

REFLECTIONS ON ASYMMETRICAL FEDERALISM IN CANADA¹

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Much of my political thinking is inspired by one of the greatest Canadian political thinkers, Pierre Elliot Trudeau. Not in detail, in the sense of that when I confront an issue, I say, “What would Trudeau have done now?” No, it is his methodology, his approach that I find useful. Trudeau believed in approaching political issues rationally in a Cartesian sense. He wanted to examine issues from all possible perspectives and only then, once the list of all possible solutions was complete, would he begin by eliminating those that were obviously impractical.. In 1970, for example, Trudeau asked the Department of Foreign Affairs to conduct a thorough review of Canadian foreign policy; including all options and their possible consequences: To the horror of the bureaucrats conducting the review, he insisted that even the option of leaving NATO be included – though it would obviously be one of the first to be eliminated as impractical. Such a methodology can be useful. It helps us to think creatively; to think of solutions we might otherwise not have considered, to think “outside the box”, as the idiom says.

So this is what I will try to do: analyse asymmetrical federalism in Canada in relation to basic principles of democratic governance.

Federalism is a principle of government based on the *territorial* division of powers. Our earth includes a finite amount of territory; and that territory belongs equally to all of the six billion plus of the earth’s inhabitants. In my ideal world, there would be no artificial division into nation-states, federal or otherwise. There would be only one system of government, a mildly hierarchical system which begins with neighbourhood councils and works its way up to a government responsible for problems which concern the whole world, such as the AIDS pandemic, greenhouse gas emissions and nuclear accidents.

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Obviously such a system of world government is not practical for now. If every government in the world were to open its frontiers and to allow people to move freely, the rich countries such as Canada, the US, Australia, New Zealand and those of Western Europe would see their social welfare systems overwhelmed by hundreds of thousands of new arrivals and their social security systems would soon collapse. The welfare state, as developed in Western Europe and adopted in Canada and New Zealand, represents the most successful combination of politics, economics and social policy that humankind has yet developed. To destroy it would mean the destruction of a valuable model; it would most likely also lead to a decline, not an improvement, in the levels of democracy and standard of living these countries have achieved to date.

But what does all this have to do with federalism? As I said, federalism is a territorial principle, an offshoot of the idea of the territorial state and territorial sovereignty, a principle which developed in Europe in the seventeenth and eighteenth centuries and is usually known as the Westphalian system, after the 1648 Peace of Westphalia, which included the principle of *cuius regio, eius religio*. From the idea that the government could determine the religion of its people developed the idea of other types of government control over the people living within a specific territory, an idea advanced most notably by the Jacobins during the French Revolution and adopted by Napoleon I.

However even as the concept of the government's right to exercise authority over the people within a given territory was taking hold, another line of thought was gaining in acceptance. This was the concept that people as individuals have rights on which governments should not encroach. And so during the last decade of the eighteenth century, the first French revolutionary government adopted the Declaration of the Rights of Man and the Citizen and the Americans added the first ten amendments, which constitute their charter of rights, to their new constitution. The American constitution introduced another new

principle, that of democratic federalism or the territorial division of powers. (There was also Swiss federalism, which emerged as such only after the Congress of Vienna of 1815.)

The French Revolution introduced a further principle, widely developed and adopted in nineteenth century Europe, that of nationalism and national self-determination. Nationalism was not a new concept. There is at least one medieval poem which lauds how wonderful it is to be German, and there is plenty of English nationalism in Shakespeare's plays. What was new and dangerous about nineteenth century nationalism, was – and is – the idea of national self-determination, the idea that there ought to be a strong emotional bond between people and the state which governs them, a bond so strong that it inspires people to die for the fatherland, *Dulce et decorum est pro patria mori*, as the poet Wilfred Owen sarcastically repeated in his famous anti-war poem.

