CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Immigration and Federalism in Canada: beyond Quebec Exceptionalism?

by

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Perspectives on Federalism, Vol. 9, issue 3, 2017

Abstract

The paper focuses on Canadian Provinces' role in migrant selection. After an asymmetric approach, that benefited only Quebec, the federal government granted devolutionary powers in migrant selection to the other Provinces as well, moving towards *de facto* asymmetry. This process has proved to be successful over the years, but recently the federal government has reacted, recentralizing some aspects of immigration policy. This does not apply to Quebec.

This policy change may suggest that, although immigration federalism may be grounded on reasons other than the need to accommodate linguistic or ethnic claims, it remains the case that the former are "weaker" than the latter, and are more subject to pressure from the central government.

This is also confirmed by looking at the mechanisms through which intergovernmental agreements have been translated into law. Unlike the Quebec case, immigration's devolution in relation to the other Provinces has occurred through administrative delegation of powers from the federal government. This permits the federal government to exercise some form of political pressure in order to realign the Provinces' discretionary choices.

Keywords

immigration, federalism sub-state nationalism, intergovernmental agreements, Canada

1. Federalism, asymmetry and immigration: some introductory remarks

Certain scholars have cautioned against the idea of a general theory of federalism and the risk of conceiving particular historical experiences, notably the US case, as a paradigmatic example of a federal state (Gamper 2005: 1297).

This methodological warning is important when it comes to evaluating issues of symmetry and asymmetry in compound territorial states. Since classical federal states have come into existence through a compact of previously independent and thus formally equal states, the assumption is that all of the components of a federation should be treated equally and be entrusted with the same powers.

However, asymmetry in compound territorial states is increasingly frequent, especially due to the fact that federalizing processes are nowadays related to devolutionary processes of previously centralized states. Often, these processes take place precisely in order to grant special treatment to specific territorial components.

When studying asymmetry in compound territorial systems, it is common to distinguish between *de facto* asymmetry and *de jure* asymmetry (Burgess 2006: 209-225; Tarlton 1965: 861).

De facto asymmetry refers to social elements such as population, territory, economy, and language, which make each territorial component different from the other units within the federation. It also includes the case of a different regulatory outcomes as a consequence of the exercise of the same power. *De facto* asymmetry does not represent a problem with regard to the equal treatment of the constituent units and it may be said that it is a natural output of any federation.

On the contrary, *de jure* asymmetry implies a differentiation that is grounded in law. Here the social, economic, geographical, and cultural differences of a relevant constituent unit are taken into consideration by the legal order in order to provide a differential legal treatment in comparison with the other subnational units.

De jure asymmetrical federalism can take many forms. It can be entrenched in Constitution; it can be established by statute law or even by intergovernmental agreements. Moreover, asymmetry can relate to the division of powers, the distribution of finances

between the federation and sub-national entities, or the institutional representation of the federal units in federal bodies (Palermo 2009: 12).

Because *de jure* asymmetry represents a breach of the principle of equal treatment between federal components, it must be justified in political and/or in legal terms, particularly when it is not originally entrenched in the Constitution. Amongst the grounds usually advanced for justifying asymmetry, the need to accommodate ethno-cultural or linguistic differences that are present in a given sub-national unit is the most common. Where a component of the federation presents some cultural elements that differ from the other federal units, namely language, religion or a different legal tradition, this component may be entitled to a different treatment and/or special powers that are functional to maintaining its distinctiveness in relation to the rest of the federation (Agranoff 1999: 21).

Other grounds for granting special powers or for providing differential treatment may be related to the geographic position of the sub-national unit (insularity for instance) or to structural problems that prevent this component from growing economically to the same degree as the rest of the federation. Some scholars argue that asymmetry should be dependent on the institutional capacity of the relevant unit to exercise its self-government powers efficiently. The more a given subnational unit provides the population with efficient services, the more the federation should grant either more powers or additional fiscal transfers (Antonini 2000).

At first, asymmetry in immigration policy is difficult to conceive. Immigration, and even more so, the selection of immigrants, are regarded as a national responsibility and as a consequence, uniformity is the rule. There are several explanations for this: immigration encroaches upon the foreign affairs of the state, it concerns the control of national borders, and finally it impinges upon the personal component of the state, which the national level has an interest in shaping.

However, there may be reasons that justify a certain degree of devolution in the selection procedure and thus *de facto* asymmetry.[I] For instance, sub-national units may be considered best placed to evaluate their labour force needs. There are also grounds for justifying *de jure* asymmetry. In a multinational state, a subnational unit in which a national/language minority is principally settled – thus constituting a majority with respect to the regional territory – may feel the need to preserve its cultural homogeneity with respect to immigrants. This occurs especially when immigrants find it more useful or more

attractive to learn the language of the national majority than to learn the local language (Kymlicka 2001, Zapata-Barrero 2009). Due to such a situation, subnational units may be granted special powers enabling them to select immigrants on the basis of their capacity to integrate successfully in the cultural/linguistic environment of the relevant unit.

The case of Canada is particularly interesting for examining the issue of 'immigration federalism',[II] and within it, the different dynamics of *de facto* and *de jure* asymmetry.

Unlike many other constitutions, the Canadian Constitution Act 1867 conceives immigration as a concurrent jurisdiction, although the supremacy of federal law is expressly foreseen. The first section of this paper will explore the reasons that led the Canadian constituent assembly to introduce this provision and the early practice and case law that, since the beginning of the 20th century, have oriented the system towards centralization.

The second section will explore subsequent practice in immigration federalism, where, through intergovernmental agreements, the federal government progressively granted Quebec special powers in the selection of immigrants. This asymmetric *de jure* approach towards devolution in immigration has been followed by a progressive devolution of immigrant selection powers to the other Provinces as well, shifting from *de jure* to a certain degree of *de facto* asymmetry. This process has proved to be successful over the years, but recently the federal government has reacted, and recentralized some aspects of immigration policy, notably immigrant settlement services. This does not apply to Quebec, which is the only Province to have exclusive responsibility in this area.

I argue that this policy change may suggest that, although immigration federalism in the selection of immigrants may be grounded on reasons other than the need to accommodate linguistic or ethnic claims, it remains the case that the former are "weaker" than the latter and are more subject to pressure from central government. This is also confirmed by looking at the mechanisms through which intergovernmental agreements have been translated into law, an issue explored in the third section of this paper. Unlike the Quebec case, immigration's devolution in relation to the other Provinces has occurred through administrative delegation of powers from the federal government. This permits the federal government to exercise some form of political pressure in order to realign the Provinces' discretionary choices in the selection of immigrants, in light of federal objectives.

