. Therefore, they also

offer a potentially interesting comparison with the process of creating international institutions of regional cooperation and integration. Furthermore, among federal countries, the conditions for achieving that sort of integration (including legal integration) can be particularly affected by the adherence of the respective federal countries to these particular principles (Lejeune, 2003: 97-114).

In one sense, legal harmonization and integration can be achieved much more easily among countries with unitary systems of sovereign authority. But in another sense, countries with true and effective federal systems can compel the sort of cooperation and collaboration at the subunit level that can make the overall process of legal harmonization and integration more thorough, more specifically relevant, more thoughtful, and more effective within a diverse legal, political, and economic environment than a centrally-imposed vision might otherwise produce. Therefore, an evaluation of the three principal countries of North America and the status of their respective federal systems in this respect might provide insights regarding the potential underlying course of the process of legal harmonization and integration for this region.

## CANADIAN FEDERALISM

Federalism has been identified as one of the defining features of the Canadian constitutional system and its political history. The union that created the Dominion of Canada in 1867 was based on antecedents that had attempted to consolidate in different ways the diverse colonies that comprised British North America. In that respect, the greatest challenge had been the attempt to reconcile the descendants of New France who had persisted in retaining their separate identity, which was a source of concern for British imperial authorities in connection with the threat of rebellion among the American colonies to the south. The British Parliament passed the Quebec Act of 1774, which affirmed the distinct legal, religious, and political identity of this part of British North America. It also established the basis for the ongoing attempt to reconcile distinct identities within this broader colony that would persist as self-government and, eventually, complete independence was pursued for Canada. This process would revolve around the two most dominant entities within British North America that by the nineteenth century would be known as Upper Canada (which would evolve into the province of Ontario) and Lower Canada (which would evolve into the province of Quebec), but the principle it established would be extended to all the component parts of this vast continental possession (Wagenberg, Soderlund, Nelson, and Briggs, 1990: 7-39; Stevenson, 1979: 27-32).

Indeed, the attempt to combine these two distinct entities (although the administrative division of Canada West and Canada East would be retained) into a united Province of Canada (as recommended by the Durham Report, created in response to rebellions in both the colonies in 1838) demonstrated the need to accommodate these separate cultural and political identities in order for any sort of self-government to be successful. The foundation of Canadian federalism was established as a result of that recognition, particularly regarding the demands of Quebec and francophone subjects (Stevenson, 1993: 3-22). The necessary compromise that emerged from the debates over the British North America Act (now the Constitution Act of 1867) produced an arrangement (mythologized as the “compact theory of Confederation”) that gave the provinces considerable advantages, though the relative strength of the provincial level would not be apparent until after favorable judicial rulings (especially from the Judicial Committee of the Privy Council, acting in London as a court of final appeal) reinforced them, especially in terms of provincial authority over resources, civil law, and property (Scott, F. R., 1989: 60-70).

One of the keys to understanding the federal relationship within Canada is section 92 of the Constitution Act of 1867. Among the sovereign powers that it delegated to the provincial level was authority over resources. The significance of that arrangement would not be fully appreciated for decades, but its significance in terms of providing greater economic strength for provincial governments in their relationships with the central government would be, arguably, the single most significant factor in shifting the balance of federal relationships in a more decentralized direction. Nonetheless, other powers of the provincial governments in the area of civil law, property rights, and administrative responsibility regarding criminal law and other matters of general enforcement, regardless of jurisdiction, assisted this tendency (Hogg, 1992: 108-112).

Historically, during its initial phase of the mid-to-late nineteenth century, the federal system within Canada was highly centralized. This trend was the result of early Canadian administrations’ relative strength in asserting their dominance over political and economic matters, as well as the tendency of the judicial system to uphold federal claims to this preeminence in matters involving disputes of jurisdictional authority. Furthermore, the federal government exercised powers of disallowance on behalf of the imperial Parliament, frequently claiming that legislation and actions of provincial governments violated imperial prerogatives but, in reality, increasing its own scope of initiative. The fact that the British North American Act appeared to grant reserve powers to the federal government (symbolized by the “Peace, Order, and Good Government” clause of section 91), rather than the provincial governments, reinforced this initial interpretation, though it was undermined by later judi-

cial rulings. It was, most likely, consistent with the desire of British officials to promote and maintain imperial cohesion within this part of the empire, which had been, after all, the prime motive for confederation from the perspective of the British government (Vaughan, 1986: 495-519; Lower, 1958: 35-36).

