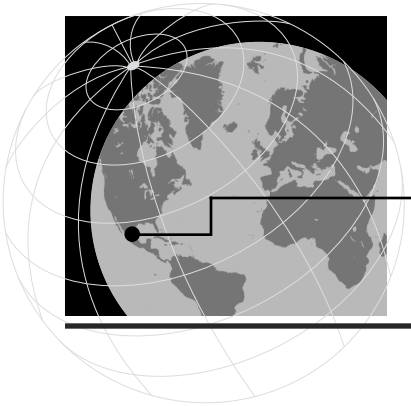


Will Vicente Fox *be able to* breathe new life *into* Mexican federalism?

BY *YEMILE MIZRAHI*

For seventy-one years one political party, the Partido Revolucionario Institucional (PRI) exercised a virtual monopoly of political power in Mexico and rendered the country's formally federalist institutions essentially inoperable. State governors became agents of the federal executive and were accountable to the President of the Republic, not to their own constituencies. Governors, in turn, exerted an enormous discretionary power over their local governments.

The victory of Vicente Fox, candidate of the Partido Acción Nacional (PAN) in July, signals more than just a change of administration. It is potentially a change of regime.

Under the PRI real competition for power did take place, but was conducted inside the Party and outside of public view. Political discipline was maintained by a vertical pyramid of power, at the top of which was the office of the President.

With the strengthening of the opposition over the past fifteen years—and particularly as a result of the victory of opposition parties at the state and local levels—the foundations of this regime began to crumble.

Non-PRI state and local officials found little reason to obey the federal government. They began to challenge the centralized structure of power and pressed for an effective decentralization of economic resources and decision-making power. And the call for an "authentic federalism" became one of the PAN's political rallying cries.

So, it 's not surprising that as Vicente Fox prepares to take office, federalism has become a critical issue in the new government's agenda.

Subsidiarity, Coca-Cola, and Guanajuato State

Fox's emphasis on federalism derives in great part from the PAN's commitment to the principle of subsidiarity. This doctrine holds that the federal government should intervene in the political and economic life of states and municipalities only to the extent that the latter cannot accomplish things by themselves. The federal government should not substitute for but rather enable lower levels of government.

Municipal governments, being the closest to society, should thus undertake as many responsibilities as they can. Similarly, the state governments should be able to undertake as many functions as they can, and the federal government should intervene only in those areas that go beyond the state's capacities.

Fox's pro-federalist stance also stems from his own business experience. As president of Coca Cola (in Mexico), he found that spreading functions and responsibilities throughout the organization increased administrative efficiency and efficacy.

Now Fox seems to want to use federalism as a means for generating the incentives to spur economic development—by allowing governments to deliver public services more efficiently and by affording state and local governments the opportunity to pursue development policies appropriate to their regions.

Most significant for Fox's approach to federalism is his experience as Governor of Guanajuato State (1995–1999). During his term as Governor Fox gave local governments the resources and the decision-making authority to plan and pay for their own public works. Municipal governments, controlled by the three main political parties, acquired new responsibilities for planning and exercising the budget. And Fox insisted new spending capacities be linked to mechanisms that allowed for the participation of civil society. In fact, public works projects had to be approved by representatives of civil society in each municipality.

In addition Fox realized that if he was going to devolve spending responsibilities to the municipal level he had to make sure that municipal authorities had the administrative skills necessary to take on those responsibilities. So, during his term as governor, Fox put in practice a program to train municipal authorities in planning and administering their budgets, and in working in tandem with organized groups in the community, including many NGOs.

'Czar' of federalism?

With the experience of Guanajuato in mind, President-elect Fox appears to continue to believe that a strong federal system is a necessary part of renewed democracy in Mexico. You can see this commitment to federalism in the very structure of his new administration. Fox intends to create a new "office of federalism" which will be in charge of coordinating inter-governmental affairs. The head of this new office will become like a "Czar" of federalism, and will have a special position in the administration, close to the president and above the cabinet.

Fox has a person in mind for this new job, Carlos Gasden, somebody who has been deeply involved in promoting federalism in Mexico in recent years. Gasden organized a national conference on federalism a few years ago and worked for the state of Guanajuato coordinating relations between

municipalities and the state government. Most recently he has been working on a doctoral thesis on federalism at Essex University in Britain.

The new "office of federalism" will cut across all levels of the federal bureaucracy. Each government ministry will have to become sensitive to the issue of federalism and will have to work with this new office. Moreover, the "office of federalism" will play a critical role in the redefining the functions and capacities of the three levels of government. It will be responsible for compiling reliable information about government performance and analyzing and evaluating the results of government actions and policies at all levels.

The challenges ahead

Many people in Mexico are skeptical that this new office will be able to work efficiently in practice—that it will be able to work together with all the different federal bureaucracies and with the state and municipal governments.

Indeed, when it comes to making federalism work in Mexico there are many challenges.

First and foremost, the commitment to federalism implies the redefinition of inter-governmental relations.

Formally, the Constitution still grants enormous discretionary powers to the federal executive. Limiting these powers and devising a new pattern for the distribution of power between the federal, state, and local authorities would require a series of Constitutional amendments. And if Fox were to want to amend the constitution he would need the consent of Congress where his party does not have a majority, a fact that complicates the matter.