Finally, in the concluding remarks, the paper will consider to what extent the Canadian case may be useful to assess in the light of some EU Member States' experiences of

immigration federalism, traditionally more concerned with migrant integration rather than selection.

2. The origins of immigration federalism in the Constitution Act, 1867 and early practice

The power to admit or deny aliens entry to the national territory (*jus excludendi alios*) is traditionally considered as a prerogative of sovereignty (Plender 1998: 6). As a consequence, even in compound territorial states, it is vested in the national tier of government.

However, from an historical perspective, although the power of the king to deny entry or to expel aliens has been admitted since the dawn of the modern age, the lack of a central well-articulated bureaucratic apparatus made this power quite ineffective. The monopolization of the legitimate means of movement by states, and thus the effective control of their national territory and population, has been a very lengthy process that has its roots in the French Revolution when, for the first time, a system of border controls and identification of aliens was implemented (Torpey 2000).

Before this, *jus excludendi alios* was a power exercised by local authorities, related to welfare access. Lacking a national system of social assistance, each local authority was responsible for providing the poor with some minimal relief. In order to avoid rendering local authorities responsible for the poor of other territorial communities, they were entitled to remove anyone "likely to be chargeable to the parish" to their place of legal settlement. This applied irrespective of the national origin of the person. This system was in place in England since the adoption of the Elizabethan poor law,[III] but similar arrangements were known in France and Prussia as well (Brubaker 1992).

These brief historical references can help us to better contextualize the *jus excludendi alios* power in the context of the federal experience in North America.

The US Constitution does not explicitly provide the federation with powers related to immigration. During the 18th and 19th centuries many states, especially on the Atlantic coast, enacted statutes with the aim of deterring the entry of paupers, idiots, lunatics and aliens, usually by imposing levies on shipmasters (Neumann 1993: 1833; Motomura 2014,

65). The constitutional authority to enact such statutes was based on the police powers of the states and on English poor law tradition (Trattner 1989; Van der Mai 2002: 806).[IV]

In one case, the US Supreme Court upheld these measures;[V] in another, it did not, considering them in breach of the commerce clause reserved to the federal union.[VI] Only in 1875 did Congress pass a federal statute dealing with immigrants' entry. As a consequence, state legislations limiting the entry of aliens were deemed to be preempted by federal statute. Lacking an express constitutional clause conferring the power to the Congress, the Supreme Court stated that the regulation of the entry and the stay of aliens in the national territory was "an incident of sovereignty belonging to the government of the US".[VII] However, the scope of federal action in immigration jurisdiction and the possible conflicts with state measures are still questionable issues, as the recent *Arizona vs. US* case revealed.[VIII]

The reference to the US experience is important in order to historically contextualize those provisions of the Canadian Constitution Act, 1867 that expressly concern the division of powers in the area of immigration. On the one hand, the influence that the US federalism experience and the US Civil War played on the choices of the Canadian founding fathers is well known, pushing them towards a strengthening of the Confederation's powers (Smith 1993: 67; D'Ignazio 2002: 9). On the other hand, like many American states, Canadian Provinces, relying on their inherent police powers, had already passed statutes regulating immigration, usually forbidding entry to those people that could become a burden upon local welfare, or that had previously been convicted of serious crimes in their countries of origin.

The result of these partially contradictory rationales is sec. 95 of the Constitution Act, 1867, which conceives of immigration as a concurrent jurisdiction. This is an exception within the Canadian watertight model of division of powers, and it means that both federal and provincial legislators are empowered to act in the immigration field. However, in order to safeguard federal interests, the clause explicitly provides that the law of a Province «shall have effect in and for the province as long and as far only as it is not repugnant to any act of the Parliament of Canada».

Thus, the clause gives the federal Parliament wide discretion in defining the role of the Provinces in immigration, admitting at least three options. Indeed, sec. 95 makes it clear that the federal legislator can opt at any moment for uniformity and centralization, since it

asserts the paramountcy of federal law in the field. However, sec. 95 also seems to admit decentralization in immigration and thus *de facto* asymmetry. There is also a third option. Sec. 95 states that federal Parliament may «pass law into all or *any* of the provinces». This means that the territorial scope of a federal statute in immigration may be formally limited to a part only of the national territory. Thus, *de jure* asymmetry, at least with regard to the territorial scope of the federal statute in immigration, would be compatible with the clause.[IX]

Sec. 95 is not the only provision of the Constitution Act, 1867 dealing with immigration, since sec. 91.25 grants the federal Parliament exclusive jurisdiction in relation to naturalization and aliens.

As admitted by the Canadian Supreme Court in 2001, the possible tension between the two provisions is an issue that has been neglected both in case law and in the literature.[X]

It may be said that the Courts have considered as falling under sec. 91.25 the various rights, privileges and disabilities attached to the status of alien. This should include admission and expulsion, as typically they are privileges or disabilities attached to the alien's status. As a possible way to reconcile the two provisions, I argue that while the procedure for the alien's admission – (i.e. the evaluation with respect to public order, public security, and health requirements) – falls under sec. 91, the selection procedure falls under the concurrent jurisdiction of sec. 95. This would reflect current federal legislation, which provides for devolution in the selection of migrants, while reserving the admission procedure to the federal government.

Soon after the entry into force of the Constitution Act, 1867, the Provinces agreed that the federal parliament would comprehensively deal with immigration. The Immigration Act 1869 – the first federal statute on immigration - was heavily influenced by previous provincial statutes, and was aimed at deterring the entry of specific classes of immigrants deemed dangerous for public order or likely to become a burden on public welfare.

The division of powers in immigration became an issue of contention when, at the beginning of the new century, British Columbia passed laws aimed at forbidding the admission of Chinese immigrants. The federal government usually disallowed these statutes, but two cases were brought before the courts. In *Narain Singh,*[XI] and *Nakane and Okazake,*[XII] the British Columbia Court of Appeal considered the British Columbia statute

to be in breach of sec. 95 and declared it preempted by the 1869 federal statute (Hucker: 1975, 649ss.).