However, by the end of the nineteenth century, the trend toward greater decentralization of the Canadian federal system had begun. In particular, constitutional rulings on federal power were increasingly appealed to the Judicial Committee of the Privy Council in London, which served as the final authority on such matters and which overwhelmingly interpreted the British North America Act in a manner that favored the sovereign claims of the provinces. During this same period, federal governments tended to abandon recourse to claims of reserve powers and disallowance, partly in recognition of these rulings and, also, as a reflection of the growing assertion of *de facto* Canadian legal and political authority, which made claims on behalf of the imperial government less and less politically acceptable. As a result, provincial government increased their legal and political activities, especially regarding administrative oversight, local economic policy, and defining the scope of property and other civil rights (Russell, 2004: 34-52).

The federal government in Canada was able to reassert its dominance as a result of the two World Wars and recourse to the War Measures Act of 1914 and the establishment of a federal income tax—measures that were generally accepted as necessary under the circumstances. During World War II, in particular, practical federal jurisdiction was extended to various social services, including unemployment insurance (Cody, 1977: 66-68). Nonetheless, by the end of the war, overall cooperation between the two sovereign levels had increased, mainly as a result of the expansion of the welfare state and the need for this sort of collaboration in order to implement these policies (Corry, 1958: 106-110). During the 1950s, this cooperation was institutionalized through the adoption of First Ministers' Meetings, in which formal and informal arrangements in this area were reached, though with inconsistent and, at times, diminishing success (Cairns, 1977: 696-699).

However, the constitutional authority of the provinces over the administration of justice was exercised in other bureaucratic areas, particularly regarding the vast scope of public policy and government services. Increasingly, provincial governments began to pursue their own public policies in this area, particularly after following Quebec's lead during its "Quiet Revolution" of the 1960s, which found its government expanding the role of the state in its people's daily lives (Dion, 1993: II, 247-312). Federal efforts to resume the public policy initiative through increased welfare programs, economic coordination, and overall centralized administration came into conflict with this trend, as is particularly evident in the implementation of a National



Energy Policy over the objections of Alberta and its petroleum interests.<sup>1</sup> Agitation within Quebec for political separation from the rest of the country increased these tensions, especially as the federal government under Pierre Trudeau sought to advance a plan of greater national unity to overcome the strains imposed by linguistic, ethnic, and –to a lesser extent– regional diversity.

In addition to the Official Languages Act and other efforts to advance the goal of a bilingual and multicultural Canada, Trudeau wanted to patriate the Constitution with the addition of a Charter of Rights and Freedoms. But that move was generally interpreted by the provincial governments as a potential step toward increased centralization of federal sovereign authority, especially after the federal government attempted to effect those constitutional changes (after attempts at agreement with the provinces had initially faltered) and impose a unilateral solution. The ultimate result was a compromise on both the scope of the Charter and the amending formula that would reinforce the federal system and the strong role of the provinces within it. That compromise remains in effect, despite unsuccessful attempts to alter the relationship (especially at the level of formal interstate relations between the provinces and the federal government) such as the failed Meech Lake Accord. The ultimate result has been a federal system in which intergovernmental cooperation, including in terms of ongoing institutional relationships (most conspicuously represented by First Ministers meetings among the various federal and provincial chief executives), is a necessary element of fundamental political and economic initiatives that affect the country as a whole, though much of that interaction occurs within the central government. This “intrastate” activity of making institutions within the federal government responsive to provincial concerns and goals can both facilitate and frustrate the legal process at the national level, including in terms of implementing the laws mandated by international agreements (Smiley and Watts, 1985: 29-33, 155-157).

## MEXICAN FEDERALISM

Mexico’s federal development has been markedly different from that of its continental neighbors, both in terms of origins and ultimate purpose. As a result, at times, its status has been perplexing. The reason for accepting a sovereign division within Mexico when its independence was first established is itself subject to dispute. Some authorities have claimed that it was a result of previously existing territorial and

<sup>1</sup> The concept of “shared powers” in this context generally referred only to powers that fell under the sovereign jurisdiction of the federal government, as the provinces became increasingly jealous of their own sovereign prerogatives (Leslie, 1987: 80-85).

cultural divisions in Mexico during the colonial period that needed to be recognized to protect the new nation from the tyrannical tendencies of centralization characteristic of imperial rule. However, other authorities have claimed that setting up a federal system was a contradictory act that belied the true nature of the new country's political system and establishment and may, in fact, have served to facilitate this consolidation, especially among large landowners (particularly *hacienda* owners) and other powerful Mexican elites (Acosta Romero, 1982: 399-404).

