

## BEYOND RECOGNITION AND ASYMMETRY

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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.

Harvey Lazar  
Director

The language and practice of asymmetry is *one* tool for coping with Canada's deep diversity. It is not, however, the only one. And at this juncture of Canadian politics, I want to argue, it may not be the most appropriate one.

The language of asymmetrical federalism is commonly thought to imply that powers and jurisdictions are distributed in a differentiated, non identical way amongst the provinces. Although the September 2004 federal-Quebec health care side deal has prompted much of the recent discussions of asymmetrical federalism, the side deal itself cannot straightforwardly be seen as an illustration of asymmetrical federalism. As health is a provincial jurisdiction, no "special power" has been handed to Quebec. The side deal only entails that Quebec will, within the parameters of the *Canada Health Act* and of the September agreement on health care, decide on its own means for achieving common objectives and report to Quebecers directly. The side deal can be understood in terms of "policy asymmetry". But "policy asymmetry" is the norm rather than the exception in a federal system; the whole point of a federation (multinational or not) is to allow the federated states to design and implements the policies and programs that most effectively address the specific challenges that confront them. The 1991 Ottawa-Quebec agreement on immigration, which confers on Quebec the prerogative of selecting its immigrants while leaving the constitution intact (since immigration is a shared jurisdiction), is a good example of policy asymmetry.

As far as I can tell (being neither a political scientist nor a constitutionalist), "asymmetrical federalism" is usually understood in terms of "constitutional asymmetry", i.e. a differentiated distribution of powers and jurisdictions amongst the provinces. Allowing and entrenching special representation to Quebec on the international scene would be an example of constitutional asymmetry. Granting a veto power to Quebec on constitutional changes that affects the way it conducts its own affairs or recognizing Quebec as a distinct society within the Constitution would be particularly strong embodiments of such an

understanding of asymmetrical federalism (unless a similar veto was granted to other provinces or regions).

While there can be sound moral and pragmatic reasons for supporting asymmetrical federalism in Canada, the principled case against the differentiated distribution of sovereignty that underlies it is easily understandable. As Alexis de Tocqueville, amongst others, has shown, the modern citizen is, generally speaking, viscerally repulsed by *formal* inequality. The modern norm of democratic equality, that stemmed out of a struggle against pre-established and institutionalized social hierarchies, seems to command that all, regardless of their class, culture, gender and religion, are equal (i.e. identical) before the law. In Canada, the “trudeauist refoundation” of Canada (based on equal individual rights and provincial equality) reinforced this already deeply ingrained uniform notion of equality.<sup>1</sup> From such a vantage point, equality entails symmetry. As a consequence, talks about “asymmetrical federalism”, “differentiated citizenship”, “special rights”, and “distinct society” usually shipwreck against this uniform notion of equality (equality=symmetry). Now, given that background reluctance against a more differentiated conception of equality, is asymmetrical federalism (constitutional asymmetry) a necessary tool for accommodating Quebec’s demand for political autonomy? In present-day context, I see no reason why. To be sure, I think that trying to squeeze Quebec within the Trudeauist Canadian box is both morally unfair and politically unwise. But I would argue that the accommodation of Quebec’s current political mode of being need not be channelled through asymmetrical federalism. An increase in policy, institutional and jurisdictional asymmetry might very well be the outcome of such an

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<sup>1</sup> As Alan Cairns opines, in a rather dramatic tone, “the Charter is not playing around with the externals of our existence. Over time, the cumulative results of its application will reach deeply into our innermost being, manipulating our psyche and transforming our self-image”. Alan Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, D.E. Williams (ed.), Toronto, McClelland & Stewart, 1991, 62.

accommodation, but accommodation does not absolutely *require* asymmetrical federalism.

The crux of the matter, for contemporary Quebec, is to find political room to manoeuvre to further its collective (social, economic, cultural) development. This implies, in some cases, rebutting the federal government’s readiness to intervene within provincial jurisdictions through its spending power and, in other cases, negotiating special arrangements; as the side deal exemplifies, the opting out with full financial compensation approach is usually favoured by both sovereigntist and non-sovereigntist governments. Now, I see no principled reason why the special agreements negotiated with Quebec should not also be an option to the other provinces, an option to which they may (or may not) choose to avail themselves. The practical outcome of such a flexible approach to intergovernmental relationships might very well be asymmetrical federalism, as the provinces’ needs and ends vary, but there is no reason why it *ought* to be the outcome. If this is so, Quebec’s interests lie not in asymmetrical federalism *per se*, but in a flexible, functional and accommodating model of federalism.

