

WHO'S AFRAID OF ASYMMETRICAL FEDERALISM ? – A SUMMARY DISCUSSION

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Foreword

The federal Liberal Party's 2004 general election platform heavily emphasized issues that are mainly subject to provincial competence under the constitution (e.g. health care, child care, cities). Since the federal government lacks the authority to implement detailed regulatory schemes in these areas, acting on these election commitments frequently requires federal-provincial-territorial (FPT) agreements.

A controversial question that arises when considering all intergovernmental agreements is whether they should treat all provinces and territories similarly or whether the agreements should be expected to differ from one province/territory to another. This issue of symmetry or asymmetry arises at two levels. The first is whether all provinces should be and should be viewed as "equal" in legal and constitutional terms. The second relates to the

Recently a group of experts at Queen's and the March on the use of employment insurance funds for parental leave. There is also the January 2005 agreement of the federal government to revise the funding arrangements for the two provinces of Nova Scotia and Newfoundland and Labrador covering offshore oil and gas revenue – and calls since then for new financial arrangements from the provincial governments of Saskatchewan, Ontario, New Brunswick, Quebec and British Columbia.

Do these special arrangements point to a major shift in favour of more asymmetrical federal-provincial relations? Why are they emerging now? Are such arrangements a good idea? What works and what doesn't in these approaches? In short, who's afraid of asymmetrical federalism? Drawing on the discussion held at Queen's and a range of views expressed recently on this development,³ this paper takes stock of the concept and its recent practice.

² The Royal Society of Canada and the Institute of

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Drawing Distinctions

Federalism is about the combination of unity and diversity. Federalism scholars have for years used the terms of symmetry and asymmetry to describe institutional arrangements in federations, or federal-type political associations such as the European Union. These arrangements are symmetrical when the entities becoming united or being governed by a federal or central government are treated identically in law or policy, asymmetrical when the constituent units of a federation are treated unequally or non-identically. Given that there is significant diversity among the units in all federations, it should not be surprising that asymmetry crops up in virtually all federal constitutions and in the continuing application of law and policy, to a lesser or greater degree.⁴ Thus federations often treat their constituent units differently (asymmetrically) in terms of legislative powers, rights and obligations, and how they are represented in central institutions. These amount to *de jure* asymmetrical features, i.e. provisions entrenched in constitutional law. More common, however, are *de facto* arrangements, not entrenched in constitutional law, but providing the application of fiscal arrangements and administrative devolution or

that redistribute income between individuals and regions. Put simply – no doubt too simply -- we have had a continuing tug of war between a vision of a more decentralized federation in which provincial autonomy is intact but with less commitment to national sharing, and more centralization in which the federal government develops and determines national norms and redistributes income. Between the two and often in a very uneasy compromise, has been asymmetrical federalism.

A History of Quebec and “Opting Out”

Some see asymmetrical federalism in the Canadian case as something just for Quebec. And this is exactly what is in the text of the statement attached to the 2004 first ministers health care agreement, entitled “Asymmetrical federalism that respects Quebec’s jurisdiction.” This agreement defines asymmetrical federalism as “flexible federalism that notably allows for the existence of special agreements and arrangements adapted to Quebec’s specificity”⁵. As Tom Kent reminded our symposium,⁶ it was this form of separate treatment for Quebec alone that was the innovation of the Pearson governments in 1963-68.

Three key developments illustrate the Pearson era approach to Quebec. First was a general devolution (“abatment”) of tax room to Quebec alone, consisting of 18 tax “points” in compensation to Quebec for going its own way in already established program areas such as hospital insurance, welfare and education. Thus Quebec opted out of the national cost-shared programs that were applied in all of the other provinces.

Second was the example of new national social programs such as student loans and youth allowances, where Quebec was allowed to

operate its own program (with considerable similarity to federal programs), and received the same sort of funding available to other provinces to participate.

Third was the case of contributory pension programs. In 1951 the federal government and all the provinces had agreed to a constitutional amendment providing for concurrent jurisdiction in this field, but with provincial paramountcy. This enabled the federal parliament to pass legislation in this field, but provincial legislation would prevail in the event of a conflict. Through this method, in 1965 all of the provinces but Quebec agreed to join the federal government’s Canada Pension Plan (CPP) scheme, while Quebec established its separate Quebec Pension Plan (QPP).

