

## A COMPARATIVE PERSPECTIVE ON ASYMMETRY IN FEDERATIONS

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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 political and administrative level and the intergovernmental agreements it generates. When should Canadians expect all provinces/territories to be treated similarly in these agreements and when should difference be the rule?

Given this political context, it is timely to reconsider the factors that are relevant to the issue of symmetry and asymmetry. We are doing this by publishing a series of short commentaries over the first half of 2005. These papers will explore the different dimensions of this issue- the historical, the philosophical, the practical, the comparative (how other federations deal with asymmetrical pressures), and the empirical. We do this in the hope that the series will help improve the quality of public deliberation on this issue.

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### INTRODUCTION:

Discussions of asymmetry within the Canadian Federation often assume that Canada represents a departure from the norm exhibited by federations elsewhere. In practice, however, there have been a considerable number of federal systems elsewhere in which there have been asymmetrical constitutional and policy arrangements relating to the status and authority of the constituent units. These have been the result of fundamental variations among their constituent units in the intensity of their relative desires for noncentralization. In addition to Canada, significant examples provided by federations today are Belgium (1993), Germany (1949), India (1950), Malaysia (1963), Russia (1993), and Spain (1978). Nor has asymmetry among constituent units been confined to federations. The European Union, fundamentally a confederation, but with some features more typical of federations, has incorporated elements of 'variable geometry' and of integration at 'variable speeds'. Recent arrangements for devolution and decentralization within a number of unitary systems such as the United Kingdom and Italy have also exhibited significant asymmetry. An issue in all these regimes, therefore, is whether such arrangements contribute to or undermine internal harmony and effectiveness.

Because in three of the classical federations, the United States (1789), Switzerland (1848), and Australia (1901), the states and cantons were assigned basically symmetrical constitutional status and authority, the literature on federal systems traditionally assumed such symmetry to be the norm within federations. But some forty years ago, an American scholar, Charles D. Tarlton, wrote an insightful essay in which he pointed out that when we turn our attention away from formal constitutional-legal relationships, then it is clear that cultural, economic, social and political factors in combination have in all federations produced asymmetrical variations in the power and influence of different constituent units, and that these affect the degree of harmony or disunity

within federal systems.<sup>1</sup> More recently, within the past decade, the issue of asymmetrical relationships within federations has attracted considerable attention from scholars and there is a burgeoning literature on this subject.<sup>2</sup>

### CONCEPTUAL ISSUES:

At the outset, to contribute to clear thinking on the subject, we need to be clear about some conceptual issues.

First, there is the definition of asymmetry in federal systems. 'Federal symmetry' refers to the uniformity among member states in the pattern of their relationships within a federal system. 'Asymmetry' in a federal system, therefore,

occurs where there is a differentiation in the degrees of autonomy and power among the constituent units.

A number of distinctions are relevant. The first is to distinguish between the *conditions* (historical, economic, social, ethnic and cultural) that have led to asymmetry in a number of federations, especially multi-ethnic ones, and the actual relations between governments, i.e. *outcomes*. A second distinction is that between *de jure* and *de facto* asymmetry. The former refers to asymmetry embedded in constitutional and legal processes, where constituent units are treated differently under the law. The latter, *de facto* asymmetry, refers to the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation, and as Tarlton noted is typical of relations within virtually all federations. *De jure* asymmetry may refer to relations among full-fledged constituent units, to differences between full-fledged constituent units and peripheral constituent units (e.g. territories, federacies and associated states), and may be transitional (i.e. eventual uniformity achieved at 'varying speeds') or permanent (i.e. viewed as 'variable geometry').

*De jure* asymmetry within federal systems may be exhibited in a number of dimensions. *De jure* asymmetry may be embodied in constitutional provisions or in differential intergovernmental policies and formal agreements. There may be variations in the territorial size, population and wealth of the constituent units as defined by the constitution, thus affecting their relative power and influence. The relative autonomy, jurisdiction and powers of units may differ. The allocation of fiscal resources and financial transfers the constituent units may vary. The member states may not be equally represented in the federal institutions such as the federal second legislative chamber. Other *de jure* forms of asymmetry may occur in the relative powers of the different member states in the constitutional amendment processes, in the application of minority rights within different constituent units, and in the form and structure of the constitutions of the member states.

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<sup>1</sup> Charles D. Tarlton, "Symmetry and Asymmetry as Elements of Federalism", *Journal of Politics* 27 (1965): pp. 861-874.

