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Institutional Design in Divided Democracies

Abstract

Constitutional and political recognition of asymmetry in Western multicultural democracies is the means to overcome the main differences among their constitutional units, whereby the political future of the common state is ensured. However, in binational or multinational post-communist states the ideal of a federative state fails.

Résumé

La reconnaissance constitutionnelle et politique de l'asymétrie dans les démocraties multiculturelles de l'ouest est le moyen pour surmonter les différences principales entre leurs unités constitutionnelles et pour assurer le futur politique de l'état commun. Pourtant, on arrive dans les états binationaux ou multinationaux post-comunistes jusqu'à l'échec de l'idée de l'état fédératif.

1. Federal principle

Federal political systems marked by self-rule and participation in governing the community can be found in federative states, confederations, decentralized unitary countries and leagues (Elazar, 1987). Federal structures cannot be understood without examining the political idea of federalism. The idea of federalism – as a political idea – contains two main elements (Baud, 2007, 110-111). The first element is conciliation of the differences in unity, or plurality in unity, which is an equivalent of the American motto *E pluribus unum*, taken over by the authors of the European Constitutional Agreement (in the articles 1-8, under the title “Symbols of the Union”: “...the motto of the Union is: “Unie dans la diversité.”, par.3). Postulate of difference in unity is the essence of each theory of federalism. Recognition of the dialectic tension existing between plurality and unity – two opposite poles – determines the fact that federalism does not exist without unity, as well as without plurality. Political life in a federal system is marked by the conflict of those opposite forces, centripetal (unity) and centrifugal (plurality). Constant and dynamic balance of these opposing forces characterises a federative constitution. Along with that element, which structures the federal idea, there is another one referring to the method of its establishment. It is about the consensual foundation of the

federations. Federations develop by the will of the political units for association, and the legal form of that will is expressed in the federal agreement, while its political form is visible in the idea of a federal freedom.

Modern theory of federalism talks about the application of the federal principle with the aim of stressing the fact that it is wrong to view the relations in complex political communities using some “clean” models, especially through the use of equalization with the federative state. Federation is a full institutional expression of a federal principle; federalism is a principle in itself, which can be further understood normatively and institutionally. As a normative principle, federalism acknowledges and encourages “difference in unity”. The substance of federalism is not in constitutional or institutional structure, but in the society itself. In that context, federalism is primarily a normative principle which acknowledges and protects territorial differences within the unity of the society. In institutional sense, federalism is an organizational principle with the purpose of a territorial distribution of authority (Bačić, 2007, 45).

According to Rufus:

The tie that binds all these is foetus; this is the heart of the matter. Whatever its institutional mutations in history, it is the primary cell of all relationships wherever individuals, families, tribes, communities, societies, nations have come together to promote both personal and common interests. It knows no degrees; it is indifferent to form, it is blind to everything but the promise of communality and individuality, and to this it demands fidelity. Without this, there can be no association, no cooperation, no treaty, no leagues, and no constitution. (Rufus, 1978, 215)

Federalism is gradable in its normative, as well as in its institutional sense. Regarding the former, federalism is described in terms of the level of diversity in a given society, its reception and recognition within the value structure of that society. Regarding the latter, it refers to the level of non-centralism which is mirrored by the structure of government, or the assurance of the territorial distribution of power. It has already been stressed that the federations are the fullest institutional expressions of federalism (Bačić, 2007, 45). Therefore the organizational principle of federalism is non-centralisation, where the diffusion and distribution of competencies among numerous centres has been carried out constitutionally, as different from the regular decentralisation, where it is assumed that there is a sovereign centre of power which uses devolution to assign a part of its competencies onto the fundamentally lower organs. The model of federal democracy is founded on equal relations among individuals, groups and units in the organization of governing social policies in search for justice, and on relations of cooperation which help in realization of partnership. The harmonization among partners therefore becomes the basis for participation in political decision making (Smerdel, 2007, 30). Modern institutional political theory adopts the above mentioned view, and the constitutional order which aspires to create a framework for solving the problems of the state and different communities which make that state cannot be justified if it ignores various cultural aspirations for autonomy. Bačić (2007,45) states that the constitutional variables are those able to express the existence and level of federalism, those referring to the allocation of competencies between the central government and subunits, as well as the territorial representation within the lower house of government. Constitutional distribution of power can be operationalized through



the division of legislative power, residual competencies, criterion for the distribution of competencies, and territorial diffusion. Representation in the lower house of government can also be operationalized through the extension of territorial representation within the house, the area of political action considering the upper house, the level of overrepresentation, and the way of electing the representatives. Para-constitutional variables refer to the intergovernmental relations and the party system. Since constitutions do not express the actual functioning of the multileveled systems of government, some complex models of intergovernmental relations take place above the constitutional framework.