The 1824 Mexican Constitution did not appear to have established a particularly effective federal system, at least in terms of the sovereign interests of the various states. If the argument that Mexico was essentially "forged" from various provinces and other local territories (Anna, 1998: 1-4) is accepted, federalism was initially necessary for achieving political cohesion, especially in reaction to the previous experience of central imperial absolutism under Spain. It is uncertain whether the federal scheme was inspired by the U.S. example or derived from that former experience. Likewise, it is uncertain whether this federal system emerged from a strong sense of commitment to a federal principle or as a political expedient for addressing the initial problems of ethnic and regional diversity threatening the new country's cohesion (Anna, 1998: 1-4, 24, 30-31).

Certain features of Mexico's early federal development appear to indicate ambiguity regarding the commitment to that principle. Perhaps the most notable feature in that respect was the absence of a bicameral legislature including a chamber dedicated to representing the federal principle. Although Canada's legislative upper house, the Senate, technically was designed to represent regional rather than provincial interests—and it was quickly relegated to a secondary and relatively powerless governmental role—the initial constitutional commitment remains symbolically important and its emphasis within the 1824 Mexican Constitution may be telling (Anna, 1998: 161-165; Suchlicki, 1996: 63, 67). The elimination of the Senate in the 1857 Mexican Constitution, especially under the influence of President Benito Juárez, who disparaged it as a "conspiratorial chamber," could be regarded as further undermining the overall constitutional commitment to the development of Mexican federalism, even though that chamber was restored in 1871 (Suchlicki, 1996: 82-84).

Of course, the institutional grounding of federalism within central institutions is only one way in which a constitutional commitment can be demonstrated. A more profound indication may be related to the status of the states. The concept of federalism emphasizes both sharing sovereignty and the permanence of that shared sovereignty and, thus, of the federal system in general. Subunit states within a true, strong federal system are regarded, therefore, as permanent entities that cannot be altered without their consent (Wheare, 1963: 6). However, of the 22 original Mexican

states, some were geographically altered (to create new states, such as in the 1849 unilateral creation of the state of Guerrero and the breakup, by presidential decree, of Yucatan and the subsequent creation of the territory of Quintana Roo in 1902) or eliminated without clear adherence to the federal principle, ultimately resulting in today's 31 states, a development that was particularly intense during the Porfirio Díaz administration (Scott, 1964: 102-103; Bernstein, 1967: I, 389-394). Although there was a similar transition involving the territory of many of the original U.S. states, the changes reflected the sovereign consent of those states in a manner that in many instances was not reflected by their Mexican counterparts. These changes also reflect the turbulence of Mexico's nineteenth-century history (including the brief imperial periods) that undermined constitutional continuity in general and core principles such as federalism in particular.

The Revolution of 1910 reestablished the federal principle in the 1917 Constitution. However, the results of that revolution and constitutional establishment also reaffirmed the historical tendency toward strong executive and centralized government, both of which tend to undermine federalism's effectiveness. It has been suggested that the popular association of federalism with democracy among much of the Mexican population made including the federal system necessary, even if only in a symbolic sense. A lack of constitutional rigor for that federal system as a system of true shared sovereignty appears to have been undermined, though, by specific constitutional clauses and political conditions (Bailey, 1994: 97-119).

Articles 40 and 41 of the Constitution of 1917 do establish, though somewhat vaguely, the federal principle. Both articles assert the general governmental expression of sovereign authority at the national and state levels. While establishing those principles in theory, there is no indication of the actual extent of shared sovereignty. Article 39, referring to the foundation of national sovereignty resting in "the people," could contribute to that ambiguity, given the president's central, pervasive relationship to the national electorate as a whole. That role as the only government official subject to a national constituency of all the people could be reinforced by the article's broad language and, subsequently, influence the practical constitutional interpretation of the two articles following it (McHugh, 2002: 175-192).

Article 115 specifies the characteristics that state governments are required to have within Mexico. That article appears to resemble the "guaranty clause" (article IV, clause 4) of the United States Constitution, which broadly mandates state Constitutions and requires that they provide "a republican form of government." Article 124, like the Tenth Amendment to the U.S. Constitution, serves as a "reserve clause," mandating that powers not expressly delegated to the federal government should be reserved to the state governments. These parallels between the Mexican and U.S.

constitutional systems suggest a federal system for Mexico that is, *de jure*, rigorous in its delegation of sovereign authority to the state level (Acosta Romero, 1982: 399-404).