The principle of national self-determination is as dangerous as it is pernicious. It holds that when people share an ill-defined national identity, they then also have a right to a sovereign government of their own choosing. The idea that there should be some kind of an emotional bond based on a common identity between the government and the governed is an idea which can and often does lead to the suspension of reason and the rational analysis of government policies and their consequences. Taken to an illogical conclusion the idea of national self-determination can even in some cases lead to aberrations such as fascism and Nazism. Jean Viard (1999) expresses a similar thought:

La logique nationaliste est beaucoup plus dangereuse pour l'humanité en Europe qu'ailleurs....
Non seulement parce que l'angoisse de la mémoire terrible de ce siècle nous étroit rien que d'en parler, mais aussi parce que nous sommes en des lieux extrêmes de tension d'une très longue histoire et, en même temps, au coeur de la puissance moderne.

National self-determination is also dangerous because it can lead to instability and thus make stable predictable government all but impossible; one can be Québécois today and Canadian a year later, French today and Corsican next month and so on. Taking to its logical

and then its illogical conclusions, national self-determination means that if Canada is divisible, so is Quebec, and if Quebec is divisible, why should Toronto not be as independent as Singapore? How can national self-determination possibly keep up with such ever changing demands? Trudeau was right when he said that government should be based not an emotional bond between people and government but on the rational acceptance by citizens of the need for authorities which can make binding decisions. (Trudeau, 1968; Nemni, 2006)

Fortunately, federalism dilutes the principle of national self-determination by postulating that an individual can have at least two, perhaps more, political identities: It is possible to be an Albertan as well as a Canadian, a Texan as well as an American; Bavarian and German, even to be a Parisian, une française and a citizen of Europe. As the last example illustrates, federalism can exist between as well as within states, but here I shall limit the discussion to federalism *within* states.

A state can be said to be federal when a system of shared sovereignty applies to most of the people and/or territory of a state *and* such a system of shared sovereignty is constitutionally enshrined, so that neither level of government can change it at will. Thus Germany is a federal state because all of its territory and people live within one of the constituent states. Britain is not because only Scotland, Wales and Northern Ireland have their own government. Canada is federal because most of its people live within the ten provinces, though the three territories have more area than any of the provinces.

A federal system could be said to be symmetrical if the same constitutional principles apply to all the constituent units. By this definition, no federalism is totally symmetrical, though the American one comes close. Germany has the distinction between the three city states and the others, as well as the distinction between old and new Länder, Switzerland between whole and half cantons, Spain's federalism is totally asymmetrical, in that there is no normal status for the constituent states, and the British North America Act of 1867, Canada's

first constitution, made special provisions for Catholic and Protestant schools in Quebec, for Quebec's civil code and for financial help to New Brunswick. Strictly speaking then, there is no truly symmetrical federalism; there are only degrees of asymmetry. (Note that there can also be territorial asymmetry of governance within unitary states, Britain being the prime example; but France has Corsica and Italy four special regions, to mention only a few examples.)

One of the preconditions of federalism is the fact that in the long run federalism can only work in democratically governed states. If the system of government is authoritarian, the federal government becomes a standing diplomatic conference, that is the state becomes ungovernable. The likely consequence is the abolition of any meaningful federalism, which is what happened in China and the Soviet Union, or the break up of the federation, as happened when Pakistan split in two. It is especially important to remember this coexistence of federalism and democracy when we talk about asymmetrical federalism because what matters is not that all constituent states within a federation have the same rights, but that all the residents of the federation enjoy the basic political equality which is the hallmark of democracy and, therefore, of majority government. (Nemni, 2006; Viard, 1999) If that is the case, it really does not matter very much whether the powers of the Quebec government are not the same as those of the government of Prince Edward Island:

It was the fourth Trudeau government, that of 1980 – 1984, which, with great difficulty finally managed to give Canada its own constitution, an objective which Canada's governments had unsuccessfully pursued since 1926. And this constitution is not just a compilation of pre-existing constitutional documents (though it is that too); it includes the Charter of Rights and Freedoms which Trudeau believed to be a necessary component of a democratic constitution: This charter includes a wonderfully flexible provision (though I doubt Trudeau would have seen it this way) which reconciles the principle of majority

government with that of a charter of rights. This provision is the notwithstanding clause, *clause non obstante* in French, It allows any of Canada's eleven parliaments to specifically exempt legislation from most (not all) of the provisions of the Charter of Rights and Freedoms. To date, only the government of Quebec has made use of this provision: In other words, asymmetry is at work and is working.