2. Application of the federal principle in Western democracies

In countries like Spain, Great Britain, Belgium and Italy, different forms of application of the federal principle are being considered, in the form of autonomy and regional self-rule. It should be pointed out that this topic has been significantly actualized in today's Canada and Spain (Moreno, 1999).¹ Recent devolution and decentralization in Great Britain and Italy are the examples of asymmetry in unitary countries. The United Kingdom has adopted asymmetrical devolution for Scotland, Northern Ireland and Wales in 1998, and Denmark for Greenland in 1978 (O'Neill, 2000). Through constitutional changes, some states have used asymmetry in framing their federal units. Those are Belgium (during federalisation process which lasted from 1970 till 1993, the following asymmetrical constitutional entities were drawn: Flanders, Walloon and Brussels region, and Flemish, French and German community), Switzerland (establishment of a new canton Jura in 1978, out of the largest canton Bern), or Nigeria (establishment of 36 states and the territory of the capital) (Witte, 1992). Spain gave asymmetrical autonomy to Basque Country, Catalonia and Galicia in 1978, while France assigned a limited form of autonomy to Corsica in 1991. For example, today in the autonomous community of Catalonia, all non-state regional political parties stress the demand for the realization of asymmetrical federalism in their political programmes. In their political agenda, *Convergència Democràtica de Catalunya* (CDC) proposes agreements on separate Catalan legal system, removal of Spanish decentralized administrative bodies on the territory of Catalonia, official representation of Catalonia in EU, as well as particular agreement on taxation with the central government, all after the model of Basque Country. Spain should become a multinational country in which the co-official languages (together with Spanish/Castilian) are to be Catalan, Euskadi (the Basque language) and Galician.² The government of the socialist P. Maragall in Catalonia revised the Statute of Autonomy of Catalonia.³ This new draft determined the Catalans to be a nation and not a nationality; it pointed to the obligation of all citizens to learn Catalan, outlined the limits of the application regarding Spanish laws on Catalan territory, and

- 1) For a series of short papers on the issue of asymmetrical federalism, see the website of the Institute of Intergovernmental Relations, Queen's University: www.iigr.ca
- 2) The coalition partner in Catalan government – *Unió Democràtica de Catalunya* – has a similar programme. In Spain, some 25 % of the population use Catalan, Euskadi and Galician as their first language, not Spanish/Castilian (McRoberts, 2007, 509).
- 3) Statute of Autonomy of Catalonia 2006, www.gencat.net/generalitat/eng/estatut, consulted page 30.11.2007.

formed some new agreements with the central government regarding taxation. In February 2006, the draft of the Statute was submitted to the special committee formed by the representatives of Spanish and Catalan government and it suffered some major changes before being submitted to the referendum in Catalonia in June 2006.⁴

Political and scientific discussion about actual and constitutional asymmetry in Canada has been significantly actualized after signing the Agreement on National Health (September 2004) between the former federal Prime Minister Paul Martin and the president of the provinces' governments, in which the asymmetrical federalism as well as the possibility of its realization in the provinces and territories is explicitly acknowledged, all on the grounds of special agreements.⁵ This agreement defines asymmetrical federalism: "...as flexible federalism which clearly allows the existence of special agreement and agreements conformed to the particularity of Quebec." At the same time, a bilateral agreement between the Canadian Prime Minister and Quebec Prime Minister has been signed, and it states that Quebec keeps its competencies in the field of Health Care, while other provinces accept stronger form of integration regarding intergovernmental cooperation in that field. In January 2005, federal government signs an agreement on financing the exploitation of the coastal oil and gas with two provinces (Nova Scotia, and Newfoundland and Labrador), while new financial arrangements are requested by the provincial governments of Saskatchewan, Ontario, New Brunswick, Quebec and British Columbia.