But the constitutional powers specifically delegated to the Mexican federal government are considerable. They include the authority over the country's labor law and policy and social security infrastructure as established in article 123 of the Mexican Constitution. Article 27 vests the control of natural resources and authority over property rights and the distribution and regulation of electricity in the central government. Even more significantly, article 73, section 30 (which authorizes the federal government to enact laws necessary for fulfilling its constitutional powers) and article 133 (which directs state courts to follow federal law when it conflicts with state law) has been broadly interpreted and practiced in a manner that has caused the state judicial system to be effectively subordinate to the federal judiciary. These provisions do not merely strengthen the federal government's political power in its relations with the states; they also represent a fundamental structural advantage for the sovereign authority at the center that challenges and, arguably, undermines the federal system's efficacy as an arrangement of a truly shared sovereignty (Acosta Romero, 1982: 399-404).<sup>2</sup>

Another constitutional feature that challenges the structural viability of the Mexican federal system is the amending formula. The provisions of article 135 are less stringent than many other federal systems provide, despite establishing a process that has been described as creating a formula that is formally "rigid" because it cannot be amended by simple legislation. This article requires the approval of only a majority of the states (regardless of population), in addition to a two-thirds approval of both chambers of the federal Congress, to ratify a change to the Constitution, including in terms of the delegation of sovereign authority. It remains a formula that is validly federal, but requires consensus among various sovereign units that other federal systems generally seek to demonstrate, if not actually produce (Smith, 1993: 94-97).

Perhaps, the most significant historical feature of Mexico's evolution as a federal system has been that its strong political executive has *de facto* consistently undermined the federal system's actual functioning during most of the nineteenth and twentieth centuries. That tradition of strong centralization, coupled with the one-party domination of the Institutional Revolutionary Party (PRI) until the late 1990s, exacerbated the Mexican federal system's institutional shortcomings. Those combined institutional weaknesses and political dominance hampered the system's constitutional effectiveness, often creating the impression –if not the reality– of a *de jure* federal system that operated as a *de facto* unitary system (Weingast, 2003: 28-33).

<sup>2</sup> An analysis of the practical consequences of this constitutional arrangement is provided in Homant, 1997: 233-274. This aspect of federalism is addressed in McHugh, 2003: 105-112.

However, the defeat of the PRI and the rise of a competitive party system in Mexico also have spurred a reexamination of federalism. President Ernesto Zedillo, building on tentative constitutional reforms intended to delegate greater responsibility for basic services to municipal governments, promoted the concept of a "new federalism" that would decentralize the balance of power within the system. One result was the National Political Agreement for the Reform of the State, which produced constitutional revisions of articles 105 and 116, especially concerning electoral reform (Fernández del Castillo, 1997: 10-12). State governors have convened to discuss and negotiate terms upon which this restructuring of the federal system may be effected, especially in response to the economic opportunities of NAFTA (Merchant and Rich, 2003: 661-667). Other attempts have been made in favor of decentralization, both for economic and political reasons (Borja Tamayo, 2001: 67-90). However, that process remains at a relatively early stage, although the idea of a "resurrection" of Mexican federalism has been addressed as a positive trend of the 1990s that may eventually be persistent, especially within a continental context (Rich, 2004: 1, 329-331, 334).

## U.S. FEDERALISM

Federalism was not only the central issue that dominated the creation of the United States, but shortcomings in resolving the precise nature and parameters of that federal union were responsible for the sectarian strife that eventually resulted in the American Civil War. The abandonment of the unworkable confederal system created as an expedient during the American Revolution led to negotiations regarding the degree to which the 13 sovereign American states would agree to delegate part of their sovereign powers to a central government. In addition to the new federal government's limited powers, the contentious issue of representation needed to be addressed, resulting in the compromise of a bicameral federal legislature in which the upper house would consist of senators selected by, and intended to be representative of, their respective state governments (Sutton, 2002: 9-34).

Three distinct phases of U.S. federal development have been commonly identified among scholars: "dual," cooperative, and the "new" federalism. The first phase reflected the initially decentralized intent of U.S. federalism. Given the fundamental economic differences between the northern and southern states (which included the uneasy compromise that permitted the continuation of slavery in the South), the scope of federal powers were deliberately kept limited. Nonetheless, due to the implications of the "interstate commerce clause" in article one, section eight of the United States Constitution, the federal government's involvement gradually began

to expand into the economic affairs of the various states, even as the scope of federal civil rights remained narrow, particularly because the very definition of national citizenship had been reserved to the states on the basis of the “reserve powers” guaranteed by the Constitution’s Tenth Amendment (Rosenthal and Hoefler, 1989: 1-23).