Since 1982 there have been two major and many other lesser attempts to amend that constitution; primarily so as to get the assent of the government of Quebec, which was the only province that did not formally accept the 1982 constitution before the Queen signed it into law. Since the constitution and its Charter of Rights and Freedom already applies to Quebec and Quebecers, these efforts to somehow include Quebec in the constitution are purely symbolic, though admittedly in politics symbolism can be important.

The First Attempt to Enshrine Asymmetry: the Meech Lake Accord

In 1980, Quebec held its first referendum on secession from Canada. The secessionists, who call themselves nationalists, lost by 60 to 40%. During the referendum campaign, Trudeau, recently elected Prime Minister for the fourth time, promised the voters of Quebec that he would give Canada a made in Canada constitution. The result was the 1982 constitution, which the secessionist government of Premier René Levesque, refused to accept, though the nine other provinces did so.

In 1984 Canadians elected a Conservative government led by Prime Minister Brian Mulroney. Like Trudeau, Mulroney was a perfectly bilingual Quebecer. Canada was governed by Liberal governments for much of the twentieth century because Conservatives had great difficulty electing MPs from Quebec. Mulroney managed to overcome this problem, partly by promising to amend the 1982 constitution so as to make it acceptable to the government of Quebec. Mulroney did not get to this part of his election promises until well

into his mandate. In 1987 he did eventually succeed in persuading the premiers of all ten provinces to accept the substance of the demands of the Quebec government, including the recognition of Quebec as a "distinct society", a provincial veto on constitutional amendments, provincial participation in Supreme Court appointments and the right to "opt out" of federal programs with financial compensation. Mulroney accomplished this feat by offering the other provinces many of the same concessions, with the exception of the distinct society clause, which applied only to Quebec. The agreement also included provincial consultation on Senate appointments and guaranteed annual first ministers' conferences. It was signed at Meech Lake, Quebec, a modest government retreat located just a few kilometres north of Ottawa, in the early hours of May 1, 1987, after a twenty hour meeting of first ministers and senior bureaucrats.

The Quebec legislature approved the agreement on June 23, 1987. It did not have such an easy ride in the rest of the country. Quebecophobists, especially those in western Canada, objected to the distinct society clause. Aboriginal groups objected to being left out of the agreement. And retired Prime Minister Trudeau led a campaign against this Conservative attempt to improve on "his" handiwork. A newly elected government in Newfoundland was led by a Trudeau loyalist who opposed Meech Lake. By the terms of the 1982 constitution, Meech Lake had to be adopted by all ten provinces within three years. As the deadline of June 1990 approached, the agreement bled to death as cut followed cut. Mulroney himself gave it the second last stab when in a newspaper interview he boasted how he had manipulated the premiers into accepting his version of the agreement (the "roll the dice interview"). Yet, just before the deadline, Mulroney succeeded in persuading the recalcitrant premier of Newfoundland, Clyde Wells, to put the agreement to his legislature, *if* the other nine provinces ratified it first. An election in Manitoba had delayed that province's ratification vote. When Meech Lake was introduced in the Manitoba legislature, there was no

time for the normal three readings procedure. So the government asked for unanimous consent to adopt the motion. One voice spoke up against it, that of Elijah Harper, an aboriginal MLA from northern Manitoba. Clyde Wells was freed from his promise, and the Meech Lake accord was dead. (On Meech Lake, see Campbell and Pal, 1994; Dyck, 2000 and McRoberts, 2006).

Mulroney had been playing with fire, or rather with nationalists and nationalism. By promising to meet Quebec's demands, he persuaded a number of Quebec nationalists to stand as conservative candidates in 1984. Led by Lucien Bouchard, these nationalists now left the Conservative party and soon formed their own Bloc Québécois, a new federal political party.

It was the perceived unfairness of asymmetry, the distinct society clause, which made Meech Lake unpopular in Canada outside Quebec (ROC for short). Aboriginal leaders sought more, not less, asymmetry. They wanted special provisions for native self-government to be included in any future constitutional amendments. Meech Lake fell between the two stools of too much and too little asymmetry.