According to Brock:

Asymmetrical federalism is a simple concept but sometimes rendered unnecessarily complex. In its most basic form, it may be understood as differences among the states or provinces within a federal system. These differences may arise from geography, history, demographics, economic and fiscal realities, population characteristics, culture or other key characteristics specific to particular units. A certain degree of asymmetry in policy is natural in any federation despite national goals or objectives since implementation and interpretation will depend on these differences. However, in its most recent (and reincarnated) usage, asymmetrical federalism is a convenient label for the different treatment of constituent units within a federation. (Brock, 2005, 8)

Constitutional doctrine determines the existence of asymmetrical federalism in case of one region in the state enjoying a special form of autonomy, and very often having some different constitutional position which distinguishes it from the other parts of the country. Asymmetrical federalism is found in federations and partially decentralized unitary states. Asymmetry may be introduced via constitution or international agreement, but also via state legislation. Asymmetrical federal agreements are found under the names "cantonisation", "partial federalisation", "asymmetrical decentralisation", while in the United Kingdom such establishment of the asymmetrical-autonomous regions is described as devolution and "home rule".

Asymmetrical position of federal units in modern federations can be determined in the constitution and legislation (de jure asymmetry), or with the actual application of federal political

4) Catalan conundrum, 07.06.2006., www.guardian.co.uk/spain, consulted page 5.12.2007.

5) Text of the agreements on webpage: <http://pm.gc.ca/>, follow the link "First Ministers meetings".



programmes (de facto asymmetry). It is about the unequal representation of federal units in federal institutions, special competencies of the federal units, and the unequal application of federal laws and programmes in those federal units (Kostadinov, B. and Cardinal, L., 2007). Tarlton (1965) pioneered the thought in modern theory of federalism regarding asymmetry as an element of federalism, in connection with different relations among southern member states of the American federation. In any and all federations, independently from those relations determined by the constitution, the combination of cultural, economic and social factors produces asymmetrical forms of power and influence exerted by various constitutional units of the federation, which also further influences the level of harmony or disunity in federal systems. Canada and Spain confirm this Tarlton's basic idea that federative systems are never fully symmetrical. Social and economic asymmetry among/between member states is the foundation for various roles these constitutional units' governments have in the political system of a given federation.

During the second part of the last century, Canada resisted asymmetrical federalism by introducing symmetrical decentralization in the whole country. Their federal government allowed all provinces the right to opt out from the federally financed programmes, and it transferred federal competencies onto the provinces rather than put itself into situation of constitutionally acknowledging asymmetry of Quebec (Rémillard, 1985). The second constitutional compromise in Canada – the Constitution Act (1982), passed and adopted without Quebec's consent – delivers the option of a centralized federalism whose incumbent is the Anglophone Canada connected through a common language, culture and religion. There were the attempts to make such a defective and incomplete agreement acceptable for Quebec, via constitutional amendments known as the Lake Meech Accord (1987). In this Accord, the vision of Quebec pertaining to the future of the federation was formed – asymmetrical federalism. The procedure of constitutional change stated in the Constitution Act (1982) was undoubtedly the main reason for rejection on behalf of Quebec of that second Canadian constitutional compromise. According to the Constitution Act (Art. 42, 1982), federal parliament may – after a regular procedure of constitutional change passed with the approval of seven provinces having 50 % of the total population – significantly change the federal institutions or even form new provinces, change the competencies of the Senate, the number of senators from each province, the provisions about the Canadian Supreme Court (except the provisions about the composition of the court, for the change of which a unanimous consent of all provinces is required), form new or expand the existing provinces onto the territories of Yukon and North Territories, as well as change the manner in which the structure of the provinces' representation in the House of Representatives is determined. Since the 1980s, the reform of the Senate has been a constant political topic in Canada, and the current Conservative government has proposed an eight-year limit for senatorial terms. It also promises further reform involving the elections of new senators (Studlar, Christensen, 2006).

For the change of the above mentioned areas the Lake Meech Accord (Art. 9, 1987) requests the unanimous consent of all provinces and federal parliament. Unanimity is also necessary for the change of the use of English and French in interested provinces, as well as for the change of the revision procedure itself. The Constitution Act (Art. 38, par. 2, 1982) determines that the provinces may exercise their right to opt out if the amendments derogate their legis-

lative competencies, their right to ownership, or other rights and privileges of the legislative body or a provincial government. The right to opt out is actually the constitutional veto of the province onto the application of a federal amendment. The provinces-dissidents can, after the passage of the decision on rejecting the federal amendment, continue to regulate the area which has been transferred into the competency of the federation by two-third consent of other provinces. If the provinces adopt the amendment by which the provincial competency for the culture and education is transferred into the competency of the federal government, the provinces which use the right to opt out and continue to independently regulate those areas will be given financial compensation from the federation. Engaging in a harsh political battle with the Prime Minister Trudeau, Quebec asked for a financial compensation before the passage of the Constitution Act (1982), pertaining to the right to opt out in all cases of the transfer of provincial competencies onto the federation. It warned that the use of that right without financial compensation was actually made impossible, since federation would punish the province which continued independent regulation of the kept area by double taxation.

