

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

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 diversity². 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

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

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 illustrates illustre of a constitu

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

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.