The Charlottetown Accord and beyond

As the French well know, most constitutions are written to correct the problems of the previous one. Canada is no different. After winning the election of 1988 and getting the little matter of the Free Trade Agreement with the United States settled, Mulroney returned to the constitutional issue. He just could not leave it alone. Many Canadians had criticized the Meech Lake Accord as an agreement between eleven men in suits meeting behind closed doors. In a kind of collective therapy exercise, Mulroney asked Keith Spicer to travel across the country and listen to Canadians. The federal parliament as well as many of the provinces appointed study groups and committees on the constitution. Mulroney consulted with the premiers and with native leaders. Committees of MPs travelled across the country, once

again to listen to Canadians who told them that they did not like any of the new constitutional proposals the government had recently made. So the Mulroney government came up with yet another set of proposals, and finally, in August 1992, the eleven first ministers (the same old crowd, just different faces, except for Mulroney and Bourassa) signed the Charlottetown Accord. This one included something for everyone: the distinct society and a role in appointing supreme court judges for Quebec, an elected Senate for Alberta, a social charter for social democratically-governed Ontario, aboriginal self-government for natives and lots more powers for all of the provinces (mining, forestry, tourism, culture, housing and urban affairs).

This grab bag was not left to the provincial governments to ratify. Although there is no such provision in the Canadian constitution, three provinces had already decided to hold a referendum on the Charlottetown Agreement (in accordance with their own provincial constitutions). So the Mulroney government decided to hold a nation-wide referendum, only the third in Canada's history. Not surprisingly, Canadians, including Quebecers, turned down the strange brew they were offered, by a margin of 55 to 45 per cent. Only Newfoundland, Prince Edward Island and New Brunswick endorsed it with respectable majorities; in Ontario it squeaked through with 50.1 per cent. (On the Charlottetown Accord, see Campbell and Pal, 1994 and Dyck, 2000).

Analysis

By October 1992, Canadians had twice turned down attempts to render Canadian federalism more asymmetrical than it already was. Was it the constitutional asymmetry that Canadians disliked? I do not think so. Canadian federalism has included elements of asymmetry since its inception. It is not asymmetry that Canadians object to. No one can seriously claim that Ontario with a population of over 11 million should be treated exactly the same as Prince

Edward Island, which has a population of about 130 000 (both according to the 2001 Canadian census). Canadians are a profoundly democratic people, who pride themselves on their sense of fairness. Unlike many others, they have known no other form of government. I do believe that it is the potential for the denial of individual rights that the distinct society clause seemed to harbour as well as the perceived unfairness of such a clause that turned many against the two agreements; and in the case of Meech Lake the perceived exclusion of Canada's native people about whom many Canadians feel some sense of guilt. In the middle of the national debate over Meech Lake, Premier Bourassa used the notwithstanding clause to escape applying a Supreme Court decision that would have made it legal to put up unilingual signs in English or any language other than French in Quebec. Canadians rightly resented this attack on their freedom of expression. Canadians fear that native self-government will once again deny native women their hard won right to being spouses on reserves. The most undemocratic of all the provisions of the Charlottetown Accord was that which would have guaranteed Quebec 25% of the seats in the House of Commons. Quebec's population is now less than 25% of the Canadian total. Such a provision would have negated the most basic of all democratic principles, that of the political equality of individual voters, without which majority government becomes meaningless. The same could be said for a Senate where New Brunswick, Newfoundland and PEI would have had the same number of representatives as Quebec and Ontario, that is six each.

Federalism is by its very nature asymmetric. As has often been pointed out, federalism is a form of government that is especially suitable for states which have wide geographic diversity and/or include linguistic or cultural minorities. If each regional government within a federation were forced to work within exactly the same constitutional framework, much of the purpose of federalism, which is to allow for diversity in government, would be lost. As long as basic human freedoms, as proscribed in the Canadian Charter of

Rights and Freedoms and the United Nations Convention on Civil and Political Rights (1966) are observed, duly elected governments should be free to set appropriate priorities for their communities.

