



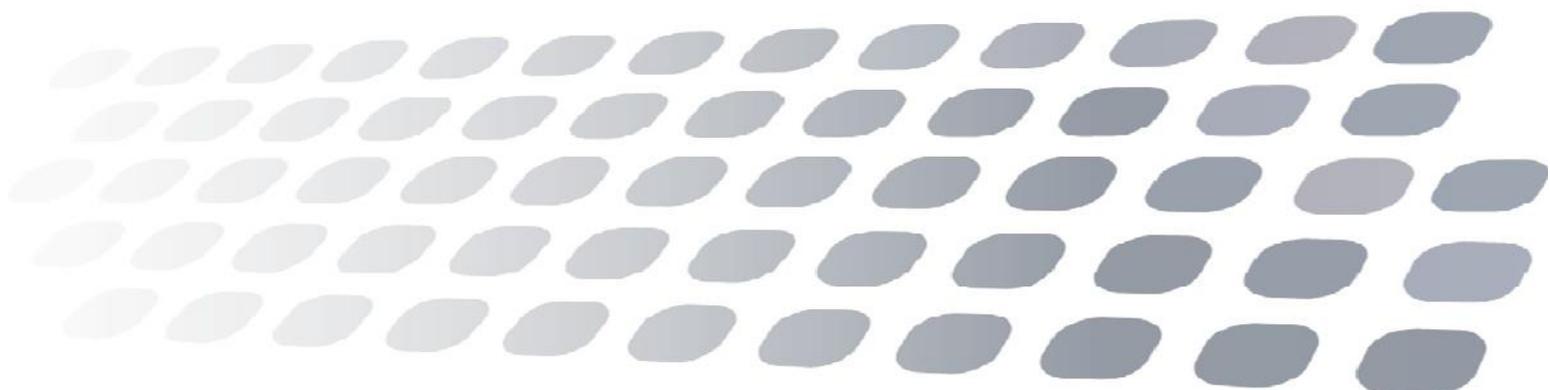
CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM

VOLUME 9

ISSUE 3

2017





ISSN: 2036-5438

VOL. 9, ISSUE 3, 2017

TABLE OF CONTENTS

SPECIAL ISSUE

The Constitution of Canada: History, Evolution, Influence and Reform

Edited by Giuseppe Martinico, Richard Albert, Antonia Baraggia and Cristina Fasone

EDITORIAL

An Opportunity for Reflection – A Special Issue on “The Constitution of Canada: History, Evolution, Influence and Reform”

GIUSEPPE MARTINICO, RICHARD ALBERT,
ANTONIA BARAGGIA AND CRISTINA FASONE

ED- I-VII

In Memoriam: Prof. Alessandro Pizzorusso

PAOLO CARROZZA AND GIUSEPPE MARTINICO

ESSAYS

FEDERALISM

Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution

JAMES A. GARDNER E- 1-30

Provincializing Constitutions: History, Narrative, and the Disappearance of Canada’s Provincial Constitutions

PETER PRICE E- 31-55

Immigration and Federalism in Canada: beyond Quebec Exceptionalism?

DAVIDE STRAZZARI E- 56-84

MIGRATION OF CONSTITUTIONAL IDEAS

The Canadian Living Tree Doctrine as a Comparative Model of Evolutionary Constitutional Interpretation

LEONARDO PIERDOMINICI E- 85-104

Constitutional Judges and Secessions. Lessons from Canada ... twenty years later

IRENE SPIGNO E- 105-132

The Spanish vision of Canada’s Clarity Act: from idealization to myth

FRANCISCO JAVIER ROMERO CARO
E- 133-159

THE ENFORCEMENT OF THE EQUALITY PRINCIPLE

Franchises Lost and Gained: Post-Coloniality and the Development of Women’s Rights in Canada

CHARLOTTE HELEN SKEET E- 160-193

Women’s rights and minorities’ rights in Canada. The challenges of intersectionality in Supreme Court jurisprudence