Although the classification of immigration as a concurrent jurisdiction could suggest that the conflict between a federal and a provincial statute on immigration should be evaluated in concrete terms, favouring the best interpretation for the safeguarding of both statutes, the court's reasoning in the two cases seemed to suggest a different conclusion. It applied a "covering of the field" test: once the federal legislator had acted in an immigration matter, the provincial legislator was prevented from taking action in the field, except in cases where the provincial statute was in furtherance of the federal statute.

The outbreak of World War I coincided with the adoption of restrictive measures on immigration, increasingly seen as an issue related to national security and foreign affairs, both falling within federal jurisdiction. As a result, immigration federalism in Canada vanished.

Immigration federalism regained political salience with claims for the recognition of Quebec as a distinct society that led to the conclusion of executive agreements granting the Province meaningful power in selecting economic migrants. Since the second half of the 1990s, this devolutionary trend has been extended to the other Provinces as well. This practice was considered by both territorial levels of governments as a way of implementing the original understanding of sec. 95 of the Constitution Act, 1867.

However, this approach to devolution in immigration was, and still is, subject to the political will of the federal level. Parliament was free, as it still is, to simply ignore these agreements and the Provinces lacked remedies against such a decision. Because of the weak position that the Canadian constitution granted to the devolutionary framework in immigration, at the time of the Meech Lake and Charlottetown Accords Quebec and the other Provinces pushed the federal government to accept some amendments to sec. 95. By and large, these amendments were aimed at constitutionalizing the practice of the intergovernmental agreements and considering them as a mechanism for determining the exact division of powers in immigration (Garcea: 1993; Schwartz: 1987, 132-133).

Had the Meech Lake Accord been approved, intergovernmental immigration agreements, once authorized by both federal and provincial legislatives, would have had force of law and been placed beyond the reach of unilateral change by the federal Parliament. They would have had priority not only over existing federal powers on

immigration (sec. 95) but also on naturalization and aliens (sec. 91.25). However, the federal government would have kept control of «national standards and objectives relating to immigration or aliens».

The Charlottetown accord confirmed the previous requests advanced in Meech Lake and added an obligation for the government to conclude an agreement when so requested by a Province and inserted an equality treatment clause. This would have guaranteed all Provinces equality of treatment in relation to any other Province that had already concluded an agreement, «taking into account different needs and circumstances».

The failure of the two accords renders the legal nature of the immigration agreements uncertain, as we shall see in the following paragraphs.

3. Immigration federalism in action. The practice of intergovernmental agreements: between *de jure* and *de facto* asymmetry

3.1. From federal uniformity to *de jure* asymmetry: the Quebec case

With Quebec's quiet revolution, the francophone Province became aware of the importance of immigration for maintaining and developing the distinctiveness of Quebec as a nation (Houle F. 2014, 118-118; Piché 2003, Kymlicka 2001).

Given the concurrent jurisdiction with regard to immigration, Quebec could opt to act in the field unilaterally, subject to the confines of federal legislation. However, this option was not viable. The previous federal practice of considering immigration as a field of *de facto* exclusive federal jurisdiction, coupled with the restrictive attitude shown by the judiciary towards the provincial powers in immigration, persuaded Quebec's leaders that they needed to conclude an agreement with the federal government before acting in the immigration field.

The results of this strategy were quite modest at the beginning. The first agreement concluded in 1971 – the Lang-Cloutier agreement – merely authorized Quebec's officers to be present in some federal consulates and to provide information to immigrants wishing to settle in Quebec. In 1975, a new agreement was signed, setting out the principle that Quebec's officers would be formally consulted before selecting immigrants wishing to settle in Quebec (on these evolutions, see Kostov 2008: 91; Vineberg 1987: 305).

Only in 1978, following the signature of the Cullen-Couture agreement, was Quebec granted substantial powers in the selection procedure. The Canadian immigration selection system was based, as it still is today, on a points system. The applicant had to totalize a given score by meeting several criteria that evaluated a candidate's capacity to adapt to the Canadian labour market.

Under the Coullen-Couture agreement, the selection of permanent economic migrants applying from abroad was the result of a joint decision-making process (see for a detailed account Garcea 1993: 111-129). Applicants had to be assessed under both federal and Quebec standards. However, applicants that met Quebec's standards would be admitted, even if they did not qualify under the federal government's selection criteria. At the same time, applicants who met the federal government's standard but failed to qualify under Quebec's standards would be denied entry into Quebec. In this case, applicants could be selected by the federal administration and once they had entered into Canada, could nevertheless settle in Quebec.[XIII] The federal administration retained the power to deny entry to migrants selected by Quebec on the grounds of security, public order, or public health (see Garcea 1993).

Quebec was also granted the power to select asylum seekers who applied from abroad. The federal tier of government retained the exclusive power to determine whether the applicant qualified as a refugee or as a person in similar circumstances in need of Canada's protection. However, once identified by the federation, the applicant had to meet Quebec's criteria in order to be admitted to Canada (Garcea 1993: 111-129).

In relation to other categories of immigrants, namely temporary workers, students, and persons seeking medical attention, Quebec was granted a negative veto. This meant that federal government retained the right to reject the applications of such candidates, even if they received approval from Quebec (Garcea 1993: 111-129).

The Cullen-Couture agreement gave Quebec the power to establish its own grid for selecting immigrants. There were two core criteria that permitted an immigrant to acquire the selection certificate: knowledge of French and adaptability. This second criterion gave wide discretion to Quebec's officers in assessing whether the applicant had the ability to rapidly integrate into Quebecker society. In practice, these criteria were applied so as to favour candidates coming from francophone countries, despite otherwise weak applications (Houle: 2014, 216). Over the years, the need to attract educated, skilled and

experienced immigrants to the Province led Quebec's authorities to admit applicants with insufficient knowledge of either French or English. In 2011, as a reaction, the Quebec government introduced an amendment to the skilled worker category with the aim of requiring candidates to provide documentation attesting their knowledge of French (Houle: 2014, 220).

The Cullen-Couture agreement did not grant Quebec any power in the selection of first family class members, and of refugees applying for visas within Canada, or any power in immigrant's settlement services. This was a crucial issue for Quebec, with such a right only being granted in the subsequent 1991 agreement. As a matter of fact, the capacity of Quebec to integrate immigrants in the French cultural *milieu* was based on several strategies. The first was to give priority to French speaking ability as a criterion for selecting immigrants. The second was the requirement that immigrants' children should be compulsorily enrolled in French speaking schools, not allowing them to opt for English schools, which were reserved for the Quebecker anglophone minority.[XIV] The possibility of providing French training services to newcomers was seen as a further necessary step in ensuring full integration into Quebecker culture.

