

## ASYMMETRICAL FEDERALISM: A WIN-WIN FORUMLA!

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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

In September 2004, the federal and provincial first ministers signed a health-care accord, which explicitly recognized the principle of "asymmetrical federalism" and the possibility of the provinces and territories having recourse to this principle through specific agreements. At the same time, and on the basis of the same principle, the prime ministers of Canada and Quebec concluded a bilateral agreement recognizing Quebec's specificity and its desire to fully exercise its responsibilities in matters concerning its jurisdiction. This agreement, which I had the privilege to negotiate at premier Charest's request, means that Quebec will retain its freedom in the area of health care, while the other provinces accept a more integrated form of intergovernmental management.

Although, as we shall see, asymmetry was already an organizational element in Canadian federative relations, with the signing of these agreements on health care, the concept has taken centre stage in discussions on federalism and intergovernmental relations. In academic circles, here as in other federations — and even in quasi-federations — asymmetry had already been a matter of interest for several years. Among Canadian and Quebec intellectuals, this interest seems to have greatly increased since the failed constitutional reforms of the early nineties. There are many who now believe that asymmetry would increase mutual trust and bring about a lasting improvement in relations between Quebec and the rest of Canada<sup>1</sup>. We

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<sup>1</sup> See notably Gordon Laxer, "Speculation: Alternatives to Secession", in (2002) 7 *Revue d'études constitutionnelles* 272, p. 280; Philip Resnick, "Repenser le fédéralisme canadien : provinces, régions-provinces et nation-province", in Jocelyn Maclure and Alain-G. Gagnon, dir., *Repères en mutation. Identité et citoyenneté dans le Québec contemporain*, Montreal, Québec Amérique, 2001, 377-391, pp. 385-; Kenneth McRoberts, *Un pays à refaire. L'échec des politiques constitutionnelles canadiennes*, Montreal, Boréal, 1999, pp. 363-; Jeremy Webber, *Reimagining Canada; Language, Culture, Community, and the Canadian Constitution*, Kingston and Montreal, McGill-Queen's University

consider asymmetry to be an essential element in the progress of Canadian federalism, both for Quebec and for the other provinces.

## 1. EVOLUTION OF ASYMMETRY IN CANADA

We should first distinguish between asymmetrical federalism and the “natural” diversity that results from inherent differences among the constituent units within the same federation, differences related to social contexts, demographics, geography or resources. Asymmetrical federalism should not be confused with these purely practical conditions of diversity<sup>2</sup>. We must also distinguish this concept from another form of asymmetry, which is based essentially on the variety of laws and public policies emanating from the different federal entities. This normative diversity is at the very core of federalism itself.

As a specific concept, asymmetrical federalism entails a genuine consideration of diversity in the organization of political and constitutional relations. It relates primarily to a delineation of the constituent parts of the larger body in terms of their respective jurisdictions, powers, responsibilities and missions. In this regard, asymmetry can be considered as the expression of a refined version of the classic centralization-decentralization categorization.

Generally speaking, asymmetrical federalism presupposes a certain organization of

our differences within our federation’s inherent diversity. As a tool on which to base constitutional and political relations, asymmetry is an essential part of the fundamental logic of federalism. In certain contexts, it can even be seen as indispensable to the achievement of federalism. This is why several instances of asymmetry can already be found, in various forms, in the organization of Canadian federative relations.

Asymmetry is present in the very text of the Constitution. The most notable examples are: section 133 of the *Constitution Act, 1867* on the use of the French and English languages in Quebec; section 93 on denominational schools; and section 94 on the uniformity of rules of private law for all the provinces with the exception of Quebec, which will be discussed below in greater detail. Other examples can be found in the *Canadian Charter of Rights and Freedoms* in its reference to official bilingualism in New Brunswick and to minority-language educational rights<sup>3</sup>.

As another example, this time with regard to central institutions, section 23(6) of the *Constitution Act, 1867* contains specific criteria regarding the qualification of senators from the province of Quebec. Quebec is also the only province to benefit from an explicit guarantee of representation on the Supreme Court of Canada, whereby three of the nine judges originate from Quebec because of its civil-law tradition.

Over time, asymmetry in Canadian federative relations became more prevalent in administrative agreements and arrangements. Some come easily to mind, such as the collection of taxes by Quebec (1954); the creation of the *Régime des rentes du Québec* (1964) or the right to opt out from certain federal programs with financial compensation —

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Press, 1994, pp. 229-; Alain-G. Gagnon, *ibid.*, pp. 336-337; Will Kymlicka, “Le fédéralisme multinational au Canada : un partenariat à repenser”, in Guy Laforest and Roger Gibbins, *Sortir de l’impasse. Les voies de la réconciliation*, Montreal, Institut de recherche en politiques publiques, 1998, 15-54, pp. 42-; Jane Jenson, “Reconnaître les différences : sociétés distinctes, régimes de citoyenneté et partenariat”, in Guy Laforest and Roger Gibbins, *ibid.*, pp. 251-.