Sectarian tensions (especially regarding economic conflicts between the agrarian South and the more industrialized North as symbolized by the moral conflict regarding slavery) resulted in the secession of southern states and the resultant American Civil War. These states claimed the authority to reclaim their full sovereignty (consistent with the principles of a confederal –rather than federal– system) and declared the creation of the Confederate States of America. That argument was resolved by force of arms in favor of the federal forces of the North, which imposed upon the reunited nation three constitutional amendments (the Thirteenth, Fourteenth, and Fifteenth) that further centralized the federal system by ending the institution of slavery throughout the country, creating a national definition of citizenship, and guaranteeing the voting rights of the newly enfranchised citizens –a traditional interpretation that has been widely accepted in U.S. political textbooks, though it has also been challenged as being a little too simple in its overall analysis (Elazar, 1971: 39-58).

These constitutional changes provided part of the institutional foundation that presaged the second phase in the development of U.S. federalism. This phase represented the evolution of institutional centralization within the U.S. federal system. Increased intervention in the economy at both the state and federal levels (including in terms of regulations regarding public health, safety, and welfare) gradually overcame judicial objections and greatly expanded the scope and role of the government. The Sixteenth Amendment, in clarifying the federal government’s authority to impose an income tax, tremendously facilitated its capacity to generate revenue. The result was a greatly increased federal government role in all aspects of the national economy (especially as the judicially-sanctioned constitutional definition of “interstate commerce” expanded) and the creation of extensive federal programs in the areas of education, social security, public welfare, emergency assistance, financial regulation, and other fundamental economic and social activities. Increasingly, the federal government found itself in a position to work in partnership with state governments in overseeing economic and social policy at the state and local levels, eventually directing and even dictating these efforts. This evolution culminated in the programs of the New Deal and the firm establishment of a social democratic state that pivoted upon the federal government. State governments maintained their sovereign authority to enact laws in these areas but the motivation and content relating to this state legislation was increasingly dictated by the federal government’s overwhelming fiscal dominance (Zimmerman, 1992: 102-134).

The third phase of U.S. federalism reflects ongoing –though sporadic– efforts (beginning with the administration of Richard M. Nixon and gaining particular emphasis during Ronald Reagan’s) at achieving greater administrative decentralization within the U.S. federal system. The establishment of “block grants,” in which federal revenues are provided to state governments, which implement their own responses to broad federal policy initiatives, has been one of the most conspicuous manifestations of this phase of U.S. federalism. The welfare reforms of the 1990s (in which states were free to develop experimental approaches to this policy within broad parameters established through federal funding assistance) offer a good example of this trend (Conlan, 1998: 19-35, 93-109). However, the results of the Reconstruction amendments, the Sixteenth Amendment (and the central government’s enhanced revenue capacity that it confirmed) and the broad judicial interpretations of the commerce clause and other constitutional provisions have ensured the prominence of the federal government, despite the strong sovereign guarantees that the United States Constitution also provides, especially as reinforced by the Tenth Amendment.

Despite recent political rhetoric to the contrary, the role of the U.S. federal government in dictating economic, social, and political policies at the state and local levels remains pervasive. Nonetheless, the federal system’s structure and the states’ formal sovereign authority remain firm, despite the federal government’s practical dominance and its fiscal power to direct the policy agenda in many areas at both sovereign levels of U.S. government. Political influence has become more centralized within the United States, but much of the legal authority that implements it remains the sovereign prerogative of state governments. The model of “marble cake” federalism in which central and state authority and input become intertwined is a useful theoretical approach for understanding this relationship (Volden, 2005: 327-342).

That institutional sovereignty of state governments is reinforced by state constitutions that address a wide array of powers, including independent standards of legal process and civil rights and liberties. Therefore, states often provide diverse experimentations in many areas of public policy, including in terms of criminal law, civil rights (including through state-level bills of rights that frequently provide more stringent protections to citizens than the federal Bill of Rights offers), welfare reform, regulatory oversight, and administrative process (McHugh, 2003: 3-17; Tarr, 1996: 3-23). Even as the economic and political authority of the country has become more centralized throughout U.S. history, the federal system itself has remained institutionally strong and salient.