The procedure of appointing the Supreme Court judges and senators ceases to be a unitary element; the provinces can nominate judges and senators. The Accord was to constitutionalize the reality of Canadian federalism: the provinces' failure to participate in common programmes of the federation and provinces with the equal contribution in the costs, all directed towards regulating the areas under the competency of the provinces; the right for a financial compensation to a province which does not wish to participate in the programmes; as well as the existence of the administrative agreements of the federation with Quebec on the immigration politics, ever since 1971. By means of an independent choice of the immigrants, Quebec would neutralize fear of Anglicisation. The Accord states that Quebec creates a distinct society in Canada, and acknowledges the role of Quebec government in preserving and promoting the identity of the province (Ostoja, 1991). The failure of the Lake Meech Accord triggered yet unseen expressions of national solidarity on behalf of the Quebec population, and the requests for independence or monetary union with the rest of Canada were voiced.

Contemporary Canadian federalism (having 10 provinces and 3 territories) is executive-centred. The key element since 1960s has been executive federalism, periodic meetings of provincial ministers, including the premiers (First Ministers Conferences), with their counterparts for negotiations about matters affecting both jurisdictions (Canon, 1982). In 2003, a Council of the Federation was established to provide a regular forum for premiers of the provinces and territories to coordinate strategy (Studlar and Christensen, 2006). Twenty years after the failure of the passage of amendments on the Constitution Act (1982), Canada is in progress of forming a plural federalism which is to ensure the asymmetric position for the provinces, in the framework of federation. In Canada, history has taught us that formal constitutional recognition of distinctiveness is less popular than asymmetry in fiscal and policy arrangements. The Canadians are pragmatists who understand the need for difference in practice. Even arrangements designed to provide room for Quebec's distinctiveness are justifiable and acceptable to the broader Canadian public provided that an equal opportunity to take advantage of similar arrangements is extended to the other provinces, even if the option is not exercised.



3. Failure of the federative state idea in post-communist countries

Asymmetrical federalism appears in multinational countries since it is sought by minority national groups, while the advocates of the state Unitarianism stress the minority regions to be the threat to the state unity and constitutional values of solidarity, equality and freedom, leading to ruin all the countries which adopt it. Sokol points out to the failure of the federative state idea, even while containing the elements of confederalism, in case of either binational or multinational federation, since it constantly produces crisis situations:

Why? As a rule, the nation which is most numerous or has the most powerful economy, the one which is historically dominant, wishes to preserve its domination or even to enhance it by some model, no matter of its form. If this model does not suit this dominant nation, they will change it formally, constitutionally or factually, with no regard to the Constitution. Other nations, which feel deprived or unsatisfied from the point of view of interests or cultural perception of values, will be against it. In that moment, within the nation, what happens is homogenization and unity of the majority of the population and political elite, which is extremely rare in other situations. For that reason, some multinational federation cannot successfully function even in the most ideal democratic conditions. Therefore, Yugoslavia would have dissolved no matter of the constitutional model of federalism, no matter of the single-party or multi-party or any other system, since the idea of the federal state with the elements of confederalism was not accepted by its peoples (Sokol, 2007, 140).

American authors Elkins and Sides (2007) claim that there is no definite or conclusive evidence of the fact that the institutional adoption of federalism or proportional election system can prevent the dissolution of plural or divided societies. The reasons for maintaining the situation in these countries are not institutional; they depend on the characteristics of their nations and their attachment to the common country. Kymlicka (1996, 130) while looking for the possible sources for unity in a multinational state – which affirms, rather than denies its national differences – says that there is no clear answer to this question.

According to Elkins and Sides:

However, there is no argument – either theoretical or empirical – that either type of reform actually builds unity within the state. Indeed, these power-sharing “solutions” imply two equally plausible, but opposing, consequences: sharing power with ethnic minorities could either ease their discontent or allow it room to grow. (Elkins and Sides, 2007, 694)

