

ASYMMETRICAL FEDERALISM: MAGIC WAND OR “BAIT AND SWITCH”

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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 term “asymmetrical,” in spite of the admirable attempts at clarification and classification by the contributors to this project, remains a fuzzy term not easily grasped by the public. It sounds vaguely pharmaceutical – like the name of a new cough syrup – and lacks the read recognition of such past political mantras as, for example, “hyphenated Canadianism”, “special status”, “community of communities” and “provincial equality”.

It is a concept so indistinct and amorphous that its use is likely to obscure rather than clarify discussion on the allocation, in law or practice, of the powers of decision-making in Canadian government.

It is a technique, not a purpose in itself, and a label that can shift from side to side in political discussion depending on the context of the decision and the purposes of the players. Pierre Trudeau, for example, was a strong *asymmetricist*, a staunch advocate of federalism because it enabled the provinces to craft divergent policies within their jurisdictions to correspond to their specific situations, thus creating a kind of “laboratory” of experimentation in social policy that would lead to a variety of approaches to be tested and assessed, those proving to be more successful acting as models for other jurisdictions. Pierre Trudeau was, equally, a strong *anti-asymmetricist*, a staunch opponent of devolving differential jurisdictional and administrative powers to the provincial level, fearing that this would accentuate what he called a “checker-board” federalism, in which the constituent units held such disparate powers that the pursuit of national interest would be severely undermined, and questions of legitimacy would quickly arise when federal parliamentarians from a province holding one set of (asymmetrical) powers would have a significant role in determining the laws and policies in the federal jurisdiction that would not apply to their own constituents, but that would apply to Canadian citizens, whom they did not represent, in other provinces not holding those powers.

As important, though not I think greatly stressed by Mr. Trudeau, is the harm

asymmetrical federalism may do in undermining the already feeble structures of responsibility and accountability in the Canadian government system both federally and provincially.

Effective accountability lies in being able to determine who is responsible for decisions that have been made, and thus for their consequences. It is only when responsibilities are clearly defined that the public can bring home its approval (or disapprobation) in a way that will strengthen the anticipatory sensibility of governments to the electoral consequences of their decisions. This is particularly true when there is a disjunction between the responsibility for providing programs and services and the task of finding the funding necessary to support them. To gain applause for providing good things while another level of government bears the antagonism of raising taxes is politically attractive to governments in that happy position. It makes, however, the electorate's task of weighing the costs and benefits, and thus the public acceptability, of what has been done, much more difficult. Clarity about the locus of governmental decision-making is an essential foundation for ensuring accountable government. An asymmetrical political system, were it to further fudge that clarity through a hodgepodge of diverse co-operative, conflicting, and variously-funded arrangements, significantly diverging from province to province, risks creating a maze of confusion for public perception. Such a confusion may be an advantage to insiders and special interests, but it will considerably weaken the general public's ability to hold governments responsible.

Because of its flexibility, or vagueness, in content "asymmetrical federalism" risks becoming a flag of convenience for those pursuing goals that might otherwise be viewed more sceptically – a surrogate of respectability that clouds rather than clarifies the purposes of those recommending it, and helps sanctify the ends being pursued.

This does not make asymmetrical structures in government necessarily illegitimate. Presumably, any allocation, or misallocation, of powers would be legitimate if it consistently received general public support. It is a question

not of whether asymmetrical federalism is legitimate but, rather, in each specific case, whether it leads to consequences we believe to be desirable. As in most cases when we apply intellectual constructs to existing structures of action which have evolved organically over time, the devil is in the details of how change is applied and what its specific consequences are likely to be. The ultimate test lies in whether the use of asymmetrical structures will respond to the practical problems of governing Canada – and one's view of that in turn will largely depend on how one conceives what the nature of the provincial-federal relationship can and should be.