Second, if Fox wants to make federalism work he will have to create an institutional infrastructure to enhance state and local governments' capacities to undertake their new functions and responsibilities. Without improving state and municipal governments' administrative capacities, and without creating the institutional mechanisms to ensure that those governments are accountable to the citizens, the federalist project could lead to the irresponsible management of resources and to the strengthening of traditional and authoritarian local power groups.

Third (and related to the prior point), as President, Fox will have to share power with many governors who come from the ranks of the PRI and who might not be too willing to collaborate with the new administration. Many members of Fox's team fear that strengthening the power of State governors could be politically dangerous for Fox and the PAN.

On the one hand, the PRI governors could use their power to sabotage and oppose the federal administration. And on the other, they could use their newly enhanced resources in, to coin a term, "clientelistic" ways. Simply put, they could enrich and empower their own bases without much regard for general good.

The challenge for Fox is thus to create new mechanisms of accountability for state governments and try to ensure that decentralization of resources and decision-making doesn't have the opposite of the intended effect.

Going around the state governments?

One strategy that is very popular in Fox's camp is the idea of working through the local governments—traditionally the most neglected levels of government. Municipal governments have been regarded by most observers as the ultimate victims of centralization, since they have been subjected both to the state and the federal governments. Empowering local governments can become a means of circumventing the state governments, particularly in those cases where the state government is controlled by a governor opposed to the president.

Ironically, this strategy would have centralizing effects. Federalism, after all—or at least Mexican federalism—implies a pact between the state governments and the federal governments.

Moreover, empowering municipal governments could become politically explosive in states like Chiapas, where rebel groups have been clamoring for greater political autonomy, including the right to be ruled according to their own traditions and customs. Doing that could deprive some people living in those areas of basic human rights and freedoms provided in the Mexican Constitution.

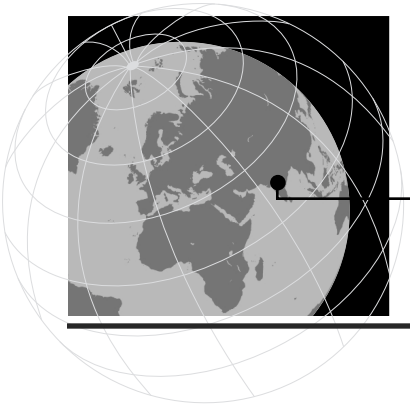
Finally, there is the question of the inherent resistance of Mexican society to increased decentralization and federalization. Although most people at all levels of public administration pay lip service to federalism, there are definite political roadblocks to rapid decentralization in Mexico.

Education and health, for example, are the sectors that have undergone the most profound process of decentralization, to date. Yet still, enormous decision-making power remains in control of the federal government. Many governors in fact complain that the federalization of education has in reality meant the deconcentration of the administration, rather than an effective decentralization of decision-making capacity. Most important decisions are still taken at the national level. Salaries, curricula, textbooks, and the relationship with the teachers' union, one of the strongest and best organized unions in the country, all remain in the national government's domain.

What all this means is that for the new Fox administration, making federalism work effectively will require more than a doctrinal commitment.

It will entail fundamentally redefining institutions to ensure that the increasing responsibilities and prerogatives given to states and local governments are accompanied by mechanisms to hold public officials accountable for their actions.

Federalism with irresponsible and unaccountable local and state officials could mean going back to where history began in contemporary Mexico: a fractious country led by local and regional political chieftains—or, as we call them in Mexico, "caciques".



Sharing *the* wealth *and* federalism *in* India

BY *PRAN CHOPRA*

Federalism in India has taken on a new tone. The states are behaving in a much more assertive manner than they have historically. Especially on fiscal matters, they're not happy to automatically accept decisions taken at the centre.

This became obvious last July when the Finance Commission (see box) gave out its 'awards' to the various states. Part of the role of this supposedly impartial body is to redress the inequalities between the richer and poorer states. But neither rich nor poor states are entirely content with their allotments.

The richer states argue are that they are, effectively, being 'punished' for doing a better job of developing their resources.

The poorer complain they haven't been given enough to allow them to catch up.

And then there are the border states, who say they need more cash to pay for the extra expenditures they must make to defend the country's borders.

This level of dissatisfaction is quite new in Indian federal relations. But what it represents is less a reflection on the Finance Commission's decisions than a shift in the political balance between the centre and the states.

The causes of the shift go back much further than the current Finance Commission. In fact, the emergence today of this level of discontent indicates how far and fast federal politics have moved under the impact of the most basic drive in Indian politics: the intensely participatory processes of the world's most pluralistic mass democracy.

The days of the single-party state

From 1947 to the mid-1960s India was, to all intents and purposes, a single-party state. The electorate may have been divided into numerous linguistic, religious, and geographic entities. But only a few of them were politically developed enough to have formed political parties of their own. And in very few cases were these parties in the majority position (whether at the local or state level).

Even in those rare cases the Congress Party had some presence—because it was the party that had led the freedom movement and had the most revered national leaders, such as Mahatma Gandhi and Nehru. The Congress was in an absolute majority in quite a few states and local governments; it was the largest single party in many, and at least a minority in most.

