

within federal systems.¹ 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.²

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,

¹ Charles D. Tarlton, “Symmetry and Asymmetry as Elements of Federalism”, *Journal of Politics* 27 (1965): pp. 861-874.

² 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*, 2nd 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*,

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*

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 Sarawak, 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 me -1.15tergovernme.

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.³ 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

³ 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.