VALENTINA RITA SCOTTI E- 194-218



ISSN: 2036-5438

**An Opportunity for Reflection –
A Special Issue on “The Constitution of Canada:
History, Evolution, Influence and Reform”**

by

Giuseppe Martinico, Richard Albert, Antonia Baraggia and Cristina Fasone*

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





Abstract

Canada is and will for the foreseeable future be a peaceful and prosperous liberal democracy whose *Constitution Act, 1867*, now 150 years old as of 2017, has become a model for the modern world. The Constitution of Canada has exerted considerable influence on other countries, particularly since the coming into force of its *Constitution Act, 1982*, which included the celebrated *Canadian Charter of Rights and Freedoms*. Just as Canada drew from foreign and international experiences in drafting its *Charter*, the world has learned a great deal from Canada, not only as to rights protections but also as to the separation of powers, the judicial function, and the structure of government.

In light of these impressive achievements, an international symposium on the Canadian Constitution was held in Pisa at the Scuola Sant'Anna under the auspices of the Sant'Anna Legal Studies project and with the support of the DIRPOLIS (Law, Politics and Development) Institute at the Scuola Sant'Anna, the Canadian Embassy in Italy, and the International Association of Constitutional Law. This special issue collects some of the papers presented on that occasion.

Key-words

Canada, migration of constitutional ideas, comparative constitutional law, patriation, Canadian Charter of Rights and Freedoms



1. Why a Special Issue on Canada?

In *Constitutional Odyssey: Can Canadians Become a Sovereign People?*¹, Peter Russell (1992) describes Canada's long march to the "patriation"¹¹ of the constitution, the dramatic failure of the Meech Lake and Charlottetown Accords, and the difficulty of reconciling Quebec with the rest of the country since the sovereignty-association referendum in 1980. For Russell, Canada's turbulent "constitutional odyssey" derives from its Burkean, not Lockean, culture of constitutionalism. With some noteworthy exceptions including patriation itself, Canadian political actors, Russell explains, have favoured incremental adjustments to their constitutional arrangements rather than a Lockean democratic moment in which a nation is forged and a people is created. In Russell's analysis, Canada is a nation of nations, home to dissimilar peoples for whom the idea of an American-style sense of collective peoplehood is perhaps neither a priority nor even a possibility. And yet Canada remains today and for the foreseeable future a peaceful and prosperous liberal democracy whose *Constitution Act, 1867*, now 150 years old as of 2017, has become a model for the modern world.

The Constitution of Canada has exerted considerable influence on other countries, particularly since the coming into force of its *Constitution Act, 1982*, which included the celebrated *Canadian Charter of Rights and Freedoms*. Just as Canada drew from foreign and international experiences in drafting its *Charter*, the world has learned a great deal from Canada, not only as to rights protections but also as to the separation of powers, the judicial function, and the structure of government. Canada, it turns out, exports much more than only hockey players and peacekeepers.

In this spirit, we organized an international symposium on the Canadian Constitution. We held the program in Pisa at the Scuola Sant'Anna under the auspices of the [Sant'Anna Legal Studies](#) project and with the support of the DIRPOLIS (Law, Politics and Development) Institute at the Scuola Sant'Anna, the Canadian Embassy in Italy, and the International Association of Constitutional Law.

The symposium offered a special opportunity for scholars from all around the world to gather to mark the Sesquicentennial of the Canadian Constitution. We invited participants



from all perspectives, including both critical and praiseworthy, to present papers on a wide-ranging theme: “[The Constitution of Canada: History, Evolution, Influence and Reform.](#)” This special issue collects some of the papers presented on that occasion. It is true that important volumes have already been published on this anniversary.^{III} But there nonetheless remains much to say about a Constitution that has had such a profound impact beyond its borders, particularly here in Europe, where many of the contributors to this special issue are based. We are especially pleased to have curated a genuinely comparative special issue of reflections on the Constitution of Canada.