Aside from these natural advantages the Congress was immensely aided by India's first-past-the-post electoral system, under which a party can win a seat even with only, say, a third of the vote—if the opposing two-thirds vote is scattered over three parties or more. Though the Congress rarely polled more than about forty per cent of the vote, its share of seats rarely fell below sixty per cent.

The Indian Finance Commission *is composed of five members, most of them economic and financial experts. It is appointed by the President every five years, and the present commission is the eleventh since 1947.*

The Commission draws its authority directly from the Constitution, not from the governments of the day, whether at the federal centre or in the constituent states. Its principal mandate is to award their shares to the governments at both levels, and also among the states, out of the proceeds of a number of constitutionally specified federal taxes and excise duties. It also determines how much extra assistance should be diverted to the resource-poor states, naturally at some cost to the better off, to help them improve their resources—what in a number of other federations is called equalization grants.

The total amounts of transfers to the states the Finance Commission handles are sometimes smaller than those transfers handled by the Planning Commission. Both draw only upon the resources of the federal government for transfers to the states. The federal government is obliged by the Constitution to share the proceeds of certain taxes according to a fixed formula specified in the Constitution and distributed on the recommendation of the Finance Commission. But the additional amount the federal government may give a state through the Planning Commission is discretionary and depends upon how it views the state's "Five Years Plan", though distribution among the states is according to certain principles which have evolved over the years.

The terms of reference of each Finance Commission are drawn up by the federal government, but it draws up its own criteria for apportioning shares of the centre, the states, and different of groups of states defined by its view of their needs. Technically, its recommendations are only advisory, but because of its origins and the status it has acquired through its competence and impartiality, they have never been questioned in the past.

For just short of two decades Congress remained in power in this way in a majority of the states—and at the federal centre for three decades. This had a powerful centralizing effect on the federal system. The Congress headquarters, known as the "central high command" could persuade many states to fall in line with its own agenda and policies on matters that are in the domain of the states under the Constitution.

The centre also had another constitutional lever—and a particularly tough one—against states ruled by other parties. The Indian Constitution gives the centre the power to oblige state governments to do or desist from doing specified things and to dismiss them if they fail to comply. This power is meant to be used only in certain emergency situations. But so long as it was in hegemonic power the Congress felt bold enough to misuse it, distressingly often, against non-Congress parties. (In fairness, it should be noted that non-Congress governments at the centre have, in more recent times, done the same to Congress state governments).

Constitutional remedies for such abuses were frequently debated but were found to be difficult to formulate without ending the use of this extraordinary power—even in circumstances where it might be needed (and most parties agree such circumstances could exist).

The regions begin to affirm themselves

But then democracy began to do what democracy does. It gave political tongue to the many entities, and the opportunity to diverse regional parties to consolidate their own clientele behind them sufficiently to defeat Congress. As early as 1957, one of them became large enough to form the world's first democratically elected communist government (Kerala State). By the mid-1960s many states had passed into non-Congress rule. And the centre did so for the first time in 1977.

For the past quarter century Indian politics has been characterized by the alternation between parties, at the centre as well as in the states. Today the federal centre is ruled by an alliance formed by almost a score of non-Congress parties. Many of them are also in power in one or another of the two dozen states. The Congress is in power in only three states. The BJP, a party of a marked Hindu orientation (that it is now trying to broaden its appeal to liberal Hindus and non-Hindus) rules in two states and is the lead element in the central coalition. Left wing coalitions rule three. And thirteen states are ruled by parties or combinations which are not in power in any other state—though some are partners in the central government or alliance.

In the electorate as whole, which now numbers more than six hundred million registered voters, the political empowerment of the lower and poorer strata of society has considerably increased. This has led to the most widespread shift of political power anywhere by democratic means—for all that it is incomplete as yet.

The concentration of power in the hands of the federal government is now considerably reduced, in large part because the federal governing coalition's survival now depends upon continued support from state-based political parties.

The current situation

What is happening to the present Finance Commission is a part of that process. So is the rejection by the states of a proposal by the federal government early this September that it should have wider powers to send military forces to the states.

Also, in the month of September the states flexed their muscles by demanding that they should have more say in the appointment of state governors. What principally motivated the states is the fact that the dismissal of a state government in the manner described earlier requires a recommendation to this effect by the governor of the state.

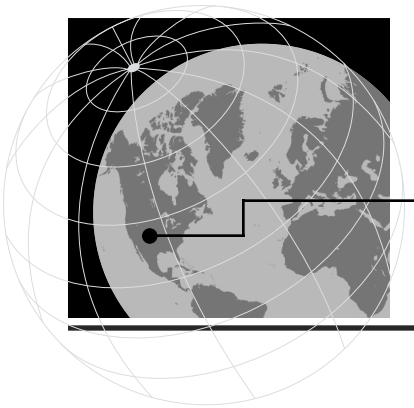
In parallel to these changes at the upper levels of the federal structure there have been new developments at the grass-roots level. A few years ago two unanimous amendments to the Constitution created elected legislative and executive bodies for towns and villages, with their powers and economic resources defined in the Constitution itself. Each state now has to institute an internal finance commission for the division of resources between the state and sub-state levels.