## TWO PIVOTAL FEDERAL CHARACTERISTICS AND THEIR LEGAL CONSEQUENCES

The status of a federal system can influence greatly the process of regional integration among different federal states. The sovereign subunits of a federal country can, potentially, pose an impediment to that process. However, those same subunits can exert an influence that can compel a need for greater cooperation and reflection that can result in legal reforms more effective at the local level and more attuned to the diverse needs of a varied and dynamic continent. Again, it is critical to evaluate these three federal systems within the context of a meaningful definition and theory of federalism as a governing principle. Only in that way can the effect of North American federalism be reasonably evaluated in terms of the continent's future legal integration and harmonization, especially as that process extends beyond its NAFTA origins. Two standards that emerge from this assessment and are fundamental to that theoretical evaluation involve normative and fairly relative concepts. The first of these involves degrees of centralization and decentralization regarding the balance of actual political and economic power between the central and subunit levels of government.<sup>3</sup> The second addresses the relative legal and constitutional strength of the federal system, itself (Kisker, 1989: 35-52).

Therefore, from this perspective, a federal system can be categorized along two different axes: degree of centralization and degree of institutional rigor. According to those criteria, the three principal countries of North America are distinct from each other. In terms of the centralization axis, Mexico is by far the most centralized, followed by the United States, which is fairly centralized, and, then Canada, which is relatively decentralized. The reasons for this contrast are rooted in the sovereign relationship of each level to fundamental economic powers, especially control over resources and revenue capacity. That status tends to be dictated by a political, rather than constitutional, condition that has been called the political "golden rule": "whoever has the gold, makes the rules." This can be compared to the relationship among sovereign states in international relations. A state can remain sovereign and retain sovereign authority over its laws and policies and, yet, the superior strength of another state (especially economically) can induce one to conform to the policy preferences of the other (Thomson, 1995: 213-233).

<sup>3</sup> This characteristic has been central to the very concept of federalism, especially as distinct from unitary regimes. It is not, however, merely the degree of decentralization of authority that is critical but the fact that, within a federal system, decentralization is mandatory and not discretionary. This point is made exceptionally well in Osaghae, 1990: 83-98.



The other axis is trickier to determine and designate. It is based on an assessment that is arguably more subjective. In particular, the idea that a federal system lacks “institutional rigor” can be refuted in terms of obvious constitutional provisions and protections, provided that it does, indeed, truly qualify as a federal system, rather than as a unitary system with administrative divisions of authority that are strong and, in a practical –if not, technically, a sovereign– sense, permanent –the sort of institutional assessment has been particularly relevant to critical evaluations of Nigerian federalism (Olowu, 1991: 155-171). According to this axis, both Canada and the United States rate fairly high in terms of institutional rigor while Mexico ranks much lower, perhaps qualifying for a relative designation of institutionally “weak.” A critical assessment of the constitutional status of the Mexican states does suggest certain institutional weaknesses that may also have reinforced the trend of political centralization that has been so prominent during Mexico’s history.

Nonetheless, “institutional rigor” and “centralization” are two distinct characteristics of a federal system that have particular significance for the law, both internally and in terms of international cooperation and negotiation. The United States can be characterized as a fairly “centralized” and strongly “institutionally rigorous” federal system; Mexico can be characterized as a strongly “centralized” and a fairly “institutionally non-rigorous” federal system; and Canada can be characterized as a fairly “decentralized” and strongly “institutionally rigorous” federal system. The overall consequence of these different characterizations of the three systems upon legal integration and harmonization within North America can potentially be significant, especially regarding the legal aspect of achieving greater institutional integration and harmonization at the continental level. This potential influence of federalism on international law has particularly been spurred by the development of the European Union, especially as a result of informal political influence, rather than as a matter of formal-legal action (Bernier, 1973: 267-278).