2. In this Issue

The articles collected in this Special Issue fall under three themes, each reflecting peculiar characteristics of Canadian constitutional law in a comparative perspective. The first is Federalism, which James Gardner, Peter Price, and Davide Strazzari investigate from different perspectives and each with a different subject-matter focus, namely the structure of governmental power, the dynamic relationship between federal and provincial constitutions, and the evolution of the federal system on public policy, respectively.

James Gardner’s article on “Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution” deals with the federal structure of the Canadian Constitution. It focuses on the existing gap between constitutional design and practice in the case of Canada and highlights the strategies and tactics put in place by provinces to assert their authority to and against the federal government. The article shows that, by using tools like constitutional conventions and executive federalism, provinces have in fact created for themselves considerable leeway to get much of what they have wanted from the central government. The (unintended) consequence, however, has been to keep the Constitution in moving to and from ever-changing equilibria between the central and subnational governments.

In his article on “Provincializing Constitutions: History, Narrative, and the Disappearance of Canada’s Provincial Constitutions”, Peter Price argues that the dominant narrative in Canadian constitutional discourse since 1867 has caused us to overlook the importance of provincial Constitutions. The result has been to minimize pre-Confederation Canadian history and, thus, the significance of the many constitutional communities and



identities shaping the original “dualist” view of the Constitution. Price traces this phenomenon to the increased weight assigned to written constitutionalism in the post-*Charter* era—a trend that combines with the lack of codified provincial constitutions in Canada to make provincial constitutions much less important than they really are and ought to be.

Davide Strazzari’s contribution on “Immigration and Federalism in Canada: beyond Quebec Exceptionalism?” aims to shed light on the balance of powers between the central government and the provinces in the specific and controversial case of migration policy. In his article, Strazzari demonstrates that since the 1991 intergovernmental agreement between the federal government and the government of Quebec on the issue (which allocated crucial powers to Quebec in matters of selection and integration of migrants), the federation has conferred more authority over immigration also to other provinces and territories, causing a shift from *de jure* to *de facto* asymmetry among provincial powers. However, as Strazzari clearly points out, while Quebec’s autonomy in migration may be constrained only by an Act of the Parliament, the delegation of powers over migration to the other provinces and territories is based on administrative agreements that can be unilaterally revoked by the federal government—as happened not too long ago in 2012.

The second group of articles in this Special Issue contributes to the literature on the “migration of constitutional ideas”^{IV} because it explores how Canadian constitutional law has travelled across borders. As one of the world’s most influential^V, the Canadian Constitution presents many avenues for research into how its doctrines, theories and innovations have been transplanted or adapted abroad. Leonardo Pierdominici’s article on “The Canadian *living tree doctrine* as a comparative model of evolutionary constitutional interpretation” analyses the influence of the “living tree” doctrine of the Supreme Court of Canada on courts that are traditionally engaged in transnational judicial dialogue and courts that are newcomers to this practice.

In “Constitutional Judges and Secession. Lessons from Canada ... twenty years after” Irene Spigno examines how the referendum has been used to address secessionist claims outside Canada in particular Italy and Spain. She draws in her article on the advisory opinion of the Supreme Court of Canada on Quebec secession. She inquires whether the principles articulated in that advisory opinion have been influential in the case law of the



Italian and Spanish Constitutional Courts, both of which have faced similar questions about secession.

Similarly, the article by Francisco Javier Romero Caro on “The Spanish vision of Canada’s Clarity Act: From Idealization to Myth” begins with the advisory opinion on Quebec secession. He focuses on its legislative follow-up in Parliament, the Clarity Act, to explore the reasons for and the pitfalls of the “deification of this statute in Spain”. He argues in particular that the Clarity Act has been misinterpreted in Spain, with serious consequences for the treatment of secessionist claims in the Basque country and in Catalonia.