These major political and constitutional changes have brought with them their own new challenges. The main one is that the unending multiplication of parties has produced some side-effects. First it has fragmented the electorate, and aggravated the defects of the first-past-the-post system. Second, governments get formed which do not have a majority in the house and survive only because their opponents cannot get together, or are kept from doing so through the governments' leverages. Third, governments can fall too easily, even when those who combine opportunistically to bring them down are known to disagree on the alternatives. This has caused serious instabilities in the executive processes of governance and in the continuity of policies.

A serious debate is now taking place on remedies—in public as well as within the recently appointed (and first ever) Constitution Review Commission. Among the suggestions: that a candidate should be declared elected only when he or she has polled at least half the votes plus one, if necessary through a run off election open only to the leader and runner up in the first round.

Another idea the Review Commission is considering would be that a government should be sworn in only when it has won at least half the votes plus one in the legislature—and a government should be replaced only when an alternative wins the vote in the same way.

In the meantime, or so the hope goes, the town and village level third tier of democracy will have imparted sufficient political education to the vast multitude of voters to help them vote only for reliable and stable candidates, parties, and governments.



Presidential politics *and the* future *of the* U.S. Supreme Court

BY *JOHN KINCAID*

The United States Supreme Court is rarely an election issue, but the next president—Republican George Bush or Democrat Al Gore—will have opportunities to nominate new justices, possibly four. One will surely be Hispanic, the Court's first. Hence, future federalism rulings will be shaped by the party that wins the White House and the party that wins the U.S. Senate in November. (The president nominates candidates for the nine-member Court; the Senate confirms or rejects them.)

Why the controversy?

The Court is a hot issue because it has voided some popular federal laws. Opponents of the state-friendly rulings believe that the Court's "conservative majority" ("The Federalism Five"—Kennedy, O'Connor, Rehnquist, Scalia, and Thomas) is building precedents to curtail many federal civil-rights and social-welfare laws. Feminists, especially, fear that Bush justices would overturn the Court's 1973 abortion-rights decision, *Roe v. Wade*.

The Court's behavior is new and unusually assertive. From 1937 to the mid-1990s, the justices routinely deferred to congressional and presidential interpretations of federal constitutional powers. Indeed, virtually all of the Court's new state-friendly rulings have been five–four decisions. One new justice could tip the Court back toward favoring national power.

Why the Court became more state-friendly during the 1990s is debatable. The change is due partly to conservative justices appointed by Republican presidents who wanted the U.S. Constitution interpreted narrowly. Liberals had long led the Court into broad interpretations that expanded national power and transformed American society. But public opinion has changed too. The federal government, once the most trustworthy, is now trusted the least—behind local governments (trusted most) and state governments.

Additionally, the Court's 1973 abortion ruling galvanized into political action evangelical Protestants and Roman Catholic traditionalists. This Christian Right views the Court as an enemy of traditional values and the true Constitution.

By the 1980s, conservatives had also constructed more effective political and legal organizations to challenge liberals, thus escalating the "culture wars" that agitate American politics. Given the federal Constitution's sacred status for Americans, politics often rises to constitutional heights, enticing or dragging the U.S. Supreme Court into the fray. Hence, in the world's most litigious society, conservatives now litigate as aggressively as liberals.

Essentially, since 1990, the U.S. Supreme Court has revived seven constitutional limits on federal power.

State republican autonomy

The opening salvo came in 1991. The Court ruled that the federal Age Discrimination Act did not preempt (i.e., displace) the Missouri Constitution's requirement that state judges retire by age 70. The decision was based on the U.S. Constitution's Tenth Amendment and on a little-used clause, which states: "The United States shall guarantee to every State in this Union a Republican [i.e., democratic] Form of Government." The authority of the people of Missouri to enact a constitutional retirement age for their judges is, reasoned the Court, basic to republican government. Although narrow and uncontroversial, the ruling signaled readiness to curtail federal expansions of individual rights viewed as secondary to the self-governing rights of the peoples of the states.

State reserved-powers protection

The Tenth Amendment, ratified in 1791, reserves to the states, or the people, all powers not delegated to the federal government. The Court had abandoned this amendment in 1941 and, again, in 1985, advising states to protect their autonomy through the national political process, not through appeals for Tenth-Amendment judicial relief.

In 1992, however, the Court declared unconstitutional a provision of a 1985 federal Low-Level Radioactive Waste act, which required states to dispose of such waste in prescribed ways by 1996 or face civil liability. Even though the act exemplified "cooperative federalism" because it resulted from negotiations between state governors and Congress, the Court held that governors lack Tenth-Amendment authority to surrender state sovereignty to Congress and, thereby, sell out the republican citizenship rights of state taxpayers (*New York v. United States*).

Through the Tenth Amendment, which has informed most of the Court's federalism decisions, the majority has resurrected the 19th-century doctrine of "dual sovereignty," namely, that the federal and state governments possess separate and independent constitutional sovereignty and that neither can invade the other's sovereignty.

State protection against federal conscription

In *New York*, and then *Printz v. United States* (1997), the Court prohibited Congress from commandeering state and local officials to execute federal law. The Court voided a provision of the 1993 Brady Act that required local law-enforcement officers to conduct background checks of handgun buyers until the federal government established its own system. State and local officials can cooperate voluntarily (and most did), opined the Court, but Congress cannot compel cooperation.

