DISTINCT SOCIETY

FEARFUL SYMMETRY: CONSTITUTIONAL UNIFORMITY AND THE FEDERAL AMENDMENT PROPOSALS

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There is a dangerous misconception afoot that constitutions have to be symmetrical. It is said that any acceptable solution to Canada's current constitutional troubles will have to treat every province just like every other province. That is nonsense, and because it threatens to interfere with effective constitutional negotiations, it is perilous nonsense.

Canadian federalism has never been symmetrical. The original 1867 Constitution openly recognized the distinctiveness of every province in many different respects. Section 133 imposed an obligation on Québec to preserve the use of English in the Legislature, the courts and the laws of the province, though there was no equivalent requirement for the other provinces to protect the use of French. Several special financial concessions were made to New Brunswick and Nova Scotia that were not available to Ontario or Québec (sections 114-6, 119, 124). Probate Courts in the Maritime provinces were to be treated differently than equivalent courts in other provinces (section 96), and a provision that contemplated uniform provincial laws (section 94) was applicable to the common law provinces only. Numerous other provisions treated the several provinces distinctively in various minor respects (sections 22, 23(6), 37, 40, 51, 63-4, 69 and 80).

In addition to those patent distinctions between provinces in the original document, there was also an important *latent* difference. Section 93 guaranteed the educational rights of denominational school adherents in every province, but because the guarantee was cast in terms of protecting such rights as those persons had "by law in the province at the Union", and neither New Brunswick nor Nova Scotia had such laws at the time of union, denominational school supporters in those provinces received no constitutional protection (*Ex parte Renaud* (1873) 14 N.B.R. 273).

In 1867 there were only four provinces, but section 146 of the Constitution permitted the admission of new provinces to the Union "on such terms and conditions in each case ... as the Queen thinks fit to approve ...". As each new province was subsequently added to the country, it brought its own distinctive constitutional "terms and conditions". Manitoba, for example, was required to provide protections for the French language like those which applied to the English language in Québec (*Manitoba Act, 1870*, s.23, S.C. 1870, c.3; confirmed by *Constitution Act 1871* (U.K.)). Manitoba was also given a denominational school guarantee worded differently than section 93 in an effort (ultimately unsuccessful) to avoid the problem that had arisen in Nova Scotia and New Brunswick (*Manitoba Act*, s.22). Manitoba, Saskatchewan and Alberta were all denied the right, accorded to other provinces by section 109, to own their natural resources, and they did not achieve resource equality until 1930 (*Constitution Act*, 1930). When British Columbia entered the Union in 1871, it was with a guarantee, among others, that a rail link with the rest of the country would be completed (*B.C. Terms of Union, 1871*, (U.K.), R.S.C. 1970, App. II, #10), and Prince Edward Island joined two years later with guarantees that included transportation links with the mainland (*P.E.I. Terms of Union, 1873* (U.K.), R.S. C. 1970, App. II, #12). Among the many special constitutional provisions applicable to the entry of Saskatchewan and Alberta in 1905, and Newfoundland in 1949, were stronger constitutional protections for denominational schools than prevail elsewhere in Canada (*Saskatchewan Act, 1905* (Can.); *Alberta Act, 1905* (Can.); *Newfoundland Act, 1949* (U.K.)).

Even after they had become part of Canada, certain provinces were made the subject of distinctive constitutional treatment. Prince Edward Island, for example, although not expressly named, was the obviously intended beneficiary of a 1915 constitutional amendment that assures every province, no matter how small, at least as many members in the House of Commons (the seats of which are normally determined on a population basis) as it has Senators (section 51A). New Brunswick was placed in a unique position, so far as language guarantees are concerned, by sections 16 to 20 of the *Canadian Charter of Rights and Freedoms*. Section 52(1) of the *Constitution Act, 1982*, which enacted the *Charter*, exempted Québec, at least temporarily, from the minority language education provisions imposed on other provinces by section 23(1)(a) of the *Charter*. The guarantees contained in section 23 of the *Charter* also have considerable latent potential for "special status" in that they, like the denominational school protections in section 93, come into operation only to the extent that specified conditions prevail in particular provinces.

The Government of Canada's 1991 proposals for constitutional amendment include several items that would, or could, patently or latently, reduce our

constitutional symmetry still further. That is nothing to worry about, in my opinion. It is something that Canadians have a right to know fully about, however, so they can make up their own minds on the question. Until now, they have been told a little about the new *patent* erosions of symmetry — one of them at least — but very little has been said about the latent ones. These less obvious instances of irregularity deserve explanation as well.

The most notorious suggested reduction of constitutional symmetry is the "distinct society" clause which, under Recommendation 2 of the federal proposals (*Shaping Canadians' Future Together*, 1991, p. 51), would add a provision to the *Canadian Charter of Rights and Freedoms* (Section 25.1) calling for the *Charter* to be interpreted in a manner consistent with the "preservation and promotion of Québec as a distinct society within Canada." The term "distinct society" is defined for that purpose as including:

(a) a French-speaking majority;
(b) a unique culture; and
(c) a civil law tradition.

The distinctiveness that is sought to be preserved and promoted by this provision is a historical and sociological fact. Québec *has* a French-speaking majority, a unique culture, and a civil law tradition. That fact cannot be denied. How would anyone outside Québec suffer detriment if Québec's distinctiveness were preserved and promoted? Not at all, in my view; we would all be less rich, in fact, if the French culture disappeared from Canada. It is true that the recognition of Québec's distinctiveness by the *Charter* might be judicially employed to justify certain favoured treatment for the French culture over other cultures within Québec. But section 1 of the *Charter* already permits such favouritism, without the assistance of a "distinct society" clause. I see nothing to lose, and much to gain, from constitutionally recognizing the undeniable socio-cultural fact that Québec is different. Many other areas of Canada and many other cultural groupings, within and without Québec, are also distinct, but that should not prevent a constitutional recognition of Québec's particular distinctiveness.