Having said that, one can see why Quebec nationalists (sovereigntists and non-sovereigntists alike) have inflated and still inflate the language of asymmetry. Had the language of asymmetry imposed itself as the dominant language of description of Canadian federalism since 1867 as well as the guiding norm regulating its institutionalization, a strong form of symbolic and political recognition would have been *de facto* and *de jure* provided to Quebec. Recognition is the key word here. For up until maybe the 1990s, Quebec put forward what Charles Taylor calls a politics of recognition: whereas Quebec federalists demanded the recognition of Quebec as a “distinct society”, sovereigntists invoked the *non-* recognition of Quebec as a distinct nation as a moral argument in favour of independence. In hindsight, one can understand why the issue of recognition was of crucial import for sovereigntists and non-sovereigntists alike. To cut a long story short, up to the Quiet Revolution Quebec was something akin to an internal colony within the Canadian

federation. (Even Pierre Trudeau recognized the subordination of Quebec in his pre-politically active life.) Accordingly, in the 1960s many intellectuals cast Quebec nationalism in the then-in-vogue language of decolonisation and liberation. To simplify, and metaphorically speaking, we were then caught up in an intricate Hegelian master-slave dialectic according to which the identities (forms of self-awareness) of both the master and the slave were at least partly conditioned by the unequal framework of mutual recognition that was in place. Under these conditions, for the slave, liberation entails the modification of its own form of self-consciousness which, in turn, seems to require a modification of the way the slave is recognized by the master. Hence Quebec's struggle for *recognition*.<sup>2</sup>

But Quebec never gained constitutional recognition of its distinct status and identity. If we stay within the Hegelian theory of recognition, we cannot but think that Quebec's sense of self must still be damaged by this failure of recognition. But Quebec nonetheless went through a process of collective empowerment (the Quiet Revolution) that is, in many respects, still underway today. Moving to a more Nietzschean perspective—i.e. a perspective centred upon the importance of action (“the deed is everything”) and upon the value of the activity of *struggling for*, we could reasonably conjecture that Quebec indirectly changed its sense of self through, and as a result of, the very process of empowerment associated with the Quiet Revolution. If this is so, we cannot think any longer that the constitutional recognition of Quebec's distinct status is a necessary precondition for a strong Quebec identity.<sup>3</sup>

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<sup>2</sup> See, generally, Charles Taylor, “The Politics of Recognition”, In *Multiculturalism. Examining the Politics of Recognition*, edited by Amy Gutmann, Princeton, Princeton University Press, 1994.

<sup>3</sup> For this approach to contemporary Quebec, see, generally, Jocelyn Maclure, *Quebec Identity. The Challenge of Pluralism*, Montreal, McGill-Queen's University Press, 2003, as well as the new public affairs journal *Les Cahiers du 27 juin* ([www.cahiersdu27juin.org](http://www.cahiersdu27juin.org)). For an enlightening interpretation of the limits of the language of recognition toward which I am greatly indebted, see

Now, if Quebec is “beyond recognition”, the fact that Canadian federalism has become (and recognizes itself as) asymmetric is somewhat secondary. For Quebec, the heart of the matter is its capacity to successfully face the economic, political, social, linguistic and identity-related challenges standing in its way. Quebec's current struggle is for self-determination (which is by no means incompatible with patterns of shared sovereignty such as federalism, treaty-federalism with indigenous nations, economic supranational integration, etc.) or, to put it differently, for democratic freedom. Correspondingly, if Quebec is “beyond recognition”, the only sufficiently strong argument capable of justifying the sovereignty project, today, is the excessive curtailment of Quebec's capacity to further continue its collective development. If this is so, Canadian federalism, because of its current de-federalizing tendency (the federal government's capacity to act generated by fiscal imbalance) and of its rigidities, arguably *maintains* the sovereignty project alive. In that sense, talks about “asymmetrical federalism” and agreements such as the side deal on health care are surely steps in the right direction. If my sketch of the evolution of Quebec's identity and politics is correct, the way to deal with the “unity problem” has much more to do with Canada's reconciliation with what Taylor calls its “deep diversity” (the fact there is a multiplicity of ways of belonging to Canada) than with defending the post-1982 vision of Canada. Somewhat ironically, the fate of the Quebec sovereignty movement now seems to rest more in Ottawa than in Quebec City.

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James Tully, “Introduction”, in *Multinational Democracies*, edited by Alain-G. Gagnon and James Tully, Cambridge, Cambridge University Press, 2001, p. 1-33.