

Constitutional Asymmetry As A Tool To Manage Diversity

Abstract

This short contribution challenges traditional perspectives in federalism studies by addressing the concept of constitutional asymmetry as an alternative approach and by examining the potentials of constitutional asymmetry. In relation to multinationalism in systems with federal arrangements, the contribution demonstrates that the use of constitutional asymmetries in contemporary federal theory provides a more flexible approach to autonomy claims.

Introduction

The concept of constitutional asymmetry broke into the federal theory discussion in 1964 with Tarlton's article on the concepts of symmetry and asymmetry (Tarlton, 1965). Based on the analysis of the relationship between constituent units and the central level in the federal system, Tarlton presented symmetry and asymmetry as two concepts opposing each other. Furthermore, he proposed that symmetry refers to the extent to which constituent units in the federal state share common features, and asymmetry to the extent to which they do not share these features. Thus far, traditional studies in federalism, have tended to preserve the concept as such. Closely linked to this, to date, traditional federal theory has focused on symmetrical mono-national federal states (Requejo, 2011). In particular, the history of most modern states shows the constant attempt to limit national diversity within these states, sometimes even by using undemocratic methods (Requejo, 2001). Moreover, the theory puts forward a notion that diversity requires more coordination and coercion from the central level for the federal system to remain operational, rather than further recognition and protection of the diversity (Tarlton, 1965). As articulated by McGarry and O'Leary (2007), so-called "national federalists" support an idea of using the federal system as a tool for nation-building. Besides, they perceive it as a potential mechanism for a more centralized unitary state. A possible explanation for this is that a so-called model federal system is inspired by the United States of America and is purely territorial (Kymlicka, 2005).

An attempt to apply these two notions in contemporary federal arrangements has received considerable disapproval (Palermo et al., 2009). Contemporary researchers suggest that this understanding of constitutional asymmetry and mono-nationalism is not quite tailor-made for its application in contemporary systems with federal arrangements. Firstly, contemporary federal theory emphasizes that one of the weak points of traditional federal theory is exactly that it heavily relies on reputed "model" federations like Australia, Canada, Germany, Switzerland, and the United States of America, while at the same time disregarding contemporary states with federal characteristics (Popelier, 2014). For instance, Obinger observes that recent federal systems are primarily fragmenting states (Obinger et al., 2005), such as Bosnia and Herzegovina, Belgium, Italy, Spain, the United Kingdom, etc. which appear to develop new federal forms (Blindenbacher and Watts, 2002) usually based on constitutional asymmetries. Secondly, contemporary federal theory restates the imperfections of ethnocentrism as it refuses to recognize distinct identities. In line with this, Tierney (2006) points out that contemporary sub-national entities challenge a mono-national notion of the state with federal arrangements with their constitutional agenda by putting forwards the accommodation of multi-nationalism, in particular through different tiers of government.

Two Implications of Constitutional Asymmetry and Multinationalism

One important implication about constitutional asymmetry is that it is immanent to federalism (Palermo, 2009). However, constitutional asymmetry is no longer limited only to federal-type models (Delmartino, 2009) but may also arise in unitary, decentralised systems (McGarry, 2011) as shown in the cases of Italy and the United Kingdom. This allows us to conclude that since any system possesses the potential for a claim based on differences, it can hardly be considered that asymmetries emerge only in federal systems, as they may be disguised in any type of the system. All things considered, this implication is important for the fact that it confirms that symmetry and asymmetry are not divergent, but rather complementary concepts in federal arrangements.

A second important implication is that where it occurs, constitutional asymmetry most certainly generates specific difficulties connected to multinationalism (Weller, 2011). Additionally, a particular issue for the multinational system has always been how to reconcile identity with territorial integrity (MacFarlane and Sabanadze, 2013). Likewise, even though central level constitutions tend to stipulate symmetry between the sub-national entities' constitutions (if there are any) for the sake of

coordination within the system as a whole, there is still one important indication. Where a claim for the institutional accommodation of multinationalism is strong enough, it will culminate in an inevitable attempt to redesign the state towards the asymmetrical model (Máiz, 2004). Given these points, this implication demonstrates that focus should not be put on coercion but rather on accommodation.

Constitutional Asymmetry as an Alternative

A point often overlooked in traditional federal theory is that the concept of constitutional asymmetry can allow for a softer response compared to coercion. At least two arguments for this come to mind. First, constitutional asymmetries are less likely to cause severe discordance in the structure of the state (Stepan, 2008). This is because they can wave aside exclusionary claims, such as self-determination. Second, constitutional asymmetries can form the basis the admissible accommodation of sub-national identity. This is due to the fact that they support legitimacy and stability in systems that exhibit multinational features; examples include Belgium, Canada, India, Russia, Spain, and the United Kingdom (Hausing, 2014).

The present findings are significant in several major aspects. In the first place, the leading characteristic of a multinational system with federal arrangements that exhibits asymmetrical features is the tailor-made accommodation of diversity (Burgess, 2009). Secondly, as the lack of success in accommodating autonomy claims might further stimulate centrifugal forces (McGarry, 2007), it can be suggested that having constitutional asymmetry within reach, equates to flexibility in the institutional design process, including successive accommodation processes (Wolff, 2011). In addition, having constitutional asymmetry at one's disposal means abandoning forceful homogenization and supporting the power to choose (Bauböck, 2001), ultimately preventing the system from falling apart (McGarry and O'Leary, 2012). Finally, it is suggested that they, in fact, encourage the dynamic stability of the system (Benz and Broschek, 2013), as stability in these systems is founded on mutual relationships between a complex set of actors and processes.

Nonetheless, some limitations in applying constitutional asymmetries must be kept in mind. Firstly, the intensity of demands to accommodate differences may be strong enough to cause an imbalance in the system. Secondly, constitutional asymmetries may be challenging with regards to the distribution of power and competences as horizontal and vertical coordination might be required (Bolleyer et al., 2014). Thirdly, constitutional asymmetries that arise in fiscal policies to match the differences among subnational entities (Watts, 2005) bring forward tensions.

Concluding Reflections

The changes experienced in the internal structure of states over the past decades have led to increased interest in the study of constitutional asymmetries. Consequently, contemporary research has raised intriguing questions regarding the nature and extent of asymmetry in specific systems. Despite this, little progress has been made in considering the employment of constitutional asymmetries as an alternative approach. The likely cause for this shortfall is a difficulty in applying traditional federal theory concepts in the contemporary dynamic environment.

Notably, constitutional asymmetries in multinational systems with federal arrangements are representative of federal dynamics. It is, therefore, important to realize that constitutional asymmetries may act as transitional or permanent solutions. In any case they will be appropriate for reaching a turning point in an agreement on potential future relationships among tiers of government. In addition, if they are institutionalized, constitutional asymmetries may act as a tool for the accommodation of multinationalism in systems with federal arrangements. Nonetheless, further study about this should be undertaken as the question of how to institutionalize differences remains opened (Burgess, 2009).

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Bibliography

- BAUBÖCK, R. 2001. United in Misunderstanding? Asymmetry in Multinational Federations. ICE – Working Paper Series.
- BENZ, A. & BROSCHEK, J. 2013. Conclusion: Theorising federal dynamics. In: BENZ, A. & BROSCHEK, J. (eds.) *Federal dynamics, Continuity, change, and the varieties of federalism*. Oxford: Oxford University Press.
- BLINDENBACHER, R. & WATTS, R. 2002. Federalism in a Changing World – A Conceptual Framework for the Conference. In: BLINDENBACHER, R. & KOLLER, A. (eds.) *Federalism in a Changing World, Learning from Each Other, Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism*. Montreal & Kingston, London, Ithaca: McGill's Queen's University Press.
- BOLLEYER, N., SWENDEN, W. & MCEWEN, N. 2014. A theoretical perspective on multi-level systems in Europe: Constitutional power and partisan conflict. *Comparative European Politics*, 12, 367-383.
- BURGESS, M. 2009. The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective. In: PALERMO, F., ZWILLING, C. & KÖSSLER, K. (eds.) *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems*. Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano.
- DELMARTINO, F. 2009. New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union. In: PALERMO, F., ZWILLING, C. & KÖSSLER, K. (eds.) *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems*. Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano.
- HAUSING, K. K. S. 2014. Asymmetric Federalism and the Question of Democratic Justice in Northeast India. *India Review*, 13, 87-111.
- KYMLICKA, W. 2005. Is federalism a viable alternative to secession? In: LEHNING, P. B. (ed.) *Theories of Secession*. London: Routledge.
- MACFARLANE, N. & SABANADZE, N. 2013. Sovereignty and self-determination: Where are we? *International Journal*, 68, 609-627.
- MÁIZ, R. 2004. Nation and deliberation. In: MÁIZ, R. & REQUEJO, F. (eds.) *Democracy, Nationalism and Multiculturalism*. London and New York: Frank Cass.
- MCGARRY, J. 2007. Asymmetry in Federations, Federacies and Unitary States. *Ethnopolitics*, 6, 105-116.
- MCGARRY, J. 2011. Asymmetric Autonomy in the United Kingdom. In: WELLER, M. & NOBS, K. (eds.) *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*. Philadelphia, Oxford: University of Pennsylvania Press.
- MCGARRY, J. & O'LEARY, B. 2007. Federations and managing nations. In: BURGESS, M. & PINDER, J. (eds.) *Multinational Federations*. London: Routledge.
- MCGARRY, J. & O'LEARY, B. 2012. Territorial pluralism: its forms, flaws, and virtues. In: REQUEJO, F. & BADIA, M. C. (eds.) *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases*. Abingdon and New York: Routledge.
- OBINGER, H., LEIBFRIED, S. & CASTLES, F. G. 2005. *Federalism and the Welfare State: New World and European Experiences*, Cambridge University Press.
- PALERMO, F. 2009. Asymmetries in Constitutional Law – An Introduction. In: PALERMO, F., ZWILLING, C. & KÖSSLER, K. (eds.) *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems*. Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano.
- PALERMO, F., ZWILLING, C. & KÖSSLER, K. (eds.) 2009. *Asymmetries in Constitutional Law: Recent Developments in Federal and Regional Systems*, Bolzano/Bozen: Europäische Akademie Bozen = Accademia Europea Bolzano.
- POPELIER, P. 2014. Subnational multilevel constitutionalism. *Perspectives on federalism*, 6, 1-23.
- REQUEJO, F. 2001. National pluralism and federalism. Four potential scenarios for Spanish plurinational democracy. *Perspectives on European Politics and Society*, 2, 305-327.
- REQUEJO, F. 2011. Decentralization and Federal and Regional Asymmetries in Comparative Politics. In: REQUEJO, F. & NAGEL, K. J. (eds.) *Federalism Beyond Federations, Asymmetry and Processes of Resymmetrisation in Europe*. Farnham and Burlington: Ashgate.

- STEPAN, A. 2008. Comparative Theory and Political Practice: Do We Need a 'State-Nation' Model as Well as a 'Nation-State' Model? 1. Government and Opposition, 43, 1-25.
- STEPAN, A., LINZ, J. J. & YADAV, Y. 2011. Crafting State-Nations: India and Other Multinational Democracies, Johns Hopkins University Press.
- TARLTON, C. D. 1965. Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation. The Journal of Politics, 27, 861.
- TIERNEY, S. 2006. Constitutional law and national pluralism, Oxford, Oxford University Press.
- WATTS, R. L. 2005. A Comparative Perspective on Asymmetry in Federations. Asymmetry Series 2005(4).

Further Reading

- AGRANOFF, R. 1999. Accommodating diversity: asymmetry in federal states, Baden-Baden, Nomos.
- BURGESS, M. 2006. Comparative federalism. theory and practice, London, Routledge.
- SWENDEN, W. 2006. Federalism and regionalism in Western Europe. a comparative and thematic analysis, Basingstoke, Palgrave Macmillan.
- WELLER, M. 2011. Introduction. In: WELLER, M. & NOBBS, K. (eds.) Asymmetric Autonomy and the Settlement of Ethnic Conflicts. Philadelphia and Oxford: University of Pennsylvania Press.
- WOLFF, S. 2011. Cases of Asymmetrical Territorial Autonomy. In: WELLER, M. & NOBS, K. (eds.) Asymmetric Autonomy and the Settlement of Ethnic Conflicts. Philadelphia, Oxford: University of Pennsylvania Press.