It is all about the critique of the concept of a consociated democracy, which was expressed by a Dutch political scientist Arend Lijphard, upon his research done on 36 democracies in the period from 1945 till 1996 (Lijphard, 1999). He mentions three possibilities of choice facing plural societies and countries: division of the country into several individual states, removal of the plural nature of the societies via assimilation, and the adoption of the plural society with the establishment of the consociated democracy (Lijphard, 1977). Consociated democracy is founded on the following principles: the government must be in the hands of a wide coalition of political leaders from all most important segments of the plural society, and the vital interests of the minorities

are to be protected via institution of mutual veto. It is important to have proportional representation of all important social groups in legislative and executive branch of government, as well as territorial autonomy assured by the federative or decentralized arrangement if the minorities are territorially concentrated, or in the form of autonomous cultural and educational institutions if those minorities are territorially dispersed within the country (Lijphard, 2004). In his catalogue of institutional arrangements directed towards assuring democracy in divided societies, the author also includes a parliamentary system of government, as well as the division of power among the main groups in army, police, and judiciary, all via ethnic quota in representation. Lipjhard also participated in the discussion about the institutional-political design in ethnically divided societies and equalized in substance the consociated democracy with the power-sharing democracy, a model of democracy for divided societies which necessarily must include proportional election system and territorial autonomy (federalism) or personal autonomy of minority nations. The critic of the above model, Horowitz (2002, 19), asks for a denial of Lipjhard's theories regarding constitutional engineering for the divided societies since the leaders of the majority communities are not motivated to share the power with the minority communities and to shape some wide post-election coalitions, as a form of division of legislative and executive power – which is a central element in a consociated democracy. He claims that Lipjhard's institutional solutions, especially the proportional election system, cannot result in compromise regarding ethnic problems. Similarly, Elkins and Sides (2007, 695) state that the combination of proportionality and an ethnic party could only encourage this party to centre its campaign on ethnic appeals, which further might accentuate ethnic identities at the expense of attachment to state.

Chapman and Roeder (2007, 677) explore options on the following examples: would partition of Chechnya and Russia, the Basque Country and Spain or Serbia and Kosovo bring more peace and democracy than an attempt to hold these together under unitary states or regional autonomy arrangements? The authors claim that after the wars involving competing of nation-state projects, partition is more effective than alternative institutions in minimizing the risk of repeating the hostilities and violence, as well as for assuring life in democracy, under condition that the partition is implemented fully through creation of separate sovereign states. Examining some 72 nationalist civil wars between 1945 and 2002, the authors have come to conclusion that only 14% of the parties in conflict, which became separate sovereign countries, repeat that conflict in the period of 2 years. However, if it is about de facto separation (when and if there is a new institutional arrangement after the ceasefire, where the secessionists are left in effective control of their region and population and keep the central government out) there is a 50% incidence of a repeated conflict, and a 63% incidence if the warring parties stayed tied in a unitary country, as well as a 67% incidence regarding the parties which received autonomy within the country. Sovereign countries which appear after the war are often not ready to start a war in comparison to the sovereign countries created by other means.⁶

6) In Spain, despite the years of violence exerted by the Basque separatist group ETA, a large proportion of Basques profess attachment to both the Basque region and Spain (Linz and Stephan, 1992).



4. Conclusion

Facing the challenge of finding the fair way of preserving unity and differences upon which depend their political futures, Canada and Spain have chosen governed asymmetry as a manner in which the unity of their countries is to be maintained. The pressure towards asymmetry in those countries causes the strengthening of the requests for symmetry, while the result of the power ratio between asymmetry and symmetry becomes the main element in the political dynamics of these federal systems. Constitutional and political recognition of asymmetry in those states is the means to overcome the main differences among their constitutional units, as well as a necessity in the process itself. The experience of the post-communist countries emerging after the dissolution of federative Yugoslavia is opposite to the above mentioned example. The examples of Slovenia and Croatia show development of a democratic political system which has been ensured by the recognition of these countries' autonomies. The most fragmented country in the world – Bosnia and Herzegovina – is an example of a denationalized state without the will to live together. What is the constitutional structure like in a country which does not have exclusive control over the process of making their own legal norms, and whose executive power does not dispose of its population consent, all resulting in it being the subject of the international protectorate? (Maziau and Pech, 2000) Similar problems exist in both Kosovo and Macedonia, while Montenegro has managed to achieve the status of an independent and sovereign country.

No set of institutional arrangements designed to manage diversity can be successful without some minimum level of trust among groups, and without a basic commitment of all to “vouloir vivre ensemble”, to “convivencia”, or to “bündestreue”.

According to Simeon :

It is true that appropriate institutions and policies can build and strengthen trust, but at the same time these cannot themselves be constructed from scratch. Institution building to reflect an underlying commitment to unity is relatively easy; institution building to create such a commitment in a diverse society is a great deal more difficult. This is one of the major dilemmas for institutional designers in divided societies. (Simeon, 2007)⁷

7) Working paper, 4th International Conference on Federalism, India, New Delhi, nov. 2007. Available on line at www.federalism2007.org/.

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