The third group of articles in this Special Issue focuses on the enforcement of the equality principle in Canada, in particular on the protection of gender equality and women’s rights. Charlotte Helen Skeet’s contribution on “Franchises Lost and Gained: Post-Coloniality and the Development of Women’s Rights in Canada” challenges the traditional understanding of the “continuous evolution” and strengthening of women’s political rights with reference to the pre-confederation history of suffrage in Canada as a case study. Her historical and legal analysis of the suffrage movements in the country show why the franchise was exercised more widely in Lower Canada and it also urges the recognition of the contributions to Indigenous peoples to the history of women’s rights in Canada. Valentina Rita Scotti’s article on “Women’s Rights and Minorities’ Rights in Canada: The Challenges of Intersectionality in Supreme Court Jurisprudence” tackles the issue of gender equality and minority rights with a careful study of the case law of the Canadian Supreme Court. After framing the debate on intersectionality in the Canadian context and after reviewing some of the main Supreme Court judgments on gender equality, Scotti then interrogates why and how intersectionality represents for Indigenous and Muslim women a source of double discrimination.

What follows, then, is a fascinating, provocative and timely set of articles that raise important questions about, raise useful critiques of and where appropriate bring a certain amount of praise to the *Constitution Act, 1867* as it marks its Sesquicentennial. We can only hope that the Canadian Constitution will continue to be a source of learning and inspiration in the years ahead.



* Giuseppe Martinico is Associate Professor of Comparative Public Law at Scuola Superiore Sant'Anna in Pisa. Richard Albert is tenured Professor of Constitutional Law at Boston College Law School. Antonia Baraggia is Postdoctoral Fellow in Constitutional Law at the University of Milan. Cristina Fasone is Assistant Professor of Comparative Public Law at LUISS Guido Carli in Rome.

^I Russell 1992.

^{II} “The word ‘patriation’, a genuine Canadian invention, refers to Canada’s final ‘bringing home’ of its constitution from Westminster, with full patriotic fanfare, on 17 April 1982. Although Canada enjoyed sovereignty since at least 1931, it nonetheless continued to depend on requests to the United Kingdom Parliament for making amendments to its constitution. The reason for this anomaly was clear: Canadian governments had proved unable to agree on an internal amending procedure by which legal changes to the constitution could be made at home without having recourse to Britain” (Milne 2004).

^{III} See, for example, Albert and Cameron (eds) 2017; Oliver, Macklem and Des Rosiers (eds) 2017.

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CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM



ISSN: 2036-5438

In Memoriam: Prof. Alessandro Pizzorusso

by

Paolo Carrozza and Giuseppe Martinico

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



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In the introduction we discussed how this special issue was the product of a conference organized in Pisa on 24 May 2017. The conference was conceived as part of the [Sant'Anna Legal Studies Project](#) (STALS), a project on which we have the honour of coordinating with Giacomo Delledonne and Filippo Fontanelli. STALS was launched in 2008, with the creation of an online research paper archive; since then it has grown significantly, we have organized almost ninety international events on different topics, covering a broad spectrum of interests. Over the last few years the Scuola has invested significantly to achieve a constant growth in internationalising our activities; a process that has enjoyed a significant acceleration under the Presidency of Prof. Yves Mény.

Along with Richard, Antonia and Cristina, the other convenors of this event, we thought that it might be a good idea to devote an international symposium to “[The Constitution of Canada: History, Evolution, Influence and Reform](#)”, by exploiting, so to speak, the chance offered by the 150th Anniversary of the Canadian Confederation.

We decided to dedicate this event to the memory of Prof. Alessandro Pizzorusso (Bagni di Lucca 11 November 1931- Pisa 14 December 2015). He was an outstanding scholar, a giant in our discipline.

Moreover and, perhaps more importantly, he was also a very humble person who always escaped celebrations, a role model for the younger generations.