It is my profound hope that, as Trudeau advocated, people all over the world will come to accept government is a rational necessity, not as part of some of mythical process of national self-determination, much less self-determination based on some kind of racial or inherited characteristics, which is the concept some Parti Québécois leaders still seem to have. (Nemni, 2006; Trudeau, 1968) As people move all over the world and populations living in the same territory become less ethnically homogenous, governments based on national cohesion should and need to become governments based on common values. The question about ethnic origin in the 2001 Canadian census, which allowed multiple responses, gives a fascinating picture of the extent to which many Canadians already share a multiple identity. (See Table 1)

The new Canadian government, led by Prime Minister Stephen Harper, has returned to the constitutional issue. Harper is advocating a looser federation – he calls this open federalism. His two main issues for now seem to be reducing the federal government's spending powers and allowing Quebec to be part of the Canadian delegation to UNESCO. (Harper, 2006) Quebec and the constitution may be the third rail of Canadian politics; Canada's political leaders have not learned not to touch it. Harper, like Mulroney, is playing with fire. He advocates a looser federation because his right-wing ideology (in the North American sense) leads him to believe that less government is good for capitalism. Yet Quebec has a strongly social democratic political culture, and Quebec governments seek more powers primarily for reasons of national identity. This is a very unstable alliance, which is likely to fall apart among recriminations of deceit.

Before concluding, I would like to present an alternative analysis of the Canadian debate about asymmetrical federalism. I call it the feminist analysis. Prime Minister Trudeau achieved what Canadian political leaders had not been able to accomplish for over fifty years, he brought Canada's constitution home from Britain, so that Canadian can change it and do with it what they want. Mulroney wanted to be as good as Trudeau. He also wanted to be a constitution maker, and he wanted to do this by accomplishing the one thing Trudeau had not, which was to have the Quebec government accept the constitution formally by a vote of the Assemblée Nationale, not just accept it as the law of the land. But Mulroney had neither Trudeau's touch nor his intelligence. As a result, he aggravated the alienation in Quebec that Trudeau had caused. Prime Minister Chrétien thought he had learned the lesson when he left the constitutional issue untouched, but this was when Quebecers decided to hold another referendum, and Chrétien's neglect nearly destroyed Canada. Paul Martin had enough sense to leave the constitution as it was, but his lack of understanding of Quebecers as he tried to destroy Chrétien's reputation did as much more or more damage to the cause of Canada in Quebec as Mulroney had done. Now Harper wants to show that he can do as well as the others. (Could he possibly do any worse?) Male egos got us into this mess, and it seems that they will not get us out any time soon.

Of course, this feminist explanation does not preclude the one given earlier. It merely adds a new perspective.

Conclusion

Rationally speaking, breaking up Canada makes no sense at all. It would be an expensive process and would cost many Canadians, especially Quebecers, their pensions and their livelihoods. Two countries would not be in a better position than one to withstand American pressure for access to Canada's resources and for a Canada which would practice

American-style capitalism and adopt American foreign policy. After the failure of the negotiations leading to a FTAA, Americans are picking Latin American governments off one by one as they negotiate bilateral so-called free trade agreements. This is the hubs-and-spokes approach that Canada tried to escape when it joined NAFTA. In other words, the trading world needs more; not less, Canada. Working together Canada as a whole and other Western hemisphere governments can surely negotiate more effectively than they can as individual countries, much less provinces. (Leslie, 1994)

Wait a minute! Did I not begin by saying that the world's resources belong to all of its peoples? Then why exclude Americans? Because the world's people will be ready to share the world's resources only when they learn to play by common multilateral rules. The United States, though admittedly it is not alone in this respect, has shown again and again that it is not willing to accept the authority of multilateral institutions. It refuses to accept the Law of the Sea and the Kyoto Accord; it invaded Iraq without international authorization, and it has defied the World Trade Organization's rulings on a number of occasions. It will not even accept basic human rights, such as that of not practicing torture or having its citizens subject to the authority of international criminal courts. If the world's peoples are to share its resources, they will need to play by common rules. Until then, territorial control of resources by individual governments which are willing to play by multilateral rules is better than exploitation by a few of the wealthiest governments and corporations. Trudeau saw nationalism as a stage through which at least some segments of humanity will pass, as they move on to the higher stage of rationalism and international cooperation: "Thus there is some hope that in advanced societies, the glue of nationalism will become as obsolete as the divine right of kings; the title of the state to govern and the extent of its authority will be conditional upon rational justification...." and "the road to progress lies in the direction of international

integration, nationalism will have to be discarded as a rustic and clumsy tool.” (Trudeau, 1968: 196 and 202)

