What Can Cannabis Legalisation Teach Us About Canadian Federalism?

Abstract

“Executive”, “Collaborative”, “Court”, “Conflicting” or “Judicial”, Canadian federalism is depicted in eclectic terms in the academic literature. Looking at cannabis legalization in Canada, this article aims to highlight what can be revealed from the policy-making process in a federal system in which a variety of actors and orders of government are involved. It appears from the analysis that there is no hegemony of style in Canadian federalism, but rather intertwined competing dynamics at stake in the making of a single public policy.

Introduction

On October 17, 2018, Canada became the first country in the Western World to legalize cannabis for recreational purposes. The decision is made in the context of a major shift in drug policy, where the long-privileged repressive approach of the War on Drugs is being challenged. Accordingly, a realignment towards decriminalization and legalization policy options have taken place in the last few years. Unlike the nine U.S. jurisdictions that legalized cannabis through a bottom-up rationale,[1] Canada has adopted a top-down approach. Indeed, while legalization in the U.S. followed citizens-led initiative processes, Canada engaged in policy change through unilateral action from Ottawa. That said, we argue that cannabis legalization in Canada is especially revealing of the intertwined competing dynamics in the policy-making process at play in Canadian federalism.

Between “Court”, “Collaborative” and “Conflicting” Federalism

Although there is not a single mention of the Prime Minister in the Canadian Constitution, he or she is nonetheless the dominant figure of executive power in Canada. Since the publication of the impactful *Governing from the Centre: The Concentration of Power in Canadian Politics* by political scientist Donald Savoie in 1999, numerous debates have taken place about the more or less autocratic nature of governance in the Canadian political regime, whether in the media or academia. Savoie argues that Canadians have been confronted, since Pierre Elliot Trudeau’s “reign” (1968-1979 and 1980-1984), to the consecration of a Court government in Canada. This Court government is characterized by the unprecedented centralization of powers in the hands of the Prime Minister, undermining the agency of both the Parliament and the Cabinet.

This concentration and unilateralism of power induce not only the creation of a democratic deficit but also of a federative deficit to the extent that provincial governments do not necessarily benefit from access to the “Monarch’s Court.” The Federal government indeed has the final word on policies that affect the entire federation. Do actions surrounding cannabis legalization reveal such democratic and federative deficits?

The way cannabis legalization was put on the Canadian political agenda – at least in recent history – undoubtedly follows the “normal” process that would be expected in a liberal democracy. Initially suggested by the Youth branch of the Liberal Party of Canada, the idea was adopted in the Party platform at its 2012 National convention by 77% of the members who attended it. Not long after being elected as the Party leader in 2013, Justin Trudeau, who earlier favored only decriminalization of the substance, joined the majority of the members in supporting full legalization. Accordingly, the 2015 platform of the Liberal Party explicitly proposed cannabis legalization, a position that was further highlighted in the electoral campaign by Trudeau. Six months after winning the election, the new Liberal government submitted the first draft of C-45, a legislative act to legalize cannabis, in April 2017. In the knowledge of the events that lead to legalization, the process seems to meet the normative standards of representative democracy.

That being said, in federations, not only does the overall public opinion matter, but so does obtaining the approval of the federated entities. The style of leadership adopted by Ottawa in the legalization process was characterized numerous times by its inflexible unilateralism, especially knowing the intergovernmental nature of the issue. If Criminal Justice, as well as the issuing of production licenses, are of federal authority, Commerce, Public Health and most of Law enforcement fall under the jurisdiction of provincial governments. Unlike what the entanglement of responsibilities suggests, the policy-making process did not lead to a negotiated project of legalization. As a result, multiple requests to delay the legalization date were brought up by the provinces, which pointed to the precipitated character of the process that left them with a shortage of time to set in place their implementation model and to fill the gaps in enforcement (onto the driving under the influence of cannabis, among others). Those demands were brushed aside by the Trudeau government.

Following the same logic, the federal government planned to implement the sales of cannabis (a provincial jurisdiction) online if some provinces appeared uncooperative. In other words, an alternative mechanism was set in place by Ottawa in order to court-circuit the will of some provinces if needed. Legalization of cannabis, therefore, does not illustrate a joint policy-making process in which the two orders of government are involved, but an imposed decision by the federal government onto its provincial counterparts. Thus, the fact that the issue of implementation already raises constitutional disputes between Ottawa and some provinces should not come as a surprise. Both Quebec and Manitoba, for instance, passed cannabis laws that prohibit the personal cultivation of the substance, counteracting the federal law which legalizes the personal cultivation for up to four plants by individuals.