A second, but less well-known, openly asymmetrical provision in the 1991 federal constitutional proposals is found in Recommendation 7, which calls for the insertion of a "Canada Clause", as section 2 of the Constitution. Such a clause would recognize, among other things, "the special responsibility borne by Québec to preserve and promote its distinct society." This would be only one of many Canadian "characteristics and values" that the "Canada Clause" would recognize. Among other characteristics listed would be "the equality of women and men", a "recognition that the aboriginal peoples were historically self-governing ..."; a "commitment to fairness, openness and full participation in Canada's citizenship by all people" without discrimination, recognition of the need to preserve "Canada's two linguistic majorities and minorities," and a potpourri of other honoured precepts including tolerance, sustainable development, free trade, and parliamentary democracy. In addition to the explicit reference to Québec's distinctiveness, there would also be a declaration that Canada's "identity encompasses the characteristics of each province, territory and community."

The impact that this "Canada Clause" would have for constitutional symmetry is difficult to assess. On the one hand, it would be broader in its reach than the main "distinct society" provision, since it would apply to all aspects of the Constitution, rather than just to the *Charter*. It could, therefore, affect the power of provincial legislatures to enact laws relating to cultural distinctiveness. On the other hand, it would have less legal potency than the proposed *Charter* provision, since it would be preambular in nature, and would, therefore, presumably be restricted to a merely interpretive role. Interpretation can loom very large in constitutional affairs, however. Moreover, the acknowledgement of Québec's distinctiveness enshrined in the "Canada Clause" could provide *political* justification for special arrangements made between Québec and the Government of Canada under certain other provisions of the 1991 proposals.

The most potentially significant of these other provisions is probably s.20, which would empower the Government of Canada to negotiate with "the provinces" separate cultural "agreements appropriate to the particular circumstances of each province to define clearly the role of each level of government." "Where appropriate," the provision continues, "such agreements would be constitutionalized." To understand the potential of this proposal, so far as constitutional symmetry is concerned, it must be borne in mind that s.43 of the *Constitution Act, 1982*, permits the Parliament of Canada and a single province to make constitutional amendments in relation to any provision that applies only to that province, and this power is expressly stated to include "any provision that relates to the use of the English or French language within a province." This would allow the federal Parliament and the Québec legislature to abolish the English language guarantees entrenched for Québec in s.133 of the *Constitution Act, 1867*. Section 20 of the federal government's 1991 proposals, if adopted, would lend political legitimacy to such a move. Section 20 would also empower Canada and Québec to "constitutionalize"

any other agreement they might choose to reach concerning "cultural matters", and, it should be remembered that the term "cultural" is capable of sweeping interpretations that would embrace everything from education to broadcasting and book-selling, from censorship to family allowances. It is likely, therefore, that if s.20 were adopted, it would contribute to reduced constitutional symmetry in Canada.

Another of the 1991 proposals with asymmetrical implications is s.24, which calls for an amendment permitting constitutional jurisdiction to be delegated between the federal and provincial orders of government. Federal-provincial delegation is not new, of course; it has been a feature of Canadian constitutional arrangements since the 1950s. Until now, however, delegation has been permissible only to *administrative* agencies of the "receiving" jurisdiction; delegation from one legislative body to another has required constitutional amendment. What is now being proposed is a scheme for inter-legislative devolution without the need for formal amendment. The Parliament of Canada would become capable, for example, of transferring to any provincial legislature or legislatures it chose to select, the power to enact laws relating to family allowances, or to marriage and divorce, within the province. As with s.20, although there is no explicit reference to Québec, it is that province which would be the most likely provincial participant in such delegation schemes. While there might be objection taken to delegation arrangements not made available to all provinces, the "distinct society" provisions of the 1991 proposals would help to disarm such objections. Delegation would be less permanent than formal amendment, of course, being in its nature a revocable process. (One hopes, at least, that irrevocable delegation is not contemplated.) Politically speaking, however, a power once delegated would be difficult to reclaim.

Constitutional symmetry could also be affected by a few other provisions of the 1991 proposals. Section 19, for instance, refers to agreements between the Government of Canada and any province on the subject of immigration. It notes that any such agreement would be "appropriate to the circumstances of that province", and states that it would be prepared "to constitutionalize those agreements." The measures proposed in s.21 for regionalizing the federal government's broadcasting responsibilities, if exercised differentially in recognition of Québec's distinctiveness, might undermine symmetry further, especially if these were made the subject of legislative delegation under s.25, or "constitutional-ization" under s.20. Differential application of the offers under s.24 and s.26 to discuss the future role of the federal authorities in certain areas of shared jurisdiction could have similar effects.

In sum, the Canadian Constitution would be even less uniform that it now is if the federal government's 1991 amendment proposals were enacted. That is no reason to oppose their adoption, however. Firefighters sometimes have to break a few windows in order to extinguish a blaze, and it would make no sense to deny them that expedient unless an uncontrolled conflagration were considered desirable. Canada would not have come into existence in 1867 if the Fathers of Confederation had insisted upon perfect constitutional symmetry, and Canada will soon cease to exist if our current political leaders insist on symmetry in the measures advanced to meet the Québec crisis.

When describing tigers, and, by implication, the universe, the poet, William Blake, used the expression "fearful symmetry". If symmetry were considered a constitutional imperative at this sensitive point in Canadian history, it would be a "fearful" concept indeed. Blake suggested that only an "immortal hand and eye" was capable of framing such symmetry. Those who bear the responsibility for framing the instrument of Canada's constitutional salvation are, not immortal. They would be well advised to leave symmetry to those who are.

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