<sup>2</sup> See for instance, Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987); B. de Villiers, ed., *Evaluating Federal Systems* (Cape Town: Juta & Co., and Dordrecht: Martinus Nijhoff Publishers, 1994); H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996); S. Henders, "Cantonisation: Historical Paths to Territorial Autonomy for Regional Cultural Communities" in *Nations and Nationalism*, 3, 4, December 1997; R. Lapidot, *Autonomy: Flexible Solutions in Ethnic Conflicts* (Washington, D.C. United States Institute of Peace Press, 1997); D.T. Ramos *O Federalismo Assimétrico* (Sao Paulo: Editora Plaviada, 1998); Enric Fossas and Ferrar Requejo (eds.), *Asimetría Federal y Estado Plurinacional* (Madrid: Editorial Trotta, 1999); Robert Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States* (Baden-Baden: Nomos Verlagsgesellschaft, 1999); R.L. Watts, *Comparing Federal Systems*, 2<sup>nd</sup> ed. (Montreal & Kingston: McGill-Queen's Press, 1999), ch. 6; Y. Ghai, "Constitutional Asymmetries: Communal Representation, Federalism and Cultural Autonomy" in A. Reynolds (ed.), *The Architecture of Democracy* (Oxford: OUP, 2001); R.L. Watts, "Asymmetrical Decentralization: Functional or Dysfunctional; *Indian Journal of Federalism*, (2004, pp.1-42); John McGarry "Asymmetrical Federalism and the Plurinational State," working draft paper for the 3<sup>rd</sup> International Conference on Federalism, Brussels, 3-5 March 2005 ([www.federalism2005.be](http://www.federalism2005.be)).

Since the issue of permanent *de jure* asymmetry among the full-fledged provinces has been one of the major sources of contention within the Canadian federation, both during the three decades of mega-constitutional politics from the mid-1960s to the mid-1990s, and most recently over the arrangements relating to Quebec in the federal-provincial agreement on health policy and funding, this article focuses on the extent to which *de jure* constitutional and political asymmetry has been exhibited in other federations, particularly in relation to delineating constituent units, the relative autonomy and powers of different constituent units, differences in fiscal power and transfers, and variations in representation in federal institutions.

#### **DE JURE ASYMMETRY OF FULLY-FLEDGED CONSTITUENT UNITS:**

This section reviews different kinds of *de jure* asymmetry within federal and decentralized political systems elsewhere.

##### **(1) Delineating the constituent units:**

In many federations, especially those created by the aggregation of previously existing political units, the historical bases and traditions of the member states are so deeply rooted that the resulting *de facto* asymmetry in population, territory and wealth is simply taken as a given not susceptible to adjustment by constitutional alteration of their boundaries. Nevertheless, in some federations, usually those created by a devolution process, and in decentralized unitary systems where the constituent units have derived their authority from the central government, there have been efforts to adjust the number and size and the boundaries of existing units. The objective has been either to moderate the degree of *de facto* asymmetry among the constituent units or to recognize distinct groups by creating more asymmetrical units. In the Canadian context, this is an issue relevant to the recurring proposals for union of the Atlantic provinces.

In two federations, India and Nigeria, adjusting regional boundaries has been done on a major scale. In India the landmarks of this process were the integration and consolidation of the princely states at the time of their

accession 1947-50, the reorganization of most of the state boundaries along linguistic lines and the reduction in the constitutional categories of states and territories from four to two in 1956, and beginning with Nagaland in 1962, the subsequent creation of a number of small full-fledged states representing distinct populations. While the reorganization of states in 1956 represented a reduction *de jure* in the asymmetry of the member states, the subsequent creation of a number of very small states has in fact increased the degree of *de jure* asymmetry. In Nigeria, the unbalanced three region structure which existed until the early 1960s has been progressively modified by constitutional amendments creating four regions in 1967, 12 states in 1968, 19 in 1976, 21 in 1987, 30 in 1991, and currently 36 states and one federal capital territory. The motivation has been to represent more precisely ethnic concentrations and at the same time to create a greater symmetry in the relative size of the constituent units. There are several other federal systems where the constituent units have been reshaped. One is Germany during the early years of the West German Republic and in East Germany at the time of reunification. In Belgium, the federalization process of the period 1970-93 included the delineation of asymmetrical constituent units: the Flemish, Walloon and Brussels Regions and the Flemish, French and German Communities. In Switzerland, there was the creation of the new canton of Jura out of one of the largest cantons, Bern, in 1978. Most recently, South Africa in the 1990s reconstituted its provincial structure into nine provinces. In all these cases the reduction or increase of asymmetry among the constituent units has been the *de jure* product of constitutional revision.

##### **(2) Relative autonomy, jurisdiction and powers of constituent units:**

In many federations the formal constitutional distribution of legislative and executive jurisdiction applies to all the full-fledged member states. Nevertheless, there are a number of instances where the constitution has explicitly provided for *de jure* asymmetry in the jurisdiction assigned to full-fledged regional units. These have aimed at recognizing significant variations relating to geographic size,

population and economic situation (i.e. they have been capacity-driven) or relating to their particular social and cultural composition (i.e. they have been driven by differing pressures for autonomy). These examples have a relevance to Canadian debates on such issues.