The Cullen-Couture agreement had a statutory basis, namely sec. 109 of the Immigration Act 1976, according to which the federal minister, with the approval of the Governor in Council, may enter into agreement with any Province or group of Provinces for the purposes of facilitating the formulation, coordination and implementation of immigration policies and programs.

Sec. 109 of the Immigration Act 1976 was not *per se* an expression of *de jure* asymmetry since the signing of an agreement with the federal counterpart was an option formally open to all the Provinces, not only to Quebec. However, given that the federal government was under no obligation to conclude such an agreement, even if requested to do so by a relevant Province, in practice immigration devolution was left to a discretionary decision of the federal government that favored *de jure* asymmetry rather than *de facto* asymmetry, and thus equal treatment in relation to the other Provinces. This reticence of the federal government to enter into agreements with Provinces other than Quebec explains why, on the occasion of the Charlottetown Accord, the Provinces attempted to introduce a new constitutional immigration provision compelling the federal government to conclude an

inter-governmental agreement when requested so by a Province, and to guarantee equal treatment.

The terms of the Cullen-Couture agreement were considered by many scholars to go beyond what the Constitution Act, 1867 allowed (on the different views see Garcea 1992: 274; for more favorable views, in line with Quebec's position, see Brossard and de Montigny 1985: 305; Brun and Brouillet 2002: 55). Some argued that allowing Quebec to veto admission into the Province of immigrants who met federal requirements, but not Quebec's requirements, was contrary to the paramountcy clause of sec. 95 (see Kostov 2008: 91-103). It was also noted that the federal government had, in practice, delegated to Quebec the selection of immigrants, despite the fact that under sec. 91.25 of the Constitution Act 1867, this power should fall under exclusive federal jurisdiction. In such a case, inter-delegation of legislative power would not be admissible according to Supreme Court case-law.[XV] Finally, even the wording of sec. 109 of the Immigration Act 1976 suggested that the intergovernmental agreement should have the aim of facilitating the federal administration in immigration, rather than replacing it.

Quebec was very much aware of these legal weaknesses. This explains why, on the occasions of the Meech Lake and Charlottetown accords, it considered the insertion of a new immigration clause to be so important. If approved, the clause would have constitutionalized the practice of intergovernmental agreements and would have clearly prescribed its legal ability to derogate from the paramountcy provisions of both sec. 95 and sec. 91 of the Constitutional Act 1867.

The failure of the Meech Lake and Charlottetown accords had two consequences. From a legal perspective, the nature of the intergovernmental agreement agreed with Quebec and its conformity with the Constitution Act, 1867 remained unclear. It was evident, nevertheless, that the federal Parliament was by no means bound by it. It could act unilaterally and thus preempt Quebecker legislation, with no need to respect any of the procedural safeguards foreseen in the agreement. However, in political terms, due to the failure to find a constitutional accommodation with Quebec, after the repatriation, and due to the resurgence of popular support for the separatist movement, not only was a revision of the Coullen-Couture agreement impracticable, but Quebec's claims for strengthening its powers in the immigration field were even tougher than before.

This led to the conclusion of a new agreement between Quebec and the Federal government, signed in 1991 and still in force (see Young 1992, Garcea 1993).

The agreement recognised Quebec's right to receive the same percentage of the total number of immigrants admitted to Canada as is its percentage of the Canadian population, with the right to exceed it by 5% for demographic reasons. Quebec is solely responsible for the selection of permanent and temporary economic migrants, who must be assessed under Quebec's points system alone. However, the federal administration retains some competency in the admission procedure: immigrants selected by Quebec may be refused entry by federal administrators only on the grounds of national security, public order, and public health. The federal government is also responsible for determining which individuals qualify as a refugee and, once this evaluation is completed, Quebec can select those refugees it feels best suit Quebec's interests. Finally, the federal administration withdrew from the delivery of services for the reception and linguistic integration of permanent residents, instead granting Quebec a federal monetary transfer in order to provide the services. In practical terms, this was the main achievement of the 1991 agreement.

The 1991 agreement's preamble explicitly states that «the integration of immigrants to that Province in a manner that respects the distinct identity of distinct society of Quebec» is one of the aims pursued by the agreement.

This further devolution of powers in immigration is then explicitly related to the need to promote and defend the cultural and linguistic background of Quebec. At the same time, however, the agreement also makes a reference to immigration as a shared jurisdiction under sec. 95 of the Constitution Act, 1867. This suggests that devolution to Quebec of immigration powers is to be considered consistent with an original understanding of Canadian federalism with regard to immigration, implying that it may be applicable to the other subnational units as well.

Thus, the 1991 agreement contains two rationales: on the one hand, it is coherent with a *de jure* asymmetry perspective and consistent with the need to accommodate Quebec's claim to a distinct society; on the other hand, it may merely be seen as an instrument through which the Federal government effectively implements sec. 95 of the Constitution Act, 1867 and the idea expressed therein of immigration as a concurrent jurisdiction. However, this second rationale would have implied that the Federal government

guaranteed devolution in immigration to the other Provinces as well, moving from *de jure* asymmetry to *de facto* asymmetry.

3.2. Moving towards *de facto* asymmetry

As a matter of fact, since the signing of the 1978 Cullen-Couture agreement, the federal government pushed the other Provinces to take advantage of possible decentralization in the field of immigration. After a century of federal uniformity, however, Provinces lacked the awareness of the political relevance of immigration for their social and economic development, as well as the proper administrative skills. Even modest attempts by the federal government to involve the Provinces in consultation prior to the programming of immigrants' entry numbers were unsuccessful (Vineberg: 1987, 305).

However, over the years, some Provinces began to consider immigration as increasingly crucial for their interests. As noted in many official reports, the great majority of newcomers in Canada settled in British Columbia, Ontario and Quebec, and lived in major cities such as Toronto, Montreal and Vancouver (Citizenship and Immigration Canada 2009). Thus, the immigration influx did not prove to be of any help to those Provinces facing serious problems of economic growth and of uneven distribution of population in their territory (Baglay and Nakache 2014: 92; Seidle 2013: 7).