Alessandro Pizzorusso started work as a judge, and then became Professor of Constitutional and Comparative Law at the Universities of Pisa and Florence. He was also Emeritus Professor at the University of Pisa. He authored more than 1,000 publications in Italian, French, Spanish and English. His works were translated into many different languages. He covered a very wide spectrum of topics related to domestic, comparative and European constitutional law. He was also part of the [Expert Group on Fundamental Rights](#) chaired by Spiros Simitis, as such contributing to the progressive constitutionalisation of the EU, as that group put forward some very important recommendations for the inclusion of a Bill of Rights in the Treaties. He was also member of the Italian Superior Council of the Judiciary, of the prestigious “Accademia Nazionale dei Lincei”, and of the International Academy of Comparative Law.



Among his works in English comes to mind in particular his article “[Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies](#)”, published in the American Journal of Comparative Law in 1990. He was also Editor of the Italian Studies in Law, with the specific goal of circulating the best outputs of Italian scholarship.

We benefited from his superb intellectual and human qualities, immense legal knowledge and generosity. There is an anecdote we want to share with our readers and which is related to the genesis of STALS. As written, we wanted to launch the website and the paper archive at that time.

STALS has been made possible thanks to the support of Emanuele Rossi and other colleagues at [Scuola Sant’Anna](#). This project was modelled on the [Italian Studies in Law](#), a sort of a yearbook series edited between 1992 and 1994 by Alessandro Pizzorusso and published by Martinus Nijhoff.

In our view STALS had to be (and to a certain extent is) a sort of follow up to the Italian Studies in Law project, but with a huge difference, as STALS relies on an electronic platform.

It was no coincidence, therefore, that we asked Alessandro Pizzorusso to launch the STALS website with a paper of his; we understood that his contribution was a sign of continuity with the experience of Italian Studies in Law.

We immediately contacted Alessandro Pizzorusso and he decided to give us a paper entitled “[Common constitutional traditions as Constitutional Law of Europe?](#)”.

In the paper you can find the essence of his way of understanding European Law; a sort of huge space that can be filled, fed and enriched by comparative law. This is also the idea behind one of his books, [Il patrimonio costituzionale europeo](#) (“the European constitutional heritage”).

Indeed, European constitutional law was one of the many fields in which Alessandro Pizzorusso wrote fundamental pieces, teaching us the importance of comparison in European studies.

His interest in European law may have been due to his connection with [Mauro Cappelletti](#) (he moved to Florence to replace Cappelletti as, among other things, Director of the Institute of Comparative law of the University of Florence); perhaps in this experiment of legal and cultural coexistence he found a natural follow up to his works on



linguistic and cultural diversity. He wrote extensively on linguistic minorities and in these works it is also possible to find some references to Canada. As an example, in a piece published in the [Boletín Mexicano de derecho comparado](#) in 2000, he briefly dealt with [Ford v Quebec](#) (AG), [1988] 2 S.C.R. 712 a very well know decision of the Canadian Supreme Court in which legislation restricting the use of commercial signs written in languages other than French was struck down. The Canadian Supreme Court acknowledged the violation of the freedom of expression as enshrined in the Canadian Charter of Rights and Freedoms. Prof. Pizzorusso had many contacts in Canada as well, José Woehrling and Prof. Andrée Lajoie, among others. He always shared his network with us and this testifies again to his generosity.

Always thanks to these contacts we had the privilege of meeting another giant of comparative law, another gentleman, Prof. Patrick Glenn who passed away some months earlier than Alessandro Pizzorusso.

We mention this because Patrick Glenn wrote our second STALS research paper, another jewel entitled “[Doin' the Transsystemic: Legal Systems and Legal Traditions](#)”.

However, if we only recall Alessandro Pizzorusso’s scientific guidance then we would not get the entire picture, as his greatest legacy to the academic community was his incredible generosity and immense respect for students, colleagues and members of the administrative staff.

Our sadness really goes beyond the power of speech, we cannot contain what we feel; we miss him greatly, and the unfinished conversations we had started with him.



CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM



ISSN: 2036-5438

Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution

by

James A. Gardner*

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



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E - 1



Abstract

This paper examines the interaction between constitutional design and practice through a case study of Canadian federalism. Focusing on the federal architecture of the Canadian Constitution, the paper examines how subnational units in Canada actually compete with the central government, emphasizing the concrete strategies and tactics they most commonly employ to get their way in confrontations with central authority. The evidence affirms that constitutional design and structure make an important difference in the tactics and tools available to subnational units in a federal system, but that design is not fully constraining: there is considerable evidence of extraconstitutional innovation and improvisation by governments. Furthermore, changes in practice initiated by Canadian subnational actors have produced changes in the allocation of national and subnational authority that are plausibly characterized as constitutional in magnitude. The paper concludes that the design of the Canadian federal system may inadvertently undermine its capacity to stabilize itself at any particular point of constitutional evolution, making it ‘permanently provisional.’

Key-words

federalism, Canada, constitutional law, constitutional design



1. Introduction

In the classic model of constitutionalism, a constitution is understood to be a permanent article of positive law containing a set of fixed instructions issued by a popular sovereign to its governmental agents. To ensure that constitutional commands issue only from the popular sovereign – to prevent the people’s agents from changing their own instructions – constitutions are deliberately ‘entrenched.’ That is, the constitution is rendered presumptively permanent by making it difficult to change, and by ensuring that the people remain the sole ultimate source of amending authority. This largely static model comports well with the philosophical premises of contractarianism, which holds that political legitimacy is founded on the consent of the governed (Locke 1690), and thus tends to conceive of a constitution as fixed and permanent – ‘established in its entirety at a definite time and place’ (Griffin 1996: 2124), at the moment in which consent was granted.

In sharp contrast, the constitutions of federal states are almost universally viewed as dynamic and continually evolving. Among those who study federalism, there is remarkable consensus on this point. ‘[F]ederal systems,’ according to Arthur Benz (2008: 1), ‘are highly dynamic.’ ‘The various parts of the system,’ M.J.C. Vile (1961: 3) observes, ‘are in continuous interaction.’ On account of this property, Carl Friedrich (1968: 7) claimed, ‘[f]ederal relations are fluctuating relations in the very nature of things.’ In short, according to Benz and Broschek (2013: 2), ‘federal systems are permanently in motion.’ Most importantly, what moves in federal systems, according to Judith Resnik (2014: 368), is the most basic, defining feature of any federal regime: ‘*competencies* are always in motion, and in more than one direction’ (emphasis added).

This evolution, moreover, takes place without popular intervention by means of formal constitutional amendment. Consequently, as Edward McWhinney (1962: 12) wrote more than a half-century ago, in all federal states there is a ‘contrast between the constitution as originally written and the actual working constitution.’ This contrast can be severe, and thus, in federal systems, ‘[t]he written constitution . . . is of limited use in explaining how the federal system works’ (Erk 2006: 456).

Why does this happen? Why would constitutions of federal states depart so dramatically from the classic conception of constitutional fixity? Granted, the classic theoretical model



tends to overstate the case for constitutional stability. More than two centuries of experience with democratically adopted constitutions have taught that constitutions are capable of evolving through mechanisms other than formal amendment – so-called ‘informal’ methods of constitutional change. For example, constitutions can change informally through judicial reinterpretation (Ackerman 1991). Informal constitutional change can also be driven by changes in the governance practices of constitutional officers (Gardner 2016). Some scholars argue that the forces of informal change are sufficiently strong to conclude that ‘[a]ll constitutions change continuously’ (Oliver and Fusaro 2011: 424).

Even if this is correct, scholars of federalism seem nevertheless to believe that the rate and magnitude of change of federal constitutions far outstrips the degree of normal evolution in constitutions creating other kinds of states. They argue, in effect, that change – including change of core structural aspects of the constitutional scheme – is built into federal systems in ways that lack a counterpart in constitutions of nonfederal states. If true, what might explain this phenomenon?