All three of these initiatives were designed as ways to preserve Quebec’s jurisdiction over important social program areas, while allowing cooperative schemes for national programs to proceed between the federal government and the other provinces. In each case the asymmetrical arrangement was embedded in, and part of a larger negotiated national scheme. These entailed at least a minimum of coordination and cooperation between Quebec, the federal government and the other provinces. For example, in the case of student loans, pensions, or hospital insurance, these arrangements maintained full portability of benefits when a resident of Quebec moved to another province or vice-versa. They were not merely bilateral deals. Moreover – and in contradiction to the often perceived notion – in none of these approaches did Quebec make any net fiscal gains. Thus, there were no additional financial resources to Quebec, just different ways of delivering federal funding. Yet they allowed Quebec to benefit from national redistribution without centralization of its jurisdiction.

Under the Trudeau governments, the federal government largely abandoned asymmetry in favour of Canada-wide rights and entitlements, reflective of Trudeau’s commitment to individual liberalism, a strong central government and opposition to Quebec nationalism. This move back to symmetry

⁵ For text of the agreement see the website <http://pm.gc.ca/>, and follow the links for “First Ministers Meetings” (accessed May 20, 2005).

⁶ Holding a variety of positions in the federal government, Tom Kent was Prime Minister Lester Pearson’s key political and policy advisor in 1963-66.

More significant perhaps are the longer-term reasons for a return to asymmetry. Three developments in Canadian politics and the evolution of our federalism point to increasing pressure for more asymmetry. First is the effect of economic globalization and continental economic integration on the traditional east-west integration in Canada. Rapidly increasing north-south trade and investment mean that the provincial and local governments must increasingly respond to competitive patterns that differ according to the region in question. Thus what makes sense for competitiveness –and therefore for tax, regulatory and social policy, in Ontario and the Great Lakes region, is going to be different than what works for the Atlantic Provinces and their competition in New England, or for British Columbia and its competition in the Pacific northwest, and so on. In other words, there is increasing asymmetry on the ground, leading to increasing asymmetry in policy responses among the provinces.⁸

Second, is the increasing tolerance for asymmetry –or more accurately perhaps, flexible devolution -- in the practice of governance more generally. In most policy fields centralized norms and procedures imposed on citizens and lower levels of governments have been discredited.⁹ Instead there is the effort to “open coordination”, of learning from diverse solutions, of realizing that one size does not fit all. Some may see this as merely decentralization in another guise, but in reality it is a response that implicates the federal government significantly to ensure that *national* policy goals are articulated, that national policy coordination occurs, but allowing considerable flexibility in how those objectives are met.

imposing limits on what could be achieved by way of *de facto* asymmetry.

Finally, there is another driver, if not of asymmetry for Quebec as such, then for the bilateralism of recent months. And that is the continuing fiscal situation faced by the provinces and territories, with chronic deficits in many provinces, and the continuing budgetary surplus in Ottawa. The debate over what has been termed “vertical fiscal imbalance” – increasing disparity between provincial revenues and their spending responsibilities, is well beyond our scope here.¹¹ However, several in our group recognized that the fiscal conditions faced by most if not all provinces has increased the incentives –in the absence of more comprehensive fiscal reform -- to cut their own deals with the cash-rich federal government. Of course since the mid-1990s the provinces have indeed sought that more comprehensive reform. And since December 2003, their efforts have been more effectively coordinated through the new Council of the Federation. While in some respects just a repackaging of the Annual Premiers Conference, the Council nonetheless has seen some major accomplishments, in particular the health care accord of last September. The bilateral negotiations on the offshore revenues took place outside the new Council, and underscores that interprovincial consensus can only go so far in meeting specific regional needs. However, if the Council continues to build on recent multilateral negotiations on fiscal matters, it can do a great deal to discipline the need for, and influence the result of such separate bilateral deals.

How much asymmetry is feasible?

There is considerable conceptual and empirical room for asymmetry in Canada, especially in light of the variety and depth of such arrangements in other federal systems. We already have, as noted above, the specific *de jure*

asymmetrical features from 1867 onwards. Also, and intriguingly, our constitutional provisions for asymmetry include section 94 of the Constitution Act of 1867 inviting the legislatures of the majority English-speaking provinces to unify their laws on property and civil rights, and on court procedure, essentially opting in to federal control. In a sense this is the obverse side of the coin of any special status or asymmetrical treatment for Quebec alone – that it allows the other provinces to proceed with centralization or standardization more in keeping with their notions of a Canadian nation-building process. However, section 94 has never been taken up. The fact that it has not been used speaks to the will among the other provinces to resist such centralization. In any case, it is confined to the one area of civil law and property rights. Still, the existence of the provision could form the basis in the future of a more comprehensive “opting in” version of asymmetry in Canada.¹²

To attempt to change the constitution to add more *de jure* asymmetrical features seems a risky proposition at best. Canadians remain deeply divided over the issue of differential recognition, particularly where the connotation is one of granting privilege, or where citizen entitlements are deemed to be at stake.¹³ They recognize that federal-provincial flexibility is a good thing, but shrink at any connotation of unequal rights or status.