Moreover, federal policy with regard to the selection of economic migrants progressively favored highly skilled applicants. This transpired to be a problem for those Provinces that had a need for low skilled jobs.

In the 1980s, some Provinces, such as Manitoba and Alberta, realised the importance of immigration for their regional economies. However, the federal government was quite reluctant to provide wide decentralization in the selection procedure, using Quebec as an example (Garcea: 1993).

The signing of the 1991 agreement with Quebec marked a turning point in this regard. Given the sensitivity of the other Provinces towards symmetry in federalism, the Federal government was pressured to promote generalized decentralization in immigration matters. Although negotiations with the government proved difficult, by 2009 all Provinces and one territory entered into agreements with the federal government (see Paquet: 2014, 519-548).

The main achievement of these intergovernmental agreements has been the possibility for the Provinces to establish their own provincial immigration selection programs (so

called Provincial Nominee Programs - PNP). Each Province has the power to select a given number of newcomers, previously agreed with the federal government, through criteria suitable for the relevant Province (see Baglay and Nakache 2014: 95-96).

As we shall see in the following section, from a legal point of view, the provincial administration acts under a delegation of power from the federal government. Indeed, the federal administration retains not only the power to deny admission to Canada because of national security, public order and public health, as in the Quebec case, but also a certain discretion in evaluating the selection procedure enforced by the provincial administration, to the extent of assessing the individual's effective ability to become economically established in Canada and to reside in the Province in question.

The PNP have proved successful. The number of people admitted through these programs has progressively increased,[XVI] almost reaching the number of people selected through the federal programs. In relation to some Provinces, the immigrant population admitted though PNP is by far the greatest channel of immigration in the Provinces in question.[XVII]

The selection of immigrants has not been the only area in immigration subject to devolution. With the 1991 intergovernmental agreement, Quebec obtained from the federal government the power to deal with settlement services for immigrants coupled with a federal money transfer. In the 1990s, the federal government offered this opportunity to the other Provinces as well. Due to the federal government's resistance to granting the same amount of money offered to Quebec, only Manitoba and British Columbia accepted full responsibility for settlement services (Banting 2012: 90-91).

These two policy areas – selection of migrants and settlement services – are strictly related, as the case of Manitoba reveals. Once an immigrant has been selected as a permanent immigrant, either under a federal program or under a PNP program, he can move freely within Canada. Thus, there are no guarantees that he will stay in the selecting Province. Because of this, the PNP programs favoured the selection, as permanent migrants, of persons already having family ties in the Province or that had previously worked there as temporary workers. For the Province, the power to provide settlement services to newcomers became an important way to increase retention of immigrant populations in the Provinces, especially in the less inhabited areas of provincial territories (Carter et al. 2008: 161-183).

3.3. The current recentralization and the resurgence of *de jure* asymmetry

Over the years, the federal government has become increasingly worried about the provincial nominee programs, as increasing PNP admission numbers were leading to a drop in the number of immigrants selected under federal administered programs.

Investigations conducted by the federal ministry revealed that in some cases, the PNP pursued objectives that were not in line with the federal programs (CIC 2011). For instance, Manitoba and other Provinces used the PNP as a way to counteract their low levels of population, favoring the selection of those immigrants that already had relatives settled in the Province. PNP was thus transformed into an alternative to family reunification, which is a matter reserved to the federal level. Other forms of misalignment were observed in relation to the selection of the labour force. While federal programs progressively focused on highly skilled immigrants, many PNP have been selecting low-skilled immigrants with negligible proficiency in English (Baglay and Nakache 2014: 101-102; Seidle 2013: 8-10).

These shortcomings, coupled with the will of the federal government to focus its priority action more on key economic issues, led the federal administration to implement stricter control of provincial measures in immigration. PNP programs were maintained, but the federal government pressured the Provinces to realign their PNP to national purposes (Paquet 2014: 540; Banting 2012: 90-91). The number of immigrants admitted through the PNP were capped at the levels of the previous years. As a consequence, some Provinces, which in the past had agreed for low numbers of immigrants through PNP, were prevented from admitting more (Paquet 2014: 540).

The recentralization process has been most evident in relation to integration services for migrants. As noted, only Quebec, Manitoba and British Columbia had agreed with the federal government to accept full responsibility for providing integration services in return for a federal money transfer. In the other Provinces, integration services have been federally administered or have followed a mixed approach.

When, in 2010, Ontario asked the federal government to renew its immigration agreement and to have full responsibility for settlement services, the federal government refused and decided, unilaterally, to take back from Manitoba and British Columbia full responsibility for the provision of settlement services. The decision, taken by the Harper

conservative government, has been maintained by the current liberal Trudeau government. Thus, currently only Quebec has the power to provide settlement services for immigrants.

Immigration has thus undergone a change in terms of policy. The decision to recentralize settlement services, as well as pressures for the alignment of PNPs to the national purposes in the field of immigration, seem to put the previous move from *de jure* asymmetry to *de facto* asymmetry under strain (Paquet 2014; Reeve 2014). This also confirms the weak legal nature of intergovernmental agreements and their main relevance as a matter of political, rather than legal, commitment, an issue we will now explore.

4. Immigration federalism, asymmetry and the legal framework

The unilateral withdrawal of the federal government from the agreements concluded with British Colombia and Manitoba with regard to the provision of settlement services in immigration indicates a need to focus our analysis on the legal nature of these agreements.

As noted above, sec. 109 of the Immigration Act 1976 enabled the federal minister to conclude agreements with provincial executives «for the purposes of facilitating the formulation, coordination and implementation of immigration policies and programs». The current sec. 8.1 of the Immigration and Refugee Protection Act 2002 (IRPA), which repealed the Immigration Act 1976, confirms this power and extends the scope of the intergovernmental agreements, stating they may be concluded for the general purposes of the act.

The IRPA foresees two distinct hypotheses. The first, defined in sec. 8.2, occurs when, under the agreement, the Province has not acquired sole responsibility for selection, but only a shared responsibility with the federal government. In this case, which currently corresponds to the intergovernmental agreements concluded by the Federation with all Provinces other than Quebec, sec. 8.2 states that the statutory provisions of the IRPA and the regulation provisions governing the selection, sponsorship and the acquisition of *status* must be consistent with the federal-provincial agreements.