What can, however, be revealed from the legalization of cannabis is that there is no hegemonic style of federalism in the policy-making process. In that sense, a federalism that is labeled as "collaborative," prioritizing horizontal and less hierarchical governance between the federative "partners" (rather than conflicting management between "opponents"), is also noted. Surprisingly, such a collaborative attitude from actors has emerged on the question of the shares of tax revenues generated by cannabis sales. Ottawa first suggested distributing the revenues equally, a suggestion to which provinces were opposed, pointing out the amount of health and public security expenses that are engendered by legalization, which they will assume for the most part. The agreement that was concluded from November and December 2017 bargaining rounds thus distributes 75% of the revenues to the provinces and the remainder to the federal government, the latter acknowledging by the same fact the burden of provincial responsibilities in the implementation of legalization. Another example of the flexibility shown in federal-provincial relations is the freedom of the federated entities regarding the configuration of their selling model (public, private or mixed).

In sum, the ambivalence of Canadian intergovernmental relations in the policy-making process is unveiled by the legalization of cannabis, for it oscillates between inflexible unilateralism, collaborative federalism, and confrontation federalism. Once the policy elaborated, the issue remains as to its implementation. From this perspective, legalization of cannabis sheds light on the tensions that still characterize the federal regime.

Between the Spirit of Federal Law and the Differentiated Implementation Rules of Provinces and Municipalities

Intergovernmental coordination of policy is one of the main challenges federations are facing. This challenge is inherent in the fact that multiple orders of government, which occasionally promote divergent interests, need to coexist in the same federative entity. In the United States, legalization of cannabis followed patchwork institutional dynamics, where some States initiated a legalization process whereas others still remain in the prohibitionist logic. This difference between the states illustrates the competing dynamics that can ensue from the absence of "federalized" policy: citizens' actions can be criminal in some States, but compliant with the laws in others.

One could have imagined that Ottawa's unilateralism on legalization would have had the advantage of avoiding the pitfalls of the absence of policy coordination. However, this is far from being the case. At the opposite, multiple public and private authorities enforce just as many particular regulatory measures, leading to a complexification of legalization policy across the country. Thus, a cannabis consumer's compliance with rules differs depending on his province, municipality, and even residential address. To better illustrate this, it is worthwhile further examining the case of Quebec.

Against its relatively progressive reputation on social policy, Quebec is on its way to adopting the most restrictive approach to the moral issue of cannabis. To start, Quebec prohibits personal cultivation of the substance, whereas the (Pan-Canadian) federal law allows cultivation of up to four plants. Then, the Coalition Avenir Quebec (CAQ) government, elected on October 1st, 2018, put forward its intention to raise the legal age for cannabis consumption and purchase from 18 to 21 years old in

2019 (with all other provinces but Manitoba having standardized their legal age for cannabis on the one in effect for alcohol, ranging from 18 to 19 years old depending on the jurisdiction). The new government has also suggested that it would limit the permissible public possession to 15 grams (rather than the limit of 30 grams enacted by the federal law) and that it would prohibit public consumption of the substance. A Canadian citizen living in Quebec could, therefore, violate the provincial law while respecting its federal counterpart.

This legislative inconstancy from one jurisdiction to the other is further experienced in Quebec by the decision of the previous Liberal provincial government to allow municipalities to regulate cannabis consumption. This choice is justified in the name of the autonomy of "proximity governments," which are represented by municipalities. It is though ironic to the extent that municipalities have historically been considered as "creatures of the provinces."

Either way, municipalities capitalized upon the power that was given to them. About thirty cities have already adopted regulations prohibiting cannabis consumption on their territory, cannabis which is now, should we remember, a legal substance… the differentiation of implementation models does not stop there: the government has also allowed landlords to prohibit cannabis consumption on their properties.[2] Knowing that a majority of pauperized classes and students are apartment tenants, a true issue of social justice is at stake here: not only is the right to consume a legal product disregarded, but it targets specific parts of the population, making them more at risk of violating the implemented laws. If this inequality seems theoretical at first (will there really be police enforcement for those types of offenses?), it nonetheless opens up the possibility of profiling in law enforcement. This possibility cannot be ruled out since it has existed before, as shown by the over-representation of visible minorities in cannabis offenses (Joseph and Pearson 2002, Werb, and al. 2010, Goldsmith 2016).

In the end, the framework for the sale and consumption of cannabis reveals a total absence of coherence between the multiple orders of government involved. Moreover, the failure of the executive powers to coordinate their action has been central in the legislative debates. These debates are likely to be settled by the judicial branch, underlining the differentiated role of each of three branches of governments within the Canadian federal regime.