There have been basically two approaches for establishing *de jure* asymmetry in the distribution of powers within federal systems. One has been to increase from the norm the jurisdiction of particular member states. The most sustained example of this approach has been the concessions made to the two Borneo states, Sabah and Sarwak, when they joined the Malaysian federation in 1963. Certain matters which elsewhere in the federation were matters of federal jurisdiction become matters of exclusive state or concurrent jurisdiction in these two states. In India there have been similar adjustments to *de jure* jurisdiction applied to some of the newer small states that have contained distinct ethnic groups. Within Belgium, *de jure* asymmetry results from the recognition of two different kinds of constituent units having distinctly different jurisdictions. The three territorial Regional Councils deal largely with economic matters, while the three non-territorial Community Councils are responsible for primarily cultural and social matters including education. Asymmetry is further accentuated by the combination of the Regional and Community Councils in Flanders, and by special provisions governing Brussels as a Region.

A second approach found in constitutional provisions or formal intergovernmental agreements has been to retain a formal symmetry for all member states in the allocation of autonomy or jurisdiction but to embody within that framework provisions available to all states that enable an optional asymmetrical exercise of those powers. This has often been the approach in Canada through the use of 'opting out' provisions. The recent health arrangements relating to Quebec provide another example. In Spain within a general constitutional framework for the jurisdiction of Autonomous Communities, there is provision for recognizing variations in the pressures for autonomy in

different regions by making available to each Autonomous Community its own Statute of Autonomy. These are tailored to the particular set of compromises negotiated between Madrid and the regional leadership. During the Yeltsin period in the Russian Federation, within a formally symmetrical constitutional framework, over 40 of the 89 component units concluded bilateral treaties with the federal government providing for differences in legislative and executive powers. President Putin has attempted to reduce the resulting complexity by revoking many of these treaties, however.

Among examples of confederal and decentralized unitary systems, a number have exhibited *de jure* asymmetry in the jurisdiction assigned to the constituent units. The European Union (EU) in negotiating the accession of each new member has often had to make some particular concessions. In addition, in order to get agreement on the adoption of the Maastricht Treaty, the EU found it necessary to accept a measure of asymmetry in the full application of the treaty, most notably in the cases of the United Kingdom and Denmark. Furthermore, the establishment of the European Monetary Union has not included all the members of the EU.

Among decentralized unitary systems both Italy and the United Kingdom have been marked by jurisdictional asymmetry. In Italy there is the asymmetry between the 17 ordinary regions and the 5 special regions. Within the United Kingdom following devolution in 1998, the asymmetry of jurisdiction is even more radical. The elected assemblies in Scotland, Wales and Northern Ireland each have different legislative responsibilities and legislation for England, with no elected assembly, is totally in the hands of Westminster.

Another aspect of *de jure* asymmetry has occurred where there is provision for different systems of law within particular constituent units. A classic example is Quebec's distinct civil law whereas the other nine Canadian provinces have legal systems based on common law. But this is not unique. Similar situations have arisen in some Asian and African federations where there are provisions to

recognize different religious customary or traditional law in some constituent units. The role of *sharia* law in some Nigerian states is one example.

**(3) Asymmetry of financial arrangements:**

An important factor influencing the powers and autonomy that member states in a federation are able to exercise is the *de jure* constitutional allocation of taxing powers and financial transfers. As the extensive literature on fiscal federalism has invariably emphasized, where there is an initial *de jure* symmetry in the constitutional allocation of taxing powers and financial resources, the result has been sharp variations in the wealth and fiscal capacities of the different member states. Consequently, in most federal systems there have been efforts to reduce the corrosive impact upon unity of such disparities and to enhance federal cohesion by systematic formal schemes for redistribution and equalization of resources among member states. Thus, paradoxically, *de jure* asymmetric systems of intergovernmental financial transfers have been employed to make the *de facto* financial capacities of the member states less asymmetrical. Examples of formal overall equalization schemes exist in virtually all contemporary federations except the United States, and even there the same objectives have been embodied in many of the separate federal grant-in-aid programs.

Where there is asymmetry in the *de jure* allocation of jurisdiction among the constituent units, in some federations there has also been an asymmetrical *de jure* allocation of taxing powers and revenue sources to match the differences among regional units in their responsibilities. A striking example is Spain, where there is a 'special regime of financing' for Basque and Navarra, and a quite different one for the other 15 Autonomous Communities. Furthermore, within this latter category are three sub-categories where the scope and character of the financial transfers is varied to fit different levels of legislative and administrative responsibility.