<sup>2</sup> Michael Burgess, “Competing national visions: Canada-Quebec relations in a comparative perspective”, in Alain-G. Gagnon and James Tully, dir., *Multinational Democracies*, Cambridge, Cambridge University Press, 2001, 257-274, p. 269.

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<sup>3</sup> See, on the subject of bilingualism in New Brunswick, subparagraphs 16(2), 17(2), 18(2), 19(2) and 20(2), as well as section 16.1, and, on the subject of minority-language educational rights, subparagraph 23(1)a), which does not apply to Quebec through section 59 of the *Constitution Act, 1982*.

including tax transfers (1965). There are also the various agreements between Ottawa and Quebec on the subject of immigration, including the well-known McDougall-Gagnon-Tremblay agreement (1991); the direct relations between Quebec and France (from 1965); the participation of Quebec and New Brunswick in the Francophonie (in 1971 and 1977 respectively); and manpower-training agreements, signed by Quebec and by other provinces (from 1996 to 2000).

The agreement concluded between Quebec and Ottawa on the subject of health care and, more recently, the agreement concluded on the subject of parental leave, fall into this category, since the asymmetry in these cases has no constitutional scope. With the health accord, as with the majority of examples mentioned previously, this asymmetry was made available to all the provinces, although only Quebec decided to avail itself of the option. Similarly, as far as parental leave is concerned, nothing would preclude another province from negotiating its own agreement with the federal government and setting up its own program in turn.

As can be seen in the light of the above examples, asymmetry is a principle that is present in our Constitution, if not implicitly acknowledged, and that has been applied many times in the past. It is an eloquent proof that we possess the flexibility and adaptability essential for the successful management of Canada. One of the most important benefits of the recent health accord consists of having set down this principle in explicit and progressive terms and having presented it as a promising ingredient in the long-term development of our country as a whole. This represents an important step forward, but there are profound reasons for going even further and ensuring that asymmetry becomes a permanent feature of our everyday political practice.

## **2. Potential of Asymmetry**

### *2.1 Asymmetry and Difference*

In order to fully understand the importance of asymmetry for the Canadian federation, we need to be reminded of the choice made in 1867

of unifying the then provinces into a federative unit. This union would not have been possible without a profound commitment to safeguarding the diversity of its constituent parts. The representatives of Quebec, then known as Lower Canada, would not have adhered to any other system of governance. The true meaning of federalism, which is the necessary respect for our differences, must therefore continue to find echo in its current practice. To do otherwise would be to reject the very basis of a system that has allowed us all to be united.

The health accord, particularly in its recognition of asymmetrical federalism, was not well received by Canadians outside Quebec. The level of disapproval was a disappointment to us since the criticism did not really relate to the results of the accord *per se*. Nor did it stem from a desire to benefit from the same conditions as Quebec, since the option of concluding a bilateral agreement with the federal government was offered explicitly to all the provinces. A plausible explanation would be that it is the very idea of asymmetry, the notion that one Canadian can be different from another, that is disturbing.

However, the evolution of our society provides us with many examples of the value of diversity. At a time when Canada is more open than ever to the world and interactions between nations are multiplying, the continuing existence of differences is no longer simply a reality to which we must be sensitive; it is becoming a genuine collective wealth that we should treasure. Globalization makes us realize every day the risks inherent in homogenization and the cultural impoverishment to which it could give rise. It is imperative, therefore, that the increasingly self-evident principles guiding our individual, community and inter-state relations, be applied to our federative relations as we proceed in building a modern Canada.

To advance along the road of a harmonious federal partnership, respectful of differences, we must develop mutual understanding and

concentrate on political effort and dialogue<sup>4</sup>. The latter should include recognition of the mutual benefits inherent in the concept of asymmetry. History has demonstrated that, far from weakening national unity and contributing to the break-up of countries, the adoption of asymmetrical policies allows the federated entities to coexist in harmony. It reduces unwarranted tensions and counter-productive confrontations, and even eliminates the demands for secession.

We must recognize that there exists in our country different visions of what we are. One of them is the notion that Canada is a single nation, made up of a cultural mosaic; this notion is related to a more territorial view of federalism, in which the federal government plays a preponderant role. Another view sees Canada as a decentralized federation, where the two orders of government are legally equal and autonomous, with Quebec comprising a distinct and enriching national reality.