State protection against the federal commerce power

More surprising was *United States v. Lopez* (1995). For the first time since 1936, the Court voided a statute as unconstitutionally exceeding Congress's power to regulate interstate commerce. The majority struck down the 1990 Gun-Free Schools Zones Act, which made it a federal crime to possess a gun within 1000 feet of a school. (Education is overwhelmingly state-local, and 41 states already had gun-free schools laws in 1990.) Congress had reasoned that possessing a gun near a school—whether or not it is used, displayed, or obtained via interstate commerce—disrupts schooling. Because education is vital to the economy, Congress can wield its commerce power to regulate or criminalize disruptive behavior in schools.

No, said the Court. Such broad interpretations would convert Congress's commerce power into "a general police power of the sort retained by the States." Indeed, when asked, federal officials could cite no human activity that Congress could not regulate under its elastic definition of interstate commerce.

State protection as laboratories of democracy

In 1997, the Court refused to recognize physician-assisted suicide as a national right under the 14th Amendment to the U.S. Constitution, thus upholding 49 state bans on such suicide. Allowing the states to decide whether physician-assisted suicide is a right, the Court opined: there is "no reason to think the democratic process [in the states] will not strike the proper balance." In 1998, Oregon became the first state to permit physician-assisted suicide.

Ruling otherwise, the Court would have ignited a political firestorm, intensifying the national conflagration still burning from its 1973 pro-abortion decision. One rationale for federalism is to prevent national firestorms by diffusing divisive cultural conflicts across the constituent units. Americans disagree about abortion, suicide in all forms, capital punishment (permitted in 38 states), homosexuality, and the like.

State protection against 14th amendment overreach

Under the 14th Amendment (1868), no state can "deprive any person of life, liberty, or property, without due process of law; nor deny to any person...equal protection of the laws." Congress can enforce this amendment, which was ratified after the Civil War to protect free southern blacks from state retribution. Since 1931, the amendment has been used to vastly expand individual rights for all persons and to protect them against state infringement.

In 1997, however, the Court limited Congress's 14th Amendment reach by striking down the 1993 Religious Freedom Restoration Act (RFRA) and declaring itself the final arbiter of the Constitution. A mission-style church located in an historic preservation zone had sued Boerne, Texas, under RFRA because the city had denied it a permit to enlarge its edifice. The Court ruled against the church, calling RFRA a "considerable intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."

State sovereign-immunity protection

The 11th Amendment (1798) was ratified to protect the sovereign states from being sued in federal courts without their consent. But the Court has long allowed Congress to abrogate this amendment in order to regulate commerce and protect individual rights. In 1996, however, the Court rejuvenated state "sovereign immunity" by ruling that the Seminole Tribe could not sue Florida for allegedly violating the federal Indian Gaming Regulatory Act. In 1999, it ruled that state government employees cannot sue their state in either federal court or state court under the 1938 Fair Labor Standards Act. Such suits, argued the majority, burden "the States' ability to govern in accordance with the will of their citizens."

Most controversial was a May 2000 that voided a provision of the 1994 Violence Against Women Act (VAWA), which allowed women to sue alleged assailants in federal court (even if assailants had not been charged or convicted of any offense in state court). Congress based the VAWA on its 14th Amendment and commerce powers, arguing that states are lax in protecting women and that gender-motivated violence harms the nation's economy.

The Court ruled that Congress had again stretched "interstate commerce" beyond reason, overreached the 14th Amendment, and invaded the states' sovereign police power in ways that threatened to obliterate "the Framers' carefully crafted balance of power between the States and the National Government."

The ruling is controversial because it invites challenges to many federal civil-rights, social-welfare, labor, and environmental laws—laws enforced by federally granted citizen rights to sue states, corporations, and individuals.

* * *

The U.S. Supreme Court has erected a beaver dam but not yet a Hoover Dam against federal power. All rulings have not limited Congress; some have limited the states. In June 2000, for example, the Court unanimously struck down a Massachusetts' economic sanctions law aimed at Burma.

Thus federalism, usually a MEGO (my eyes glaze over) issue, again animates American national, state, and local politics.

Canada's native peoples fight *for* self-government *on* many fronts

BY *TERRY GLAVIN*

On the morning of September 14, 2000, a solemn but happy ceremony was conducted in Gitlaxt'aamiks, a small village in the Nass Valley in the northwest corner of British Columbia, on Canada's west coast. The event was held on the occasion of the official opening of Wilpsi'ayuukhl Nisga'a, the legislative building of the new aboriginal government of the 6,000-member Nisga'a nation.

Meanwhile, several thousand kilometres away, on the east coast of Canada, a sometimes-violent dispute continued to inflame tensions between the Mi'kmaq people of Burnt Church, New Brunswick, and their non-native neighbours. Houses have been burned, boats rammed, and fisheries officers pelted with rocks over the question of whether treaties negotiated in 1760 and 1761 afford the Mi'kmaq the right to govern the conduct of their own lobster fishery.