One possible explanation – and the one I wish to explore here – has to do with the method of entrenchment employed by federal constitutions. The conventional design approach to constitutional entrenchment involves little more than erection of a highly public expectation of compliance: the popular sovereign commands and its servants obey. This relatively static command-and-control approach, however, courts a significant risk: it offers few resources to guard against a failure of obedience by government officials. James Madison called this the problem of ‘parchment barriers’ (Madison 1787-1788: No. 48). On Madison’s account, governments are run by human beings; human beings are subject to temptation; and the accumulation of power is an attractive temptation that few officials can be expected permanently to resist. Constitutional entrenchment, Madison agreed, is necessary, but it cannot occur dependably through the mere issuance of commands.

To deal with this problem, Madison proposed a radically different solution. If political institutions are vulnerable to human ambition, Madison argued, then ‘[a]mbition must be made to counteract ambition’ (Madison 1787-1788: No. 51). If entrenchment cannot be achieved statically, then it must be achieved dynamically, through construction of an equilibrated system in which strong forces align in well-balanced opposition. This task is accomplished through a careful division of power, undertaken against a background assumption that power holders will attempt periodically to expand their domains. At the



same time, other power holders will have an equally predictable propensity to defend their own domains against encroachment. Such a system is highly dynamic; it creates a kind of permanent contestation among holders of official power. If the system works well, constitutional limitations on government power are entrenched by maintenance of a dynamic equilibrium at the desired design parameters (Schwartz 1989: 35; Ordeshook 1993: 204).

Federalism is such a system. By definition, a federal constitution (1) creates a national government; (2) recognizes the permanence and autonomy of subnational units; and (3) allocates to each level some measure of power (Elazar 1966). The existence and authority of the two orders of government is then made permanent through entrenchment: the federal plan ‘freezes a particular allocation of authority between provinces and the center’ (Levy 2014: 345). This end is achieved, however, not simply through an initial textual allocation of competencies followed by an expectation of obedience – through the creation, that is, of parchment barriers. In the Madisonian model, each level of government is endowed with powers sufficient to allow it monitor and check the abuses of the other: ‘The different governments will control each other, at the same time that each will be controlled by itself’ (Madison 1787-1788: No. 51). Thus, the stability of the constitutional plan depends upon the capacity of each order of government to ‘control’ – or at least to influence and obstruct – the other. To accomplish this end, the amount of power allocated to each level of government and the reach of its authority presumably must be calibrated with some precision; an imbalance in either direction could lead to a risky accumulation of power at the national or subnational level – the very result that federalism is instituted to preclude. Thus, constitutional designers carry a heavy burden: they must carefully plot out and entrench, as the U.S. Supreme Court has said in a comparable context, a ‘finely wrought and exhaustively considered’ division of power¹ that will permit national and subnational governments to fight each other to a permanent draw.

What Madison did not and could not know, however, was that the dynamic, contestatory system he contemplated does not fully solve the problem of constitutional entrenchment due to the phenomenon of informal constitutional change. One of the most common drivers of informal constitutional change is alteration by government officials of the practices they employ in the discharge of their official duties. As Behnke and Benz (2009: 217) explain, ‘[c]onstitutional evolution is often initiated by unilateral action [of government officials].’ In Denning’s (1997: 211) formulation, these kinds of actions may properly be understood as



‘claims of power’ that constitute “‘moves” made by the “legislative and executive branches . . . that serve as precedents for future actions.”¹¹ The establishment of precedents permitting government authority to be exercised in new ways in turn can alter the substance of the constitution’s grants of authority to the actors who establish these precedents. In other words, constitutional actors can alter their own power by changing how and when they exercise it, thus initiating change in the substance of the constitutional allocation of power (Gardner 2016: 353-364).

If static methods of constitutional entrenchment are vulnerable to the problem of ‘parchment barriers,’ this analysis suggests that dynamic systems of constitutional entrenchment may be vulnerable to what we might call the problem of ‘plastic barriers.’ That is, in a dynamic system, constitutional instructions may not be overtly repudiated or ignored, but may instead undergo alteration or evolution as holders of government power constantly probe for advantage in a permanent contest over public policy.