Federal Assessment		<i>Institutional Rigor</i>	
		Weak	Strong
<i>Degree of Centralization</i>	Strong	Mexico	United States
	Weak		Canada

## NORTH AMERICAN LEGAL HARMONIZATION AND THE PRINCIPLE OF SUBSIDIARITY

The principle of subsidiarity has guided the legal harmonization of Europe throughout its development. It directs that the implementation of all policies and their translation into law should be interpreted and applied in a manner that reconciles the overarching desires for central harmonization with local autonomy and plural diversity, which can be, ultimately, both a centralizing and decentralizing force (Duff, 1992: 29-30). A central law will be imposed only when the actions of individual states, regions, or subunits are insufficient for achieving a legitimate community objective. Furthermore, it encourages the interpretation of those central goals through values and norms that reflect the communities they directly affect (Estella, 2005: 1-35). The emphasis on the effect of policies on individual citizens and their particular perspective is a key goal of this adaptation. In that way, a closer union can be effected by acknowledging and adapting to needs as expressed at a decentralized level (Hartley, 1993: 214-218). It addresses, therefore, the underlying concerns about shared sovereignty that have been a strong motivation for opposing greater European integration. Subsidiarity has become a defining constitutional principle of the European Union and has been cited as contributing to the process of legal integration and harmonization that had previously been perceived as frustrating to achieve (Edwards, 1996: 38-79).

Germany offers a good example of the effect of federalism on legal subsidiarity. The German *länder* have acquired increased influence and even constitutional authority over the country's European Union policy as a consequence of this principle. This authority includes the necessity of obtaining the approval of the *länder* for future delegation of German sovereign authority to the European Union (Baun, 1998: 329-346). In fact, the *länder* have used this leverage in constitutional negotiations with the German federal government, providing reinforcement to their sovereign position within that country (Rogoff, 1999: 415-455). Given the emphasis of subsidiarity on the legal norms and rules as they exist at the most local level, the evaluation of North America's federal systems based on their institutional rigor and degree of centralization is particularly pertinent. However, the success of the European approach in this area does not necessarily provide a model for success in terms of North America, especially given other differences between the two continents in this respect and the uncertain future of North American cooperation in general (Duina, 2007: 63-100).

It can be argued that Canada's federal system is best suited to take advantage of a North American legal system based upon subsidiarity, especially as it has been demonstrated within the model of the European Union. It has been noted that subsidiarity relies on a process of sovereign cooperation within a system that is both

strong and flexible (Kohler, 1993: 613-615; Schaefer, 1991: 681-687). It could be argued that the combined federal traits of institutional rigor and relative decentralization that Canada possesses reflects those conditions very well. Thus these characteristics could enhance the Canadian federal system's capacity to take advantage of subsidiarity as a legal principle in support of greater continental legal harmonization.

The more centralized federal systems of Mexico and the United States might have greater difficulty in adapting to a principle of legal subsidiarity. Indeed, it has been noted that the strongly centralized U.S. federal system could be regarded as reflecting, if not the anti-thesis of subsidiarity, then, at least, a federal system that is widely incompatible with this legal principle (Bermann, 1994: 403-447). The emphasis on delegating increased responsibility (if not actual sovereignty) upon the Mexican states (especially during the late 1990s), on the other hand, might indicate a future willingness on the part of Mexico to be more adaptive in this respect. For now, though, subsidiarity does not seem to be especially compatible with the goal of greater continental harmonization in terms of the Mexican federal system.

## NORTH AMERICAN FEDERALISM AND LEGAL INTEGRATION

The process of legal harmonization and integration in North America can pose different potential consequences and opportunities, depending on the characteristics of that system within the respective federal systems. For Mexico, the strong central government that also possesses sovereign authority over key areas of the country's economic and social system as a whole can impose a vision that has been negotiated between it and its continental partners. However, the practical result can be laws that are difficult to apply, not only because they may be unpopular in certain parts of the country, but also because they have not been instituted in a way that takes into account the local conditions and other criteria that affect practical implementation. Continental legal integration could be more easily imposed but also could result in ineffective or even counterproductive implementation.<sup>4</sup>

For the United States, practical centralization also makes it easier for the federal government to negotiate and impose legal changes in support of regional integration. However, the more rigorous status of the federal system itself creates conditions

<sup>4</sup> Suggestions that this traditional condition of Mexican federalism could be changing as the result of administrative and political accommodations (particularly in relation to economic issues such as NAFTA) nonetheless have recognized that this change depends upon the central government's willingness to "let go," given the institutional advantage of its sovereign position within the Mexican federal system, as acknowledged in Ward and Rodriguez, 1999: 673-710.

that permit the various states to intervene in the practical implementation and application of this process of legal harmonization, especially at an institutional level. That factor also would affect enforcement, which could be key to the ultimate effectiveness of laws attempting to create a continental standard within important legal areas, especially –but not exclusively– from a regulatory perspective. Furthermore, that realization may help explain the initial lack of vigorous objections to NAFTA among most U.S. state governments (Weiler, 1994: 113-133).