Although the events in Gitlaxt'aamiks and at Burnt Church are a study in contrasts, both mark milestones in an emotional debate that continues to raise vexing constitutional and political questions in Canada. Where do aboriginal governments fit, exactly, as institutions of Canadian federalism? Are they mere creatures of federal statute, or do they arise from inherent, constitutionally-protected aboriginal rights? Are they subservient to provincial governments, or are they equal?

These questions are being answered, increasingly, by Canada's courts.

A right to self-government ?

The new Nisga'a government is certainly not without controversy. Although it arises from a modern-day treaty, which enjoys broad public support in Canada, several of its aspects—and to some, the very fact self-government was included in it at all—remain politically contentious.

The Nisga'a treaty itself is the first such arrangement concluded in British Columbia since the former British colony became a Canadian province in 1871. The treaty was approved by the government of British Columbia last year, and Canada's federal government, after a 1999 House of Commons vote of 217 to 48 formally ushered it into law on May 11 this year. The treaty eliminates the Nisga'a Indian reserves, sets out amounts of land to be held by the Nisga'a in common, allocates access to natural resources, and provides a cash settlement along with measures to extend tax laws to Nisga'a individuals and businesses. But it is the treaty's self-government provisions that have attracted the most heated criticism.

The nineteenth-century act of the British Parliament (the British North America, or BNA, Act) that forms the essential core of the Canadian Constitution assigns jurisdiction over what were then referred to as "Indians" to the federal government. The BNA Act makes no reference to anything resembling a right of aboriginal peoples to self-government.

But the Nisga'a treaty sets out a complete self-government regime. In specific areas of jurisdiction, such as Nisga'a culture and education, the Nisga'a power to legislate is paramount. In most areas of jurisdiction, however, Nisga'a laws are to be consistent with, and answerable to, the laws of Canada and British Columbia. The Nisga'a are entitled to pass laws with respect to Nisga'a citizenship, the regulation of land use, the protection of children, and so on, but Nisga'a law applies only to Nisga'a people, on Nisga'a lands.

Spurred on by "one law for all" and "no special rights" rhetoric, British Columbia's official opposition party has campaigned against the Nisga'a treaty and has challenged its self-government arrangements in the courts. The fallout from the rumpus has severely hobbled the work of treaty making in British Columbia, where no other treaties have been concluded, and where bitter disputes over access to natural resources are commonplace as a result. The self-government provisions of the Nisga'a treaty were hoped to be a model for similar treaties, but that prospect is now in doubt.

An "empty box"

One might have thought, at the advent of the 21st century, that Canada would have been long past divisive constitutional and legal arguments about the scope and extent of aboriginal self-government rights. But the place aboriginal self-government occupies within Canadian federalism is burdened by a rather grim history.

The British North America Act established Canada as an independent nation state in 1867—and, as we pointed out earlier, gave responsibility for native people to the federal government. Within 20 years, the federal government had outlawed the "potlatch" system*, which was the heart of aboriginal systems of government on

* *Potlatches were at one and the same time ceremonies to mark important events and instruments of social and political organization for many of the aboriginal peoples of the Pacific coast. They took many forms and could involve singing, dancing, dramatic presentations and games. One of the most prominent features of many potlatches was the practice of extensive gift giving by the host to his/her invited guests.*

Canada's west coast. Indian bands were established in ways that made aboriginal people wards of the state, with the same rights as lunatics and children, and in 1927 Canada's aboriginal peoples were prohibited from raising money or retaining legal counsel to advance their rights to land, natural resources and self-government.

Most of these discriminatory laws were abolished in 1951, but the vote was denied to aboriginal people until 1960. When the federal government formally considered abolishing all forms of aboriginal status in 1969, many aboriginal communities in Canada were antagonized to the point of insurrection.

In 1982, Canada enacted an important series of amendments to the BNA Act (the Constitution Act of 1982) that included a charter of rights and a new formula for future constitutional amendments. This Act contained a clause recognizing aboriginal rights in a non-specific way and provided that aboriginal self-government be discussed at a series of subsequent federal-provincial conferences. These discussions produced no results, however, and the whole matter of aboriginal rights, particularly self-government rights, was left "an empty box" that the courts were expected to fill.

Confrontation and the courts

The 1990s began with a tragic confrontation between Quebec's Mohawks and the Canadian Armed Forces, and the decade was marred by several bitter disputes between aboriginal societies and Canada's federal and provincial governments.

Meanwhile, Canada's courts have been busy, although reluctantly so, with the work of filling the "empty box" of aboriginal rights recognized and affirmed by the 1982 Constitution Act. As for aboriginal self-government rights, Canada's courts are increasingly finding that despite the exhaustive assignment of jurisdictions between Canada's federal and provincial governments in the old BNA Act, and despite the absence of an explicit recognition of aboriginal self-government in the 1982 Constitution Act, self-government is still an aboriginal right.

The courts are also finding that self-government is in fact a meaningful and enforceable form of government within Canadian federalism, and that this has always been so. For instance, in 1867, in a decision handed down by a Quebec Superior Court judge when Canada was only eight days old, an Indian woman was found to be fully entitled to claim community of property under the laws of Quebec as a result of a marriage entered into according to customary law of the Cree tribe. And throughout the 20th century, several court rulings—mainly in the federally administered Northwest Territories—recognized and enforced aboriginal laws governing marriage and adoption. In fact, federal courts have ruled that certain actions taken by Indian band councils need be subject only to the customary laws of the aboriginal communities they represent.