The problem of plastic constitutional barriers is clearly presented in constitutional systems of federalism. Federalism is by nature a contestatory system in which it is anticipated that national and subnational governments will contend to secure influence and advantage (Bednar 2009: 63-85). As a result, the elements of informal constitutional change are necessarily present. First, the tools constitutional actors possess to deploy against other actors in contests over authority are by definition the tools of official practice. To the extent that the duties of officials at each level of government include monitoring and, when necessary, deploying power against the other level of government, the form that such resistance takes is inherently a mode of official practice. Second, a constitutional regime that furnishes government officials with incentives to struggle against one another provides them with incentives to prevail not merely by deploying the tools of incursion and self-defense that the constitution uncontroversially provides, but also to compete by changing the constitutional ground rules so as to develop and deploy more effective tools of contestation (Levinson 2011).

The institutionalization of intergovernmental contestation thus has the potential to place great pressure on the stability of federal regimes. ‘The incentive to deviate from the division of authority,’ argues Jenna Bednar (2009: 63), ‘is inescapably built in to the federal structure.’ Because the system contemplates that national and subnational actors will compete against each other, ‘[t]he constitutional allocation of competences . . . is particularly prone to



entrepreneurial redefinition' (Broschek 2011: 548). Constitutional actors, in other words, have an incentive to 'try to shift the balance [of constitutional authority] incrementally in a direction favourable to them,' thereby inducing a form of 'authority migration' (Benz and Colino 2011: 381). When government officials become adept players of this game, 'assignments of power and competences have to be continuously renegotiated' (Benz 2008: 1).

In short, a constitutional regime that institutionalizes contestation among officials is a regime that invites unforeseeable alteration of the very aspects of the constitutional regime that contestation is meant to stabilize – the constitutional allocation of authority. Through the process of intergovernmental contestation, the location of the boundary between national and subnational authority may shift, initially as a matter of contingent fact, and eventually as a matter of constitutional reformation. Contestatory federalism, then, is a constitutional structure that seems to invite change, not only in the palette of tools and techniques that national and subnational governments deploy against one another, but also, over time, in the substantive allocation of authority among the two orders of government.

If I am correct to this point, the relevant question of constitutional design in federal states is quite different from the one that occupied Madison. My claim is that the mechanism of intergovernmental contestation deployed by federalism to stabilize constitutional allocations of power is capable simultaneously of *destabilizing* those very allocations; federalism, in other words, is inherently a system with the capacity to destabilize itself. If so, then a different question arises: might some federal constitutional arrangements be more stable than others? Might they incur less risk of variation from the desired distribution of competencies, and thus endure longer? This is not an idle inquiry: by one count, 27 of the 44 federations formed in the last two hundred years have failed either by breaking apart or by collapsing into a unitary state (Lemco 1991: 1). Especially in modern, ethnonational federations, maintenance of a particular allocation of authority between national and subnational governments is often a critical term of the basic constitutional bargain upon which the legitimacy of the state is founded.

The balance of this paper explores these questions through a case study of the Canadian Constitution. It begins with an overview of the Canadian Constitution, focusing on the allocation of power between the national government and the provinces contemplated by the constitutional design. It then moves on to examine how federalism is actually *practiced* in



Canada, primarily by analyzing the tools and tactics deployed by Canadian provinces in moments of conflict with the central state. It also looks at the consequences of these tactics for the constitutional allocation of power. The paper concludes with some reflections on the relation between the Canadian Constitution's federal design and the stability over time of the constitutional division of authority.

2. A case study: Canadian federalism

2.1. The structure of Canadian federalism

In a celebrated double irony of unintended consequences, the Constitution of Canada was written for the express purpose of making the structure of Canadian government as different as possible from that of the United States. In this, the designers of the document succeeded, but not in a way they foresaw. Enacted at Canadian request by the British Imperial