What does all this have to do with asymmetrical federalism? Though there has been much talk among political scientists about neo-feudalism and multi-level governance, in short a movement away from strict territorial sovereignty, governance by territory still appears to be the most practical solution for most of the world’s peoples. I do not advocate rigid territorial sovereignty. Sovereign governments should accept common minimum standards of governance on issues such as human rights and sustainable development. There is also the danger that different rules for different people living within the same territory can detract from that basic political equality which is a necessary element of a functioning democracy. So territorial governance yes, but flexible territorial governance with different forms of government and different rules to suit different populations. In the case of Canada, this means an asymmetrical federalism which can make Canada, all of it, a model for the rest of the world.

TABLE 1

Population by selected ethnic origins, by province and territory (2001 Census)			
(Canada)			
	Total responses	Single responses	Multiple responses
	number		
Canada			
Total population	29,639,035	18,307,545	11,331,490
Ethnic origin			
Canadian	11,682,680	6,748,135	4,934,545
English	5,978,875	1,479,525	4,499,355
French	4,668,410	1,060,760	3,607,655
Scottish	4,157,210	607,235	3,549,975
Irish	3,822,660	496,865	3,325,795
German	2,742,765	705,600	2,037,170
Italian	1,270,370	726,275	544,090
Chinese	1,094,700	936,210	158,490
Ukrainian	1,071,060	326,195	744,860
North American Indian	1,000,890	455,805	545,085
Dutch (Netherlands)	923,310	316,220	607,090
Polish	817,085	260,415	556,665
East Indian	713,330	581,665	131,665
Norwegian	363,760	47,230	316,530
Portuguese	357,690	252,835	104,855
Welsh	350,365	28,445	321,920
Jewish	348,605	186,475	162,130
Russian	337,960	70,895	267,070

Filipino	327,550	266,140	61,405
Métis	307,845	72,210	235,635
Swedish	282,760	30,440	252,325
Hungarian (Magyar)	267,255	91,800	175,455
American (USA)	250,005	25,205	224,805
Greek	215,105	143,785	71,325
Spanish	213,105	66,545	146,555
Jamaican	211,720	138,180	73,545
Danish	170,780	33,795	136,985
Vietnamese	151,410	119,120	32,290

Source: Statistics Canada, Census of Population.
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REFERENCES

- Campbell, Robert M. and Leslie A. Pal (1994) *The Real World of Canadian Politics. Cases in Process and Policy*. Peterborough: Broadview Press, 1994. Third Edition.
- Canada. 2001 Census. <http://www40.statcan.ca/101/cst01/demo26a.htm>. (consulted June 5, 2006.)
- Dyck, Rand (2000). *Canadian Politics. Critical Approaches*. Toronto: Nelson. Third` edition.
- Harper, Stephen. Prime Minister Harper Outlines his Government's approach to Priorities and Open Federalism Approach. Ottawa: [Office of the Prime Minister]. <http://pm.gc.ca> (accessed May 10, 2006).
- Leslie, Peter M. (1994) "Asymmetry: Rejected, Conceded, Imposed" in F. Leslie Seidle, ed., *Seeking a New Canadian Partnership. Asymmetrical and Confederal Options*. [Kingston]: Institute for Research on Public Policy, pp. 37-70.
- McRoberts, Kenneth. (2006) Les modèles asymétriques au Canada et en Espagne. Traduits de l'anglais par Lise Couillard et Sébastien Côté. Toronto : 2006.
- Nemni, Max. (2006) Pierre Elliott Trudeau et Charles Taylor : Deux visions du Canada. Toronto : 2006.
- Trudeau, Pierre Elliott (1968). *Federalism and the French Canadians*. Toronto : Macmillan.
- Viard, Jean (1999) « Guerres aux nationalismes » *Le Monde*, 1 avril.

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