The fathers of Confederation, in drafting the constitution in 1867, did not prove to be particularly prescient in allocating legislative jurisdictions and fiscal resources in a way well adapted to the evolution of Canadian society and its changing economy. The content of the powers held by the provinces became more and more important with the passage of time, the allocation of fiscal resources available to them seemed increasingly inadequate. The provision in the 1982 Constitution of complete provincial access to virtually all forms of taxation has not assuaged the desire of the provinces to receive larger transfers of funds from the federal government, since using their own taxation powers more vigorously is a political challenge, but blaming the federal government for parsimony is politically advantageous. Curiously, such a position in some ways also suits the federal government, or at least the Department of Finance, since it regards the control of fiscal policy generally to be an important tool of macro-economic management and would be reluctant to see that overall management undermined by an expanded weight of provincial taxing decisions.

Logically, this discrepancy between responsibilities and financial resources could be redressed by a transfer of jurisdiction upwards from the provincial level to the federal government. This is not an option, perhaps unsurprisingly, that enjoys provincial support. More see the reallocation of significant federal powers to the provinces as a natural means of responding to the problems within their

communities, but the success of such transfers would depend either on the willingness of provincial governments to increase transfers of funds from the central government, often without effective accountability for their use.

Others (of which I am one) fear that the increased fragmentation of federal powers will strengthen the fissiparous tendencies in the Canadian governmental system, and that if extensive devolution takes place public attention will increasingly focus on powers of provincial decision-making and lead to further encroachments that diminish the sense of, and importance of, shared and common interests that are at the heart of a national political community. Structural changes are not simply a static response to existing discontents. They become, in turn, a catalyst for new problems and further changes, as, for instance, the entrenchment of the Charter of Rights has shown. These doubters, like me, fear that the use of asymmetry to satisfy the demands of devolution will not satiate the pressures to weaken the federal power, but is likely, rather, to stimulate the appetite for more demands.

In this context, the arguments for asymmetry and subsidiarity take on a different connotation. They are likely to become stalking-horses for the devolution of federal power which was denied by constitutional reforms of 1982, and which, given the rigidity of the Canadian amending formula, cannot be easily accomplished by constitutional amendment. These changes were, in fact, largely rejected by the Canadian public when presented in the Meech Lake agreement and the Charlottetown accord. Asymmetrical federalism and subsidiarity are handy tools for now achieving these objectives by alternative means, an apparently innocuous mechanism for accomplishing piece-meal an agenda with worrying implications. In advertising parlance, this amounts to "bait and switch", that is, offering one product to get customers into the store and then persuading them to take another product instead.

This will strike some as an extreme view. After all, asymmetry is a tool, not an end in itself. Who can argue against the essence of

subsidiarity, that each level of government should occupy itself with the responsibilities that are most appropriate to it? In the practical world of Canadian politics, however, both these concepts are one-way streets. They are brought forward in support of only one direction, that of increasing provincial power. I do not recall many in the ranks of asymmetry urging, on the basis of subsidiarity, that, for instance, the complete management of immigration, or the conduct of foreign trade policy, or the regulation of securities and financial services, or the responsibility for post-secondary education and research, or diplomatic representation abroad, or the administration of Canadian governments' over all foreign borrowing, or the control of all tax and subsidy incentives offered to foreign companies contemplating investing in Canada, or (as in many federations) the primary management of resources, or environmental regulation (which inherently deals with causes and consequences that transgress provincial boundaries) – to take some absurd, and some not so absurd examples – should be the expanded and essential and exclusive responsibilities of the federal government, where they could be more effectively performed.

In effect, the arguments for asymmetrical federalism and subsidiarity in the present Canadian political context are, intentionally or not, almost invariably stalking-horses for the diminution of federal power and, thus, their practical consequences seem likely, inevitably, to be the weakening of the essential foundations of a national focus, and national interests in a country which, because of its size, cultural diversity, and scattered population, faces strong centrifugal forces. While in some specific cases, no doubt, arguments might favour minor transfers of responsibility, asymmetrical federalism is not a magic wand, and using it is more likely to conjure up irascible genies rather than congenial ones.