Between Executive Federalism and Legislative Federalism

Canada is characterized by a federalism that is usually labelled as executive, in which negotiations between the central government and the provinces are done almost exclusively outside parliaments, through informal meetings that are more often than not limited to the executive branches (Hueglin 2014, Poirier and Saunders 2015). This style of federalism is uncommon; usually, the federalist principle lies on both "self-rule" and "shared rule" logic (Benz and Sonnicksen 2015). Consequently, the constituent members of a federation participate in pan-federal policy through the federal legislative power, which is usually bicameral, where the lower chamber represents the population, and the upper chamber represents the interest of federated entities, in which all are considered on equal terms. It is through this upper chamber that federated entities can get involved in the debates that take place at the central government level.

If Canada does have an upper chamber, the Canadian Senate, the latter has never successfully played this role. Indeed, the Senate holds on to no democratic legitimacy since its members are not elected; to no federative legitimacy since the Prime Minister appoints its members; and to only little political legitimacy since its members have traditionally been appointed according to their degree of partisan affinity with the party in power. For those reasons, the Senate has generally had a trivial role in the legislative debates. In an unusual fashion, however, the Senate has been shown to be fairly active on the consideration of the cannabis legalization bill C-45, with two main effects on the process.

First, the extensive study of the legalization bill by the Senate, which took place from November 2017 to June 2018, led to a delayed legalization date from July 1st to October 17th, 2018. If it can be explained partly by the filibuster tactics employed by conservative senators who were opposed to legalization, issues of time also lie on the 46 legislative amendments that were put forward by the upper chamber. Second, the most important of those amendments gave the possibility to provinces

to establish regulations on the personal cultivation of cannabis, and, by the same token, granted the provinces the power to prohibit such practice. The Senate, therefore, acted as the voice of the federative entities, especially of Manitoba and Quebec, which both favoured the prohibition of the personal cultivation of cannabis. If the amendment had been rejected by the House of Commons and the Senate had respected this choice, as shown by its approval of the proposed bill at second reading, the institution still played a role in the defense of the provinces against the unilateralism of the federal government. Despite the rejected amendment, Manitoba and Quebec persist in their will to prohibit the personal cultivation of cannabis. This is problematic in for two reasons, both in policy coherence terms and with regards to the Canadian federal regime. Indeed, the actions of the two provinces and of several municipalities do not respect the spirit of the federal law (stop criminalizing cannabis consumption, fight the organized crime market), and perhaps even totally contradict it (criminalization of personal cultivation, restrict legal possession quantities).

When questioned on the inherent contradictions in their regulations, both the federal government and Quebec's government have reaffirmed their own jurisdictional preponderance, while refusing to ask the Courts to solve this legal vagueness. Thus, the two orders of government transferred the burden of challenging the law to individual citizens instead of assuming themselves the resolution of this conflict in which their jurisdictional responsibilities are at stake. In other words, not only do Quebec's citizens possess unequal rights regarding cannabis in comparison to their fellow citizens from other provinces, but it is their responsibility to dispute this inequality. Thereby, sooner or later, one of the most important actors of Canadian federalism, the judicial branch, will be involved.

An intervention of judicial courts in the legal cannabis jurisdictional conflict underlines two important trends in today's Canadian federalism: the absence of a will from elected officials of the two orders of government to set in place formal and effective political mechanisms to ensure a negotiation of policies involving competence overlaps and, consequently, their tacit consent to an increased role of the judicial branch in the settlement of litigious questions. The federal and provincial elected bodies thus shirk their role in the federal regime's building and evolution processes, leaving it to judges.

Of the Relevance of Public Policy Analysis in Federalism Research

This short analysis of cannabis legalization in Canada underlines the relevance of public policy analysis to the study of federalism "in motion." Research on federalism, at least from a Canadian perspective, has mainly focused on federal institutions or on cultural and (multi)national dynamics that characterize federations. Without taking anything away from these perspectives, a public policy approach seems to enhance further intellectual reflexion on federalism, pointing out power relations and collaboration dynamics that arise from political choices along the policy-making process. The process of legalizing cannabis reveals no unique federalism style in Canada to guide policy-making, but instead that the pathway of an intervention of the State in a federal context is littered with various decisions. Those decisions fall within a range of approaches – from collaborative, unilateral, to conflictual –, and they involve multiple actors – from executive, legislative and judicial branches of governments–, which are operating on numerous levels – from federal, provincial, municipal to the private order.

Suggested Citation: Benoit, M and Lévesque, G. 2019. 'What Can Cannabis Legalisation Teach us About Canadian Federalism?'. *50 Shades of Federalism.* Available at:

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Further Reading

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[1] Of the 10 legalizing U.S. States, only Vermont has not proceeded through the initiative process, which legalized cannabis by parliamentary means.

[2] Quebec is no exception on this point: aside from British Columbia, all North American jurisdictions have allowed landlords to do the same.