For Canada, the rigorously structured federal system, combined with the practical decentralization that control over resources and other assets provide, seemingly would make the process of legal harmonization and integration much more difficult to achieve. Interestingly, though, the most economically dominant Canadian provinces also are the ones that have generally been most supportive of NAFTA and continental integration. The political and economic willingness of the governments of Ontario, Quebec, and Alberta to engage in this process might facilitate, rather than frustrate, this overall goal. That support has not been consistent, and its implications in terms of federalism offer interesting insights into this overall theme (Abelson and Lusztig, 1996: 681-698). However, it also would require more substantial internal negotiations between the central Canadian government and its provinces (a process of intergovernmental federalism that has been increasingly developed during the past few decades) in order to reach specific agreement in terms of many of these legal reforms (Choudhry, 2002: 163-252).

## CONCLUSION

Ultimately and, perhaps, counter-intuitively, federalism can enhance the process of legal harmonization and integration, despite the fact that shared sovereignty might appear to be a source of potential frustration in that respect. By compelling greater internal debate over the precise vision of a continental union, a country with a strong, decentralized federal constitutional order could engage in a more thorough and thoughtful process of determining the precise needs and nature of a legal system that transcends, yet accounts for, local and national conditions, values, and requirements. It is structurally more conducive to the introduction of a legal principle such as subsidiarity, which has made German federalism a useful model for the process of European confederation (Heuglin, 2000: 147-150). Meanwhile, a institutionally less rigorous and more centralized federal system can be more easily and speedily imposed, but those conditions also could lead to a legal integration that takes into account a centralized vision, limited to dominant and perhaps less responsive inter-

nal forces, that is not conducive to accommodating the needs and desires of a local population, perhaps exacerbating internal divisions within that country, especially among differently situated subunits.<sup>5</sup>

Of the three North American federal systems, Canada might have the best model for success in relation to future continental cooperation. Comparisons with the relative success of the German federal system and its relationship to the European Union (especially in terms of the subsidiarity principle) provide potential insights. However, the strong contrasts between the two continents must be taken into account. In terms of North America, these partners are in "uncharted territory." It is impossible, therefore, to make specific predictions concerning the particular effect or course of future legal negotiation and implementation. But the German example and the nature of Canadian federalism in relation to theories of federalism suggest that a strengthening of federal institutions and, perhaps, a trend toward decentralization (perhaps through voluntarily loosening constraints and a greater willingness to involve the sovereign subunits, especially within Mexico and the United States) could potentially be helpful. However, that success will depend on other factors, including political will. Those factors include the need for the respective governments to restructure their institutions and political approaches in order to adapt to the potential future of a North American community (Pastor, 2001: 147-170).

Granted, a strong and decentralized federal system also could pose an obstacle to efficient negotiation at the international level, especially when based on fearful and parochial objections, rather than being open to a bolder and broader vision for the future. Therefore, federal systems, such as the principal partners of a North American union, need to consider these potential difficulties and opportunities as they engage in a process of developing and adapting legal norms and practices that will harmonize and integrate the law within the specific areas that will be most affected by that process, especially in matters of law concerning trade, labor, commerce, intellectual property, family relations, and the regulatory implementation of a broader, more cooperative continental vision.

The fact that Mexico has a relatively highly centralized and institutionally weak federal system may make it easier to negotiate future legal agreements with its continental neighbors. But it could also undermine practical implementation, especially by ignoring the real difficulties of regional and local feelings of alienation. Meanwhile,

<sup>5</sup> It has been argued that the influence of "new federalism" policies and the revival of constitutional jurisprudence relating to the Eleventh Amendment of the United States Constitution has provided increasing scope for U.S. states to challenge the treaty-making authority of the U.S. federal government in areas that impinge upon sovereign state authority, such as matters pertaining to criminal law and consular protections of foreign residents (Swaine, 2003, 403-533). However, the actual potential of that sort of challenge has proven to be extremely limited.

the fact that Canada has a relatively decentralized and institutionally strong federal system could make initial legal negotiation and institutional implementation more difficult. But it could also enhance a sense of legal legitimacy for those arrangements that could strengthen its practical effectiveness. Like Germany within the European Union, that integration of federalism within this legal process could have a very positive overall effect on the laws and institutions it produces. Again, therefore, the presence of federalism could actually enhance the process of legal harmonization and integration within North America, even though it also could pose certain institutional hurdles that would need to be negotiated along the way.

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