An "inherent" right

In a 1993 case in British Columbia adoptions by aboriginal customary laws were found to be as valid as adoptions by conventional civil law, and in 1997, the Supreme Court of Canada ruled, in a case known as Delgamuukw Versus the Queen—now the leading aboriginal rights case in Canada—that an aboriginal community's right to its lands "encompasses within it a right to choose to what ends a piece of land can be put."

Meanwhile, several provincial governments have conceded the existence of aboriginal self-government rights, at least as a matter of policy. And in 1995, the current federal government stated that it recognized aboriginal self-government as a matter of law, describing an inherent right to self-government as being "an existing aboriginal right under section 35 of the Constitution Act, 1982."

But the road ahead is by no means certain, and difficult questions remain.

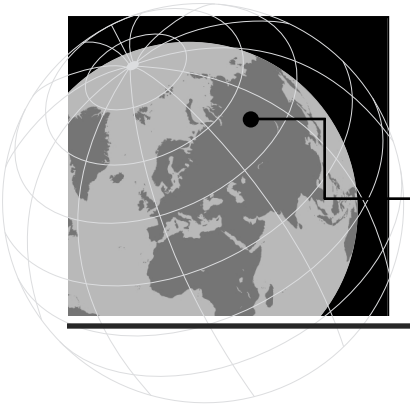
In September 1999, the Supreme Court of Canada ruled that treaties negotiated between the Crown and the Mi'kmaq people in 1760 and 1761 gave rise to a contemporary Mi'kmaq right to fish in pursuit of a "moderate livelihood." The judges subsequently clarified their decision to make it plain that Mi'kmaq fishing rights were in no way absolute, and the federal authority to regulate the lobster fishery was still very much intact.

But the main point of contention between the federal government and Mi'kmaqs of Burnt Church is the extent of the federal government's authority to make decisions about the Mi'kmaq fishery that go beyond simple regulation for conservation purposes.

The Mi'kmaq issue is by no means insoluble. Canadian courts have been consistently adamant that such matters should be negotiated, rather than litigated, and negotiations continue. Still, it appears that for the foreseeable future, Canada's judges will continue to play a reluctant role in sorting out the place aboriginal governments occupy within Canadian federalism.

As for the Nisga'a, the limited self-government powers in the treaty they recently signed have not provoked violent standoffs or stone-throwing. In the villages, life has not changed—people still hunt, fish, and struggle to find jobs. But the Nisga'a are busy establishing their own courts, mapping out economic initiatives, and planning a future in which the decisions they make will not depend upon whims of far-away politicians.

There is an undeniably upbeat mood in the Nass Valley, which comes from what Nisga'a chief Joe Gosnell says is the Nisga'a people having "become full partners in the Canadian federation."



Vladimir Putin reinvents Russian federalism

BY *ANDREI ZAGORODNIKOV*

When President Putin came to office he found that even though the constitution of the Russian Federation invested him with enormous power on paper, he could not use it effectively. As he tried to put his programs into effect, he discovered that the Parliament maintained the power to block many of his key initiatives.

Ironically, the present Russian Constitution—which was promulgated in 1993 during Boris Yeltsin's presidency—concentrates power in the Presidency.

But, as President, Boris Yeltsin essentially 'gave' the heads of the regional governments a great deal of power that was not constitutionally theirs. In many cases these power-sharing arrangements were based on personal understandings between Yeltsin and the regional leaders.

The 1996 regional elections led to the rise of local legislative assemblies, which were mostly in opposition to the Kremlin. Many regions enacted constitutions that included articles in conflict with the Russian Federation constitution. That began what is sometimes referred to as a 'War of Laws'.

At the same time, the way federal subsidies to the regions were allocated generated much dissatisfaction. Regions were divided into "donors" and "recipients". The "recipients" received donations from the federal government as well as from the "donors". Observers say this system was awkward and worked ineffectively.

The role of the upper house

Another complicating factor for the practice of federalism in Russia was the increased power assumed by Russia's upper house of Parliament during Yeltsin's time. This is the Council of the Federation, the body designed in the 1993 constitution to be the Russian version of the German Bundesrat, or the senate in other federations.

The Council was composed of the heads of the executives of the regions (who have different titles depending on what type of constituent unit they lead—i.e., whether it is a Republic, autonomous territory, etc.) and the speakers or chairpersons of the regional legislative assemblies. All 89 constituent units were represented, giving the Council a membership of 178.

The Council of the Federation was designed to mediate between the regions and the centre. But during Yeltsin's time its role went beyond that. The leaders of the regions would negotiate particular arrangements for their regions there and the Council became the focus for many important decisions for the entire country.

So powerful did this body become that candidates for Prime Minister (including Mr. Putin) felt compelled to appeal to it for political support before seeking the constitutionally mandated approval of the directly elected lower chamber of Parliament (the State Duma).

And so—in part to increase the President's influence over Parliament, but also to enable the upper house to function more effectively—Putin got Parliament to pass a law that established new "guiding principles" for the Council of Federations.