In the view of one of our participants, what killed the continuation of the Pearson-era asymmetry for Quebec was the perceived desire of Quebec to have its cake and eat it too: to have both more power in Quebec and more say in Ottawa. In the 1960s, francophone Quebecers promoted “french power” in a then-anglophone dominated Ottawa, but some Canadians think that increased asymmetry with respect to Quebec should mean less, not more influence in the federal government. This is the case for

¹¹ See Harvey Lazar and France St-Hilaire and Jean-Francois Tremblay (2004) “Vertical Fiscal Imbalance: Myth or Reality?” in Lazar and St-Hilaire eds. *Money, Politics and Health Care: Reconstructing the Federal-Provincial Partnership* (Montreal: IRPP).

¹² On this concept see articles in the IIGR series by each of Guy LaForest, David Milne and Joceyln McClure.

¹³ For more detailed analysis on public opinion see the article by Leslie Seidle and Gail Bishop in the IIGR series.

example, with the more recent practice in the European Union where member states that do not wish to go as far with integration as other members, pay the price in terms of reduced decision-making authority over those aspects of integration. Thus the United Kingdom which remains outside the monetary union, does not participate directly in joint decisions about monetary matters.¹⁴

To date our asymmetrical arrangements have not extended to differential participation in central decision-making in the federal parliament. Having Quebec MPs participate in decisions on the CPP, for example, may in fact contribute to the integration of the QPP and CPP. In any case, few people seem to have a problem with the idea that measures specific to a particular region or province are continuously deliberated upon in the federal parliament by MPs from all provinces and regions. And they know that members vote more along party lines than regional lines in any case.

The decision-making issue aside, the Canadian public will likely support more

common entitlement. Delivering on that vision in terms other than empty platitudes is, of course, a tall order.

Where To From Here...?

In the short term, what happens to asymmetrical federalism is highly dependent on federal electoral politics. As this article is written, the Martin government has survived the votes on its 2005 budget bills, and pundits are predicting that it will stay in office at least until an election early in 2006. This provides more time for Canadians to judge the relative merits of the Liberal approach to an alternative Conservative government under Stephen Harper. This electoral contest is unlikely to hinge on asymmetrical federalism, but the latter is not irrelevant either.

As noted above, asymmetrical federalism in a general sense is a compromise between centralist and decentralist federalism. Its merits are based on the relative merits of the two approaches.

support for asymmetrical approaches provided that they are transparent, coherent and pragmatic. However, there seems much less support for grand, symbolic initiatives, at least in the near term. Similarly, flexible deal making is an acceptable device in Canadian federalism, but beware regional jealousies lying underneath the surface. Such flexibility is clearly in the eye of the beholder: what is perceived in one quarter as a fair adaptation to special circumstances will be seen in another as unfair privilege. What is really needed is a lot more perspective all-round. The concept of asymmetrical federation, like many aspects of our federalism, will continue to be contested. For all its awkwardness, it is a phrase that has entered our political lexicon, and can provide a further foundation for federal stability.

Appendix

“Asymmetrical Federalism: Is reviving an Old Idea Good for Canada?”, A symposium sponsored by the Royal Society of Canada, held at the Institute of Intergovernmental Relations, Queen’s University, May 12, 2005.

List of Participants:

Marc-Antoine Adam, Government of Quebec
Keith Banting, Queen’s University
Kathy Brock, Queen’s University
Douglas Brown, Queen’s University
Sean Conway, Queen’s University
Tom Courchene, Queen’s University
Patrick Fafard, Government of Canada
Roger Gibbins, Canada West Foundation
Gordon Gibson, Fraser Institute
Tom Kent, Queen’s University
José Lalande, Royal Society of Canada
Harvey Lazar, Queen’s University
Jean Leclair, Université de Montréal
Peter Leslie, Queen’s University
Christian Leuprecht, Queen’s University
John McGarry, Queen’s University
John Meisel, Queen’s University
Gilles Paquet, Royal Society of Canada
Richard Simeon, University of Toronto
Jennifer Smith, Dalhousie University
Hamish Telford, University College of the Fraser Valley
Ronald Watts, Queen’s University
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