**(4) Representation of member states in federal institutions**

The federal legislature in most federal systems is bicameral with one chamber based on representation by population and the other based upon representation of the governments, legislatures or populations of the constituent units. Experience elsewhere of the composition, method of selection and powers of the second chamber is relevant to the proposals advanced in Canada for a 'Triple-E Senate'.

Often cited in Canada are the examples of the Senates of the United States and Australia where the member states are equally represented. Other federations with symmetrical representation of the constituent units in their federal second chambers are Argentina, Brazil, Mexico (partially), Russia, Nigeria and South Africa. But Canada is by no means unique among federations in representing the provinces or states asymmetrically in the federal second chamber. In Switzerland, of the 26 cantons, six are classified as half-cantons and have only one, instead of two, representatives in the Council of States. In Germany, different Länder have 3, 4, 5 or 6 votes in the Bundesrat. In India and Austria the variation in representation of states is even greater. Nor is there equality of constituent unit representation in Spain or Belgium. In Malaysia states are equally represented in terms of members elected by the state legislatures, but the large number of additional central appointed members (who constitute 58 percent of the total membership) has not been distributed equally among the states, thus leading overall to considerable asymmetry in the representation of individual states within the federal second chamber. In summary, it would appear that among federal systems there have been many departures from the principle of *de jure* symmetry in the representation of member states in the federal second chamber, although most have attempted to counterbalance the influence of the larger units by some weighting in the representation to favour the smaller constituent units.

## **FEDERAL ASYMMETRY AND POLITICAL COHESION:**

Given the numerous examples of *de jure* constitutional and political asymmetry in federations noted above, this raises the question whether such arrangements have contributed to or undermined political cohesion. Have they been functional or dysfunctional?

There are examples of successes where asymmetrical arrangements developed to accommodate political diversity, different capacities, and varying intensities of desires for autonomy have contributed to political legitimacy and stability. The presumption that symmetry invariably promotes harmony and that asymmetry always produces discord in federations and decentralized unions does not seem to have been borne out in practice.

There are a number of examples of asymmetrical successes. In the European federations such as Belgium, Germany (since reunification) and Spain (although nominally not a federation, in most practical respects it possesses the major characteristics of a federations) techniques of constitutional or political asymmetry have been put to good effect although not always without strains. In India, for all its problems arising from its size and complexity, the use of asymmetry has enabled it for over half a century to accommodate its internal diversities, especially through the creation of the smaller states composed of minorities, although its success in the Punjab and Jammu and Kashmir is still open to question. In Malaysia, the constitutional asymmetry applied to the two Borneo states, Sabah and Sarawak, with their distinct populations, has been successful for over four decades in reconciling the differences between them and the states on the Malayan peninsula. In the cases of the European Union, the United Kingdom and Italy, recent accentuations of internal asymmetry seem to have moderated rather than exacerbated differences and pressures for independence. In all these cases, asymmetrical constitutional and political arrangements appear to have made possible the accommodation of deep diversity that could not

otherwise be reconciled within a symmetrical organization.

Against these examples of successes must be set other less encouraging examples. Here the pathology of federations and unions draws attention to such cases as the disintegration of federations in the West Indies (1962), Rhodesia and Nyasaland (1963), Yugoslavia (1991) and the USSR (1991), to the splitting of Pakistan (1971) and Czechoslovakia (1992), to the expulsion of Singapore from the Malaysian Federation (1965), and to the civil war in Nigeria (1967-70) followed by alternating periods of civilian and military rule. In all these cases the existence of significant asymmetries were major contributing factors, although there were also other relevant factors.

It is also worth noting that in some cases such as Canada, Spain and Russia, pressures for constitutional asymmetry have induced counterpressures for constitutional symmetry. In these instances, the tension between resultant opposing pressures for greater asymmetry and for greater symmetry has itself become a major element in the political dynamics of the federal system.

Nevertheless, it is worth noting that many cases of secession or breakdown in federations have been the result of efforts to impose symmetry in situations where there has been deep diversity.<sup>3</sup> Furthermore, while lessons can be learned from the examples of failures and the problems of particular kinds of asymmetry, it is also noteworthy that some federations have found that in their particular circumstances, the only way to accommodate sharply differential pressures for autonomy and to maintain the federation or union has been to incorporate some permanent constitutional or political asymmetry in the relationship of the constituent units to the polity. The most notable such cases have been India, Malaysia, Belgium and Canada. Furthermore, in some cases such as Spain and the European Union, constitutional asymmetry has proved useful as a transitional arrangement accommodating regions at different stages of

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<sup>3</sup> Y. Ghai, *op. cit.*

political economic development by proceeding to eventually greater symmetry at 'varying speeds'. Thus, in spite of the increased complexity and risk of provoking counterpressures for symmetry, it appears that in a significant number of federations and unions, the recognition of constitutional and political asymmetry has in fact provided a way of accommodating major differences between constituent units that otherwise would not have been possible.