The most important change was to the way members of the Council would be selected. No longer would the Council be made up of the heads of regional governments and the speakers of the legislatures. These ex-officio members would be replaced by full-time members, some of them chosen directly by the regional executives and the others elected by the assemblies of the constitutent units.

Too much centralized control?

To some, this change is problematic. They argue that the new members of the upper house will no longer have the capacity to act as honest brokers between the centre and the regions. They will be financed by funds from federal coffers and their housing, cars and other perks will be provided by the federal administration. Indeed this federal largesse might even include providing jobs for their family members.

Based permanently in Moscow and integrated into the Moscow power structure, the argument goes, members of the newly constituted Council could become isolated from the real needs of the regions.

And critics point out that this reform of the parliamentary upper house should be seen in connection with another significant reform Putin has initiated: the naming of seven plenipotentiary representatives of the President to deal with the 89 regions. Part of the job of these seven federal representatives will be to see to it that the laws and constitutions of the regions correspond to the laws and constitution of the Russian Federation.

Some critics argue that these initiatives taken together could be turning the Russian Federation into something that more closely resembles a centralized state.

Others point out that, since the fall of communism, many of the regional governments have been dominated by self-serving oligarchs. In addition,

a number of the regional government leaders were in the habit of devoting inordinate energy to political gamesmanship in Moscow—when they should have been seeing to the needs of their regions.

Putin's reforms, according to this view, serve to rationalize the federal system. They serve to encourage the governments of the regions to focus on the problems of their home territories. At the same time, they create deliberative bodies at the centre that can focus on the needs of the federation as a whole.

Putin's approach different from Yeltsin's

What is clear to everyone is that Putin is creating a system quite different from Yeltsin's—a system of balance and counterbalance. For instance, he has sought to increase the power and authority of the lower house of Parliament, the Duma. To cite one example: with President Putin's support the lower chamber has discussed taking over from the Council of the Federation the prerogative of appointing Constitutional Court judges and the Attorney General.

The Kremlin might consider that now that the question of reforming the upper house is settled it can turn its attention to the Duma—and that the lower house might pose less of a barrier to the exercise of presidential power.

This could be an illusion. The present Duma was elected during President Yeltsin's term. In the course of Putin's reforms the socio-economic situation in the country has changed. There is unrest in the parliamentary alliances, which are on the brink of break up. Under those circumstances the State Duma might become difficult to control.

But Putin seems to move in contradictory ways. On the one hand many of his policies seem to have the goal of moving power away from the regional leaders to the centre.

Then he re-established something called the "State Council", which some might say gives *greater* power to the regions.

The original State Council was the predecessor to the current Council of the Federation—an upper house of Parliament designed to be the voice of the regions at the centre. In its new incarnation, reinvented by Putin, the State Council is a consultative body whose aim is to co-ordinate the activities of the presidency and the upper house of Parliament. And the members of the State Council are those very same regional governors and other executive leaders whom Putin's reforms had ejected from the upper house.

Putin created this new body by Presidential edict so it has no constitutional status, and serves only to advise the President. But while only consultative, it could become very important. Observers see it becoming the body that drafts legislation and Presidential edicts, and that could formulate plans to reduce the territorial divisions of the Federation.

And so, in one sense, Putin has brought regional power right into the centre of the action.

Another way of looking at it, though, would be that the creation of the State Council is part of a process by which Putin is concentrating power in the presidency—since it only exists by virtue of the will of the President. Indeed, while the State Council will be able to offer advice, it is the President who will have the ultimate power of decision. Plus, of course, administratively and financially the State Council is completely a creature of the Kremlin.

There are those who argue that the ultimate plan is to have the State Council take upon itself some of the constitutional responsibilities of the upper house of Parliament. And some go so far as to suggest that the creation of this new body, in some ways, violates the principle of separation of powers.

What are the real goals of these reforms?

Does all this mean that Putin is creating a centralized structure with all power concentrated in the Kremlin? Not necessarily.

When one considers that over the past seven years a great many of the states have acted almost as though they were independent countries, Putin's strategy may seem not so much a power grab as a defense of the integrity of the Russian Federation. After all, among many examples of constituent unit governments going their merry way, we have:

- several states, such as Tyva, Tatarstan, Krasnodar and Daghestan signing international agreements and creating their own security forces;
- Bashkorstan recognizing the sovereignty of the breakaway Georgian territory of Abkhazia;
- Yakutia adopting English as its 'official' language;
- Buryatia, Karelia, Ossetia and several other constituent units passing laws giving themselves the right to declare a state of emergency at will;
- and Ingushetia legalizing polygamy.

Given all that, it's not hard to sympathize with a Russian President who might want to put some order and coherence into the practice of federal governance in the country.

But still, many in Russia argue that there could be a different way to approach the reform of federal structures in Russia. The government, they say, not the President, could become the centre of economic power. These same critics advocate that the power of the judiciary should be strengthened and that measures should be taken to insulate legislators from the corrupting influence of lobbyists.

The President's role, according to this view, should be that of guarantor of the Constitution. The President, they say, should see to it that any political crisis be solved peacefully by co-ordinating the interests of different federal elite and pressure groups—just as presidents of many other democratic countries do. Only when that is done, or so these critics say, will democratic federalism have found appropriate mechanisms in Russia.