The second hypothesis applies where, under a federal-provincial agreement, a Province has acquired sole responsibility for the selection of a foreign national who intends to reside in that Province as a permanent resident. In such a case, which currently applies vis-à-vis Quebec, sec. 9 (1) explicitly states that the individual is granted permanent status if he

meets provincial selection criteria. Sec. 9 (1) lett. d) also states that the conditions imposed by the law of the Province will have the same force and effect as if they were made under the IRPA. This applies unless the agreement provides otherwise. Thus, in case of non-consistency with the IRPA provisions, the agreement is supposed to be directly applicable.

Are these provisions a sufficient basis for granting force of law to the intergovernmental agreements? Are these references enough to incorporate the intergovernmental agreements into the legal order, make them opposable to third parties and Parliament and confer on them a derogatory capacity of the federal statute?

Despite their relevance to Canadian constitutionalism, there is little literature concerning the legal nature of intergovernmental agreements. They are considered, especially by political scientists, as soft law instruments (Simeon and Robinson 2004: 101) and/or as binding only on the executives, but they are not considered opposable to the legislatures and third parties. According to some analysis based upon Canadian Supreme Court case-law, because an intergovernmental agreement is recognized as having the force of law, a specific parliamentary act that incorporates the agreement is necessary, as occurs with international agreements (Poirier 2009: 78-111).

Thus, in light of this framework, the IRPA provisions do not seem to represent a sound basis on which to give force of law to the intergovernmental agreements in immigration.

However, this is not enough to conclude that they have no legal effect, since the normative substance of these agreements may be reflected by official sources of law and thereby become binding and opposable to third parties.

Indeed, in order to grant intergovernmental agreements and cooperative federalism a legal value, the Canadian legislative bodies have made use of several techniques, such as administrative inter-delegation, referential legislation or conditional legislation. At the heart of the system is Canada's retention of the British system of responsible government, which, according to Peter Hogg, renders any separation of the executive and legislative functions utterly inconsistent. Because of this, there are no limits, or at least there are no clear constitutional limits, to the capacity of Parliament to delegate its legislative powers to the executive branch of government.[XVIII]

However, in the early 1950s the Supreme Court was unwilling to accept that federal and provincial legislatures could circumvent the division of powers prescribed by the

Constitution by means of legislative inter-delegation (La Forest 1975: 131). In a case decided by the Supreme Court, the federation and the Provinces decided on a statutory scheme for old age pensions. Since the federal level had no constitutional power to impose a contributory pension scheme on the Provinces, while the Provinces had no power to levy taxes for financing such a scheme, each parliamentary assembly lent the other, by means of delegation, the necessary powers. In *Attorney General of Nova Scotia,*[XIX] the Supreme Court struck down the initiative, holding that one legislative body cannot enlarge the power of another by authorizing it to enact laws where the matter falls outside of its jurisdiction.

The *Nova Scotia* decision has also had some echoes in the debate concerning the devolution of immigration to Quebec. Some scholars, opposing the constitutionality of the Cullen-Couture agreement, suggested that the federal government had delegated the responsibility in the selection of immigrants to Quebec, despite the fact that, under sec. 91.25 (but not under sec. 95), selection of immigrants falls under the exclusive federal jurisdiction on naturalization and aliens.

Although the *Nova Scotia* decision is still a binding and quoted precedent, over the years the Supreme Court has validated other techniques that have permitted the development of cooperative federalism, and has allowed for the departure from the Nova Scotia rationale based on dual federalism. Inter-administrative delegation of powers and referential incorporation are among them.

Inter-administrative delegation of powers occurs when, in an area of exclusive federal responsibility, the federal Parliament delegates the power to the federal executive to regulate the matter. The federal executive is, in turn, enabled to delegate this power to the provincial executive branch.[XX]

Referential incorporation occurs when a federal statute incorporates, by reference, rules that exist in another jurisdiction, included the provincial one. The Supreme Court has even admitted anticipatory incorporation by reference that occurs when the referred rule is not already in force, but it when it might come into existence in the future.[XXI] As Peter Hogg notes, a combination of administrative inter-delegation and referential legislation have thus helped to evade the *Nova Scotia* inter-delegation case-law (Hogg 2003: 350).[XXII]

Moving back to immigration, we may note that both techniques are used in order to effectively implement the intergovernmental agreements.

As far as the PNP programs are concerned, their legal basis rests on the Immigration and Refugee Protection Regulation (IRPR). Section 12 of the IRPA confers on the federal government the power to set the criteria for the selection of immigrants and to establish classes of admissible immigrants. As an exercise of this delegation of powers from the Parliament to the federal government, sec. 87 of the IRPR provides for the institution of the provincial nominee class, which is the only legal provision dealing with the PNP.[XXIII] According to sec. 87 of the IRPR, a foreign national is a member of the provincial class if he is named in a nomination certificate issued by the government of a Province under a provincial nominee agreement concluded between that Province and the federal minister. Thus, the signing of the agreement is the condition that allows the Federal government to delegate its administrative powers of selecting economic migrants to provincial administrators.

The fact that the provincial administration acts under a delegation of administrative powers implies some limitations to provincial discretion. For instance, sec. 87.3 of the IRPR sets out the rule that the federal administration may, after consultation with the provincial administration, review the provincial evaluation on the grounds of the likely ability of the foreign national to become economically established in Canada. Moreover, under sec. 10.2.1 of the IRPA, the federal minister retains the power to give instructions and thus to realign PNP to federal objectives.[XXIV] As noted above, this power has been substantially exercised after the federal administration's review revealed some misalignments of PNP with the federal objectives.

The mechanism to give force of law to the Canada-Quebec agreement follows a different scheme. According to sec. 9 of the IRPA, the signing of the intergovernmental agreement, under which a Province is granted sole responsibility for the selection of foreign nationals, has the primary function of triggering the application of sec. 9.1 paragraphs a), b), c), d), provided that the agreement does not state otherwise. This safety clause is undeniably difficult to assess, as it seems to confer on the intergovernmental agreement a higher position than federal law, and suggests that the agreement, as such, would be opposable to Parliament's discretion.

However, setting aside this reservation, sec. 9 in practice replicates the content of the 1991 agreement in so far as it grants Quebec a negative and a positive veto with regard to the selection of immigrants, and it incorporates, by reference, the law of the Province,

granting it the same force and effect as the IRPA provisions. It is not, then, the intergovernmental agreement as such that is incorporated by reference, but a *statutory* act of the Province.. It follows, then, that unlike the other Provinces, where the power to select immigrants stems from a delegation of administrative powers, Quebec exercises its own legislative functions with regard to immigration. The discretion of the Quebec administration is not subject to any limitations by the federal administration. This cannot substitute the Quebec administrative evaluation, as it may occur under the PNP programs, and the federal Minister is not allowed to give instructions, However, it is important to stress that the evaluation with respect to public order, public security, and health requirements in order to admit an alien remains a federal responsibility.

I argue that this scheme, based on incorporation by reference to the Quebecker legislative act, is in line with sec. 95 of the Constitution Act 1867, which allows the federal parliament to pass an act in the field of immigration having territorial effect only in some Provinces. Sec. 9 of the IRPA may be read as having the effect of excluding from the territorial scope of the IRPA those Provinces (currently only Quebec) that, under the agreement, have taken full responsibility for the immigrants' selection process. The applicable law in this case will be the provincial statute that is referred by the IRPA.

The different techniques used for incorporating intergovernmental agreements have consequences for the individual seeking a judicial remedy against provincial immigration decisions. Given that the powers of the Provinces to act under the PNP stem exclusively from federal legislation, and that the PNP do not currently have a statutory basis, there is no clear legal framework to review a negative decision of a Province concerning an application made under a PNP. Conversely, the process of obtaining a Quebecker certificate of selection is regulated by statutory and secondary legislation, offering more precise safeguards to individuals (Nakache and Blanchard 2014: 527).

5. Concluding remarks: a lesson to learn – Immigration executive federalism?

The analysis conducted thus far has demonstrated the different approaches adopted by the Canadian system towards federalism and immigration. Although sec. 95 of the

Constitution Act, 1867 conceives immigration as a shared power, since the beginning of the 20th century the rule has been federal uniformity.

With Quebec's quiet revolution, the federation progressively granted special powers to Quebec in the immigration field, according to a framework of *de jure* asymmetry. Since the 1990s, however, soon after the signing of the 1991 Canada and Quebec agreement, the federation has promoted a general decentralization in the selection process of immigrants that also benefited the other Provinces. By 2005, all Provinces and one territory had signed intergovernmental agreements with regard to immigration and, thanks to the PNP programs, were granted substantial powers in the selection of migrants.

Although significant differences exist between Quebec and the other Provinces, the shift from *de jure* to *de facto* asymmetry has been evident. However, the two devolutionary processes have been based, also in legal terms, on different grounds. As a matter of fact, the PNP programs are based on an inter-administrative delegation of powers, which grants the federal government a certain power to redress the provincial administrative discretion. This became apparent when in 2012 the federal Government required the Provinces to bring their PNPs into line with federal objectives, and withdrew unilaterally from agreements with Manitoba and British Columbia concerning immigrant settlement services. Thus, although Provinces other than Quebec still maintain relevant powers in the selection procedure, the result of these policy changes has denoted a resurgence of *de jure* asymmetry. Quebec is the only Province that maintains the full control of migrants' integration process. Unlike the other Provinces, Quebec acts autonomously in the field of selection of immigrants, and not under a delegation of administrative powers. This also implies that while in relation to PNP programs a unilateral decision of the federal government is enough to end them, in the Quebec case an act of Parliament is needed.

Thus, the Canadian case tells us that devolution in selection procedures, and in integration of migrants, may be an answer not only to subnational-units' national claims, but also to the economic and/or demographic needs of territorial units. However, the two grounds may not equally counterbalance the national interest in a uniform policy in migrants' selection and integration. The federal measures adopted in 2012 seem to confirm that immigration federalism is more likely to develop, or, at least, to have a broader scope, in compound territorial states characterized by ethnic and linguistic cleavages, where it is

used as an instrument to bring together the different original nations.[XXV] Because of this, immigration federalism is also inherently asymmetric.

A second element to highlight is the role played by sec. 95 of the Constitution Act, 1867 in shaping the current Canadian immigration federalism scene. I argued that sect. 95 of the Constitution Act, 1867 may be interpreted according to three different options: centralization, *de facto* asymmetry and *de jure* asymmetry. As a matter of fact, the Canadian system has over time developed each of these different possibilities. Because of this, it may be assumed that sect. 95 has not been crucial for a correct understanding of the division of powers in immigration, whose effective boundaries have been defined by inter-administrative agreements rather than by the Constitution. However, such a conclusion would be unwarranted: the very existence of the immigration clause has allowed for the consideration of the devolution in immigration, as developed in the inter-administrative agreements, to be legitimate and consistent with the original understanding of the constitutional division of powers rather than beyond the letter of the Constitution.

The failure of the Meech Lake and the Charlottetown Accords has certainly been a missed opportunity, not only to constitutionalize the practice of the intergovernmental agreements and state clearly their ability to derogate the federal primacy under both sec. 95 and 91.25 of the Constitution Act, 1867, but also to guarantee to the representatives of both federal and provincial legislatures the possibility of exercising democratic control over the process of conclusion, modification or redrawing of the intergovernmental agreements.

However, the fact that at both the Meech Lake and Charlottetown Accords' conclusions the insertion of a new immigration clause was not a highly debated issue, might confirm that the Canadian system as a whole has accepted that devolution in immigration is indeed an acknowledged feature of the federal-provincial relations. After all, even the recent recentralization trend has had as a consequence a better realignment of PNP programs with federal objectives, rather than the ending of the PNP's existence.

A further point worth highlighting is the legal technique which make the immigration intergovernmental agreements legally binding. As noted in relation to PNPs, this occurs through a delegation of administrative powers. The use of the delegation of powers and of other incorporating techniques is common not only in immigration but also in other material areas and has allowed the Canadian federal system to evolve from dual to cooperative federalism. These developments have been possible thanks to the cabinet

system of Canadian government: the functional relation between the Executive and the legislature allows Parliament to delegate normative powers to the Executive with no clear constitutional constraint.

Thus, although this institutional feature of the Canadian system needs to be kept in mind, the Canadian case suggests nonetheless that an effective decentralization process in migrants' selection may occur by means of a devolution of administrative functions.

This feature may be important in order to consider the feasibility of the application into Europe of the Canadian case of federalism in immigrants' selection. In many European states, immigration is a legislative power reserved by the Constitution to the national jurisdiction, even in compound territorial states. This is the case, for instance, of both Italy (see art. 117, 1 lett. a) and b) of the Italian Constitution) and Spain (see art. 149, 1 n. 2 of the Spanish Constitution). However, art. 118 of the Italian Constitution, which deals with the division of administrative functions in conformity with the subsidiarity principle, calls for the national level to agree with Regions' measures for coordinating their actions in the field of immigration (Bonetti 2002, 1149). In Spain, at the occasion of the amending process of their *Estatuto de Autonomia* in the second half of the 2000s, Catalonia and Andalusia introduced provisions aimed at having administrative powers in the selection of immigrants, to be exercised in collaboration with the national authorities. They drew this power from the competences they already had in relation to the organization of active labour market policies (Donaire Villa and Moya Malapeira 2012: 521-559).

Certainly, there are social and cultural features that make the Canadian case different from the European states' experiences of immigration federalism. For instance, while in Canada, economic immigration is by far the main channel of access to the country, this is not the case in many European countries, where family reunification and humanitarian immigration are the most important migration channels. Both cases are areas where EU directives and international law apply, leaving no or scarce room for autonomous regional policies.

Nonetheless, the idea remains that having a territorial decentralisation in economic migrant's selection based on a devolution of administrative functions would be legally possible, as seen in relation to Italy and Spain, and it would offer an opportunity for subnational units to better match their territorial needs with migrants' profiles, at the same time granting the national level a coordinating role.

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[I] Scholars have usually highlighted the role of subnational units in integration of migrants (see for a recent comparative overview Joppke and Seidle 2012), according to the distinction between "policies of immigration" – to be reserved to the National level – and "policies for immigrants" – to be reserved to the sub-national level -, formulated by Hammar 1990. However, there are also books taking a broader perspective and analysing the increasing role of subnational units in the selection procedures. See for a comparative overview, Baglay and Nakache 2014.

[II] 'Immigration federalism' is the expression used in American legal scholarship to describe the role of subnational units in the enforcement of immigration rules (see Huntington 2008). Some scholars express criticisms, deeming that immigration enforcement by state authorities would increase the risk of racial discrimination (see Wishney 2001; Olivas 2007), others express more positive views (see Schuk 2007).

[III] The poor law principles were reaffirmed by Charles II with the *Act for the Better Reliefe of the Poore of this Kingdom*, in 1662.

[IV] It is important to note that in many cases these statutes were aimed to deter the poor irrespective to their national identity. They also applied to American citizens coming from other states of the federation. See Neumann G.L. 1993.

[V] *City of New York vs. Miln*, 36 (11 Pet) (1837)

[VI] See *The Passenger cases*, 48 US (7 How) 283, 512-513, 12 L.Ed, 702 (1849).

[VII] *Chae Chan Ping vs. US* 130 US 581, 604 (1889)

[VIII] *Arizona vs. US*, 132 S. Ct. 2492 (2012).

[IX] Arguably, this could also mean that the federal statute might provide different treatment that would apply only in some of the Provinces. This would not be a specificity of immigration, however, but rather is a general tenet of Canadian federalism. In fact, Peter Hogg (2003: 439) suggests that «while uniform laws are usual, federal law occasionally impose different rules on different part of the country. There is no constitutional requirement of uniformity».

[X] *Law Society of British Columbia v. Mangat*, (2001) SCC 67.

[XI] *Narain Singh*, (1908), 13 B.C.R. 477 (B.C.C.A.).

[XII] (1909), 13 B.C.R. 370 (B.C.C.A.)

[XIII] This was a consequence of sec. 6.2 of the Canadian Charter of Rights and Freedoms that grants to permanent migrants the same mobility rights that are granted to Canadian citizens. This principle was already enforced by the judiciary before the entry into force of the Charter.

[XIV] This is set out in the Charter of the French language. On this, see Richez 2014.

[XV] On this point, see later in the text.

[XVI] According to Seidle 2013: 5, in 1999 only 477 people were admitted though the PNP programs. By 2004 they were 6,248 admissions. Following the election of the Harper Conservative government in 2006, there was a general move away from limit and in 2012, 40,899 people (17,200 principal applicants and 23,699 spouses and dependants) were admitted. However, in 2012 the same Harper government progressively become concerned with PNP programs and introduced limits as describes later in the text.

[XVII] According to the CIC 2011 evaluation, in Manitoba the percentage of migrants admitted through PNP during the 2005-2009 period was 91,1% (which corresponded to 13,089 people), while the percentage of migrants admitted through federal programs was 8.5% (1,223). In Ontario, the situation was reversed, with a percentage of migrants selected by the federal programs which amounted to 94.2% (98,733) and only 1.2% selected by the PNP (1,247). See, p. 39.

[XVIII] See Hogg P. 2003, 350-351.

[XIX] *Attorney General of Nova Scotia v. Attorney General of Canada*, 1951 SCR 31.

[XX] See *P.E.I. Potato Marketing Board v. Willis*, (1952) 2 S.C.R., 392

[XXI] See *Coughlin v. Ontario Highway Transport* (1968) S.C.R. 569, 584.

[XXII] For a recent application, *Pelland v. Attorney General of Quebec*, [2005] 1 S.C.R.

[XXIII] This reading is confirmed in by case-law. See *Kabernal v. Saskatchewan (Ministry of Economy)*, 2013 SKQB 244, 424 Sask R 144: "The Saskatchewan Immigration nominee program is not established pursuant to specific legislative authority. It derives its authority pursuant to "management direction from the broader umbrella legislative mandate of the ministry. In this respect, the processes, forms guidelines, criteria, requirements, evaluation and decision making were all created and are governed by broad based ministerial policy. As succinctly put by the ministry, the program has no statutory basis and the officials who administer

it do not exercise statutory authority of any kind".

[XXIV] Sec. 10.2.1 applies only to those Provinces that concluded an agreement under sec. 8 of IRPA, not under sec. 9. This means that currently only Quebec is not subject to this federal power.

[XXV] As Zapata-Barrero and Barker 2014: 29 point out: «Given that admissions, reception and citizenship policies have significant downstream impacts on the demographic, linguistic, and cultural make-up of the multinational state, it is unsurprising that sub-state units assert an interest not just in implementing but also in deciding on immigration policy with the goal of mediating the impact of immigration and integration on their own national identity and society». On the relation between sub-state nationalism and immigration, see also Medda-Windisher and Popelier 2014.

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