We are forced to admit that, until now, these two visions have been set in opposition. In spite of numerous attempts at compromise, we have seen far too often the defenders of one vision succeed in preventing the advocates of the other from achieving their aspirations, without actually achieving their own. The result is that no one is ever satisfied, and Canada is locked in a permanent existential debate.

Asymmetry constitutes a powerful tool to help all Canadians meet their aspirations, be they from Quebec or from other Canadian provinces and territories. By accommodating or even promoting our differences through asymmetry, we allow Canada as a whole to evolve, with each constituent unit proceeding at its own pace and following its own path. Seen in this manner, asymmetry appears to be just as attractive for the rest of Canada as it is for Quebec. Indeed, insofar as certain provinces wish to advance towards common objectives that Quebec does not necessarily share, or towards objectives shared by Quebec, but

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<sup>4</sup> Jane Jenson in Guy Laforest and Roger Gibbins, *above*, note 2, p. 251.

through different means, asymmetry allows us all to move forward.

Some people see asymmetry as incompatible with the equality of the provinces and even with the equality of individuals. That is simply not a valid perception. On the contrary, asymmetry is a means to attaining real equality. As it is understood today, the notion of equality takes into account the real situation of its beneficiaries. “Real equality” is contrasted with “formal equality”. Surely, it is the former that should exist between the different political communities within a federation<sup>5</sup>. Furthermore, the frequent equating of equality with uniformity is totally unfounded. While the quest for equality is surely desirable, the search for uniformity would appear to be, nowadays, far more questionable.

Asymmetry holds tremendous potential for every province. From the origins of the Canadian federation, to the developments of the 20th century and the current debates, asymmetry, as a phenomenon, has been associated principally with Quebec and linguistic issues. Although we often relate asymmetry to issues of identity, it is certainly not impossible for it to be associated with other types of issues. In fact, the recent multilateral health accord stipulates that asymmetry is a concept accessible to all the provinces. On the other hand, the bilateral agreement, which provides an asymmetrical solution for Quebec, refers to Quebec’s specificity within the Canadian federation. There is a certain balance here, as the reference to Quebec’s specificity points to the importance of the motive underlying this application of asymmetry. Different circumstances could justify the existence of other significant motives for provinces other than Quebec.

In response, therefore, to those who fear that there is a sort of *à la carte* federalism on

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<sup>5</sup> Alain-G. Gagnon, “The moral foundation of asymmetrical federalism”, in Alain-G. Gagnon and James Tully, dir., *Multinational Democracies*, Cambridge, Cambridge University Press, 2001, 317-337, p. 329.

the way, it is important to note that asymmetrical arrangements normally have a genuine reason for existing, a profound justification. They respond to pressing needs and enjoy a definite legitimacy. They are not a matter of chance or the product of the whims of politicians.

Of course, asymmetrical federalism has its limitations if it wishes to be classified as “federalism”. We cannot, without calling into question the federal model, cast aside basic federative responsibilities like solidarity, sharing of risks and economic and social opportunities or, more generally, participation in a common project.

## 2.2 *Asymmetry and unexplored avenues*

We have seen that asymmetry allows us to respect our differences, and that it does not run counter to the idea of equality. We shall now see that its potential is even more significant when we consider the importance that Canada gives to the principle of the rule of law. If the rule of law is unassailable in respect to democracy and human rights, it cannot be otherwise in matters that are at the very heart of the federative reality.

Effective rules are necessary to protect us from arbitrary or power-biased governance. To trivialize the rules of federalism would be tantamount to trivializing its very foundations — a dangerous game indeed. Unfortunately, we must admit that in Canada, the importance of the fundamental rule of federalism, respect for the distribution of powers, sometimes tends to be minimized.

We are well aware that in Canada, particularly outside Quebec, many do not object to the federal government playing an important role in a wide range of areas, including some that are under provincial jurisdiction. This point of view, favouring the centralization of federal authority, cannot justify side-stepping the rule of law. We must instead make every effort to reconcile the wishes of the various partners in the federation with the basic rules of federalism. Rather than finding ways to bend the rules of federalism, we must ask ourselves how the current rules can legitimately accommodate the

different views expressed by the various partners in the federation in respect to the role of each order of government.

In intergovernmental matters, much can be done by non-constitutional means, notably by administrative agreements, as long as they are consistent with the fundamental rules of our formal Constitution. The modification of these rules would normally imply constitutional amendments. That being said, we must not neglect unexplored avenues in the Constitution, such as section 94 of the *Constitution Act, 1867*. The existence of this section appears to be directly inspired by the principles of asymmetry and respect, and it allows these same principles to be deployed in conformity with the existing rules. It deserves our attention.

