FEDERALISM-E

The Constitutional Difference in Canadian Asymmetry: The Limitations of Indigenous Power, Neocolonialism, and Social Inequality

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Federalism-E is founded by the Royal Military College of Canada and the Institute of Intergovernmental Relations at Queen's University - ISSN 2562-3435

Federalism-E Vol. 21, No.2 (2020)
10.24908/fede.v21i2.13933

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Unity, guaranteed rights and freedoms, and diversity are often the portrayed trademarks of Canadian federalism. However, these aspects often serve to divide nations based on hierarchical power relations steeped in neocolonial systems. These divisions in power relations have led to neocolonialism and social inequality. This has occurred through the ignorance of Indigenous power while offering constitutional recognition to former colonial nations. This paper will first examine the function of asymmetry in Canadian federalism and then discuss how it contributes to power imbalances amongst the various nations within Canada. A careful distinction will be made between a province, as a constitutionally defined unit, and a nation, as a community with a shared sociohistorical context. This paper will then examine the attributes of the Canadian Constitution Act and Indian Act which cause legal limitations in Indigenous power, and will connect these limitations with neocolonialism. Finally, this paper will discuss how the limitations of Indigenous power in government and neocolonialism contribute significantly to the social inequalities faced by Indigenous nations and how Indigenous advocacy has progressed beyond government institutions to address inequalities. For the purpose of this paper, jurisdictional power refers to the powers delegated to the provinces from the federal government which enable them to create legislation that is sustained only within itself and does not require the approval of the federal government. Further, Indigenous nations refer to all First Nations, Inuit, and Metis peoples within Canada.

Federalism has been heralded as the glue that holds Canada and the diverse nations within together.¹ Specifically, it promotes cohesion between the federal and provincial governments through the sharing of jurisdictional powers.² Asymmetrical federalism occurs when the power shared between the federal government and the provincial subunits is not equal.³ Asymmetry can also be present in two forms: de jure and de facto.⁴ “De jure” asymmetry is often seen through constitutionally defined jurisdictional powers.⁵ This style of asymmetry has been prevalent in Canada since its founding, through both the former British North America Act and now through the Constitution Act of 1982. “De facto” asymmetry is less apparent and occurs through transactions of power between the federal government and the provincial subunits that are not defined within a constitution.⁶ Canada also participates in this style of asymmetry. It can

¹ Richard H. Leach, “Canadian Federalism Revisited,” *Publius* (1984), 11.

² Charles D. Tarlton “Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation,” *The Journal of Politics* (1965), 861.

³ Ibid.

⁴ Ronald Watts, “A Comparative Perspective on Asymmetry in Federations,” Institute of Intergovernmental Relations, Queen’s University, (2005) 2.

⁵ Ibid.

⁶ Watts, “A Comparative Perspective on Asymmetry in Federations,” 2.

be seen through the federal government's dealings with the province of Quebec and Indigenous nations. Quebec, as a constitutionally recognized power, has legitimate authority over specific jurisdictions. These include healthcare, education, and the prison system.⁷ However, indigenous nations are not included in the constitution's division of powers, and therefore, are under the jurisdictional control of the federal government. This unequal power allocation causes asymmetry.

It is also pertinent to acknowledge the various degrees in which nations are asymmetrically recognized within Canada. Provinces are constitutionally defined and have jurisdictional powers that are enshrined into the Constitution Act of 1982.⁸ These powers enable provinces to create and implement policies based on the regional culture(s) within certain jurisdictions that the provinces have been delegated. As such, it is invariably difficult to alter these powers without a significant shift in the opinions of the majority. Provincial governments can tailor policies to the needs of their populations. Additionally, the federal government can maintain substantial control over the state, as the asymmetrical flow of power is directed to the federal government. This allows the federal government to centralize or decentralize power amongst itself and the provincial subunits depending on the needs of the state.⁹ The independence given to the provincial subunits also releases the federal government from the responsibility of creating umbrella policies and legislation for regionally diverse issues.¹⁰ However, Indigenous nations within Canada do not have constitutionally defined jurisdictions. Instead, they rely on the vague wording of several significant pieces of legislation through de facto asymmetry to provide insight into their limited abilities. Further, if the legislation is not upheld, Indigenous nations must seek judicial intervention.¹¹

Although asymmetry can act as a unifying force between the federal and provincial governments, it also acts as a divisive force in Canada through its selective acknowledgement of other nations.¹² Specifically, asymmetrical federalism significantly limits the powers of Indigenous nations that do not have jurisdictional independence enshrined within the

⁷ The Constitution Act. 1982. Part II. Section VI.

⁸ The Constitution Act. 1982. Section V.

⁹ Michael Keating, "What's Wrong with Asymmetrical Government?" *Regional & Federal Studies* (1998), 198.

¹⁰ Tarlton "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation" (1965).

¹¹ Watts, "A Comparative Perspective on Asymmetry in Federations," 2.

¹² Keating, "What's Wrong with Asymmetrical Government?" 214.

constitution. This is a serious contrast the claims that federalism unifies all nations.¹³ This is evident through several different channels of intergovernmental relations. First, as provincial subunits hold jurisdictional power over areas such as healthcare, policies and regulations are decided based on regional consensus. Furthermore, if a province requires additional funding for healthcare, it can directly advocate for such to the federal government as it is a constitutionally recognized unit. As mentioned above, Indigenous nations are a jurisdiction of the federal government and must therefore advocate within the federal government for such funding. There is no guarantee that the concerns of Indigenous nations will be heard, as they do not have jurisdictional power over healthcare. Despite Canada acting through an asymmetrical federal system when engaging within Indigenous nations, the agreements are not often legally guaranteed or, if they do possess legal standing, are often ignored by the federal government, forcing Indigenous nations to begin court proceedings.¹⁴ In fact, the Indian Act establishes a paternalistic relationship between the federal government and Indigenous nations. This can be examined in further detail through the Constitution Act's mention of Indigenous nations and the Indian Act.

The Constitution and Indian Act limit the power of Indigenous nations to act within the federalist structure of the Canadian government while granting power to provinces, who are representative of former colonial nations. As discussed, the Constitution Act granted provinces control over certain jurisdictions. These jurisdictions would become arguably the areas that most affected the Canadian public, and included healthcare, education, and social services.¹⁵ The dispersal of powers was meant to unify Canada through acknowledging and allowing regional diversity to influence certain areas of policy and legislation. However, the act failed to recognize that the formation of provinces was an artifact of colonialization. Colonies formed into provinces and created governing bodies, leaving Indigenous peoples excluded from any formal territorial recognition.¹⁶ This failure, reflected in the Constitution Act, validated the nationhood of solely colonial settlements in Canada. The Constitution Act is also filled with vague wording surrounding Indigenous inclusion. This can be seen in Section 35.1, where it states:

(a) a constitutional conference that includes in its agenda an item relating to the

¹³ Ibid, "The question of autonomy hinges on the argument that it is unfair for one part of the country to have more powers of self-government than another. This is a serious objection if any territory is being denied self-government while another is being given it."

¹⁴ Tarlton "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," 861.

¹⁵ Leach, "Canadian Federalism Revisited," 11.

¹⁶ Richard Stacey, "The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism," *Federal Law Review* (2018).

proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.¹⁷

The section states that the conference will be composed of federal and provincial representatives but that Indigenous representatives will be invited to participate. This is demonstrative of the limited power allotted to Indigenous nations in the federalist structure. Despite acknowledging that Indigenous representation will be invited, it does not specify which Indigenous representatives will be invited as it does with the provinces. Additionally, the flexibility of the language used also signifies the differences in legal power; as it states with certainty that the Prime Minister and Premiers will attend but uses uncertain language regarding the substantive participation of Indigenous representatives.

The Indian Act has been another influential document in Canadian federalism. It formally recognized First Nations peoples as a distinct nation. However, it denies Indigenous nations the power to decide on legislation and policies for their communities.¹⁸ It also designated who the government recognizes as an Indigenous person. Lastly, the act mandated that Indigenous nations act through a minister in the government. This limits the ability of Indigenous nations to collaborate with other departments of the federal government or provincial subunits as they must act through a federal department that must also grant approval for the communication. It also limits the ability of Indigenous nations to designate membership. If such a document was created that forced federal government approval as to who Ontario could consider to be an Ontarian, there would be mass protests and uprisings against such an intrusion. This is a single example of many of how the federal government limits the powers of Indigenous nations through legal legislation.

The Constitution Act and Indian Act limit the ability of Indigenous nations to participate in government in a substantive manner through different means. The Constitution Act recognizes only provinces as subunits. Therefore, Indigenous nations are excluded from holding jurisdictional powers and cannot create and implement legislation and policies without federal interference. This stifles Indigenous efforts to enact policies that are best for their needs, thus, it denies Indigenous nations the ability to act on behalf of their regional needs as provinces can. The Indian Act dictates that Indigenous nations act through a federal government representative in the Department of Indian Affairs.¹⁹ This robs Indigenous nations of the ability to self-govern and represent their own needs within the federal government. It also allows for biases, as the

¹⁷ The Constitution Act. 1982. Part II. Section 35. 63.

¹⁸ The Government of Canada. *Indian Act*. 1985.

¹⁹ Keating, "What's Wrong with Asymmetrical Government?" 214.

department can elect to act on the concerns of certain Indigenous nations while ignoring others for a myriad of reasons. These acts have contributed to the maintenance of the neocolonial structures within Canadian federalism.

Neocolonialism is reproduced through the Constitution and Indian Acts as it severely limits the power of indigenous nations. The asymmetrical structure of Canadian federalism recognizes former colonial nations as holders of jurisdictional powers, therefore, prioritizing the needs of colonial nations, and thus reproducing colonial structures. Presently, Canadian federalism has created a two-tiered system of recognition. This system prioritizes the federal and provincial governments, as both have the legal authority to ensure that issues are dealt with. However, Indigenous nations do not have the legal authority to ensure that promises and standards are maintained in the same manner, and therefore, are lower on the hierarchy. Specifically, Indigenous nations must rely on the justice system to uphold rights and treaties guaranteed to them through legal documentation.²⁰ That is not to ignore the fact that provinces also rely on the justice system as well; however, it is not their first course of action. This hierarchy reproduces colonial structures which had aimed to repress Indigenous nations through poor recognition of their rights and denial of power in government.²¹ The system is also costly and time-consuming. Further, the structure has not only denied Indigenous nations jurisdictional control, but allotted power to provincial governments that arose from colonies. These factors have led to the reproduction of colonial structures in Canadian federalism.

Indigenous nations have been deliberately denied the ability to advocate for change through participation in government. This has occurred through the exclusion of Indigenous nations from yielding jurisdictional powers²². Due to this, Indigenous nations have been forced to rely on the federal government to acknowledge and act on various concerns, including healthcare inequalities. Additionally, the asymmetrical power sharing between the federal and provincial governments has caused Indigenous nations to become stranded, as jurisdictions such as healthcare require communication between both governments.²³ One such incident occurred in the case of Jordan River Anderson. Jordan, who was born with a rare health condition, spent his whole life within the confines of a hospital, despite being eventually cleared to return home. Neither the federal nor provincial governments stepped up to be accountable for the financial cost of homecare services for Jordan; therefore, Jordan remained in the hospital. Situations such as Jordan's have occurred, in which Indigenous children have been denied healthcare services

²⁰ Watts, "A Comparative Perspective on Asymmetry in Federations," 2.

²¹ Martin Papillon "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States," *Publius* (2012), 299.

²² *Ibid.*, 290.

²³ Leach, "Canadian Federalism Revisited," 11.

due to jurisdictional tensions between the federal and provincial governments.²⁴ Further, following the outcry regarding the poor treatment of Indigenous children, the federal and provincial governments vowed to correct the tensions that left Indigenous children stranded for healthcare. However, Indigenous nations were excluded from the final processes of negotiations when Jordan's Principle was finalized.²⁵ This is exemplary of how the government has denied Indigenous nations from having a voice. Jordan's Principle became a top-down appropriation of Indigenous policy by the federal government. Currently, Jordan's Principle is practically unusable as it does not incorporate definitions of the healthcare terminology used by provinces and Indigenous nations, favouring only the federal government's terminologies.²⁶

This has led to Indigenous nations choosing to expand their calls to action into domains that act externally to federalism. This has occurred mainly through two channels: grassroots movements and international organizations. Grassroots movements are particularly relevant to the scope of this paper as they act physically within Canada but work external to the federal system. Specifically, these movements have involved Indigenous nations opting out of participating in the Canadian government, instead of working within their own governance structures.²⁷ These movements work external to the Canadian government, and include funding campaigns and social media pressures, and apply a boomerang effect of external pressure to endorse change.²⁸ This directly disrupts the aim of federalism, as Indigenous nations must act in a decentralized manner to achieve change. Despite being successful in furthering Indigenous social equality, acting externally to the federalist government has caused deeper division in Canadian unity. Federalism aims to promote unity among the diverse nations within a state. In order to do such, the state must provide the nations with a voice and an ability to act. As Indigenous nations must work external to the federalist system, it invalidates the ability of the system to function and attain unity.

Canadians often believe that the federal nature of the government enables diversity to contribute to the policies that affect the average citizen. Further, it is a widely held belief that

²⁴ Laura Eggertson, "Red tape blocks care for Aboriginal children." *Canadian Medical Association* (2015).

²⁵ Keating, "What's Wrong with Asymmetrical Government?" 206.

²⁶ Papillon "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States," 299.

²⁷ The Constitution Act. 1982. Part II. Section 35. 63; Papillon "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States," 302

²⁸ Papillon "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States," 290.

provincial jurisdictional power contributes to unity, as it reduces intergovernmental tensions. However, these statements are not only inaccurate but also neocolonial. As discussed in this paper, the asymmetrical federalism of the Canadian government validates only former colonial nations, namely the English and the French. Further, the most significant document in contemporary Canada, The Constitution Act, fails to recognize any nations other than those of former colonial powers. This has caused Indigenous nations to be excluded from any benefits reaped from the current federal system of government. Additionally, the federal system has allowed neocolonialism to maintain the social inequalities of Indigenous nations through the Indian Act, and related limitations on their power in the federal government. This has caused Indigenous nations to reach outside of the federal system of government to achieve change. Although this has amounted to considerable success for Indigenous nations in Canada, it has also contributed to a widened divide between the various nations within Canada. Therefore, within contemporary Canadian federalism, the implications of being a multination state have been bleak and have maintained colonialism through structural power inequalities amongst nations, leading to social inequalities.

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