The issue of parental leave illustrates the potential of section 94. In this particular instance, if the Supreme Court were to confirm the claims of Quebec that parental insurance comes under provincial jurisdiction, section 94 could nonetheless allow other provinces that so desire, to continue to benefit from a pan-Canadian parental leave program. Section 94 allows the common-law provinces to consent, through their respective legislatures, to the federal Parliament intervening in relation to property and civil rights. Quebec, which is a civil-law province, is excluded *de facto*<sup>6</sup>.

Section 94 is eloquent proof that there exist in Canada constitutional rules that allow asymmetrical federalism. It enables us to demonstrate that asymmetrical results are in conformity with the vision of the “Fathers of Confederation”, and that we must stop viewing an asymmetry that allows Quebec to have a distinctive system as a threat to federalism. This is clearly an eventuality that was contemplated at the very time Canada was created.

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<sup>6</sup> See notably F.R. Scott, “Section 94 of the British North America Act”, (1942) *Canadian Bar Review*, vol. XX no. 1, 525, on pages 529-532 and G. V. La Forest, “Delegation of Legislative Power in Canada” (1975) *McGill Law Journal*, vol. 21 no. 1, 131, on page 132.

It is undeniable that the recent agreements are of great interest and that the potential of recourse to an administrative asymmetry cannot be ignored. On the other hand, the fact that such recourse contains no legal protection means that it is fragile and vulnerable. The asymmetrical approach provided for in section 94 offers the advantage of being part of a legal process, not an intergovernmental practice. Thus, this section allows the formal setting down of asymmetry in law, while ensuring respect for the Constitution.

Clarity and predictability are undeniable virtues for effective governance. The federal context is certainly no exception. In the current state of affairs, it happens all too frequently that the federal government adopts measures unilaterally, which fall under areas of exclusive provincial jurisdiction, particularly in matters of property and civil rights. This trivialization of the distribution of powers, and thus of the Constitution itself, creates a dangerous state of confusion in federative relations, for both the partners of the federation and the population.

The provinces do not contest all such encroachments. Some even seem to be receptive to federal intervention. But, for Quebec, full respect for the distribution of powers remains an essential principle, especially when it concerns an area of jurisdiction as crucial to its specificity as that of property and civil rights. This difference of vision can be explained by the fact that Quebec, as a North-American minority francophone society, deems it necessary to ensure control of all the means at its disposal to guarantee its future and the development of its identity.

The difference that may exist between Quebec's vision and that of the rest of Canada with regard to the distribution of powers is often felt in very concrete terms in the current practice of federalism. Besides the question of parental leave, consider for example, the issues of the protection of personal information and of assisted human reproduction, where, to date, only Quebec has instituted legal proceedings challenging recent federal intrusions in these areas. As well, Quebec could not adhere to the

Social Union Framework Agreement given its impact on provincial jurisdictions, whereas the other provinces did not express the same reluctance. We should point out that in the current context of fiscal imbalance, the provinces are somewhat stifled financially, making them more vulnerable and sometimes more susceptible to accepting programs and federal spending in their own areas of jurisdiction.

What is particularly interesting about section 94 is that it allows Quebec to exercise its full autonomy in the area of property and civil rights, while at the same time enabling the common-law provinces that so desire to benefit from the federal interventions that they consider expedient. It also offers the same advantage to the provinces in the rest of Canada as to Quebec to see their jurisdictions better respected, inasmuch as the necessity of final provincial approval guarantees them the last word. Finally, this approach, which is fully respectful of the rule of law, should also be attractive to the federal government, as it allows it to adopt a clear public policy and, unlike the current situation, to avoid the risk of seeing some of its laws contested and invalidated by the courts.

## CONCLUSION

Asymmetry is a powerful representation of the idea that federalism is more than just the pooling of resources, values and ideals, that it is also based on the diversity of its constituent elements. Asymmetry is not an adulteration of federalism — quite the contrary. As we have seen, at its very origin, the Constitution envisaged the possibility of extensive recourse to asymmetry when one of the core jurisdictional rights of the provinces, namely property and civil rights, was affected. The Canadian federation, in its current state, could gain a great deal from the acceptance of this idea. If history and experience teach us anything, it is that the respect for others and the recognition of the importance of diversity should mean more, not less, asymmetry. Section 94 allows us to progress along the road to asymmetry, and to do so for the benefit of all, in accordance with clear rules set out in advance

and respectful of the federal spirit. It would certainly be advantageous to consider this option more fully.

Moreover, as part of a constant effort to find the means to enable us to build the Canada of the 21st century together, surely it would be desirable to keep an open mind and lend an attentive ear whenever promising ideas like asymmetry are invoked. If all new areas of discussion are rejected out of hand, it will be difficult to advance together. The federal spirit encourages us to respect one another, to collaborate, to search for balanced solutions. It is by constantly renewing their commitment to these principles that Canadians will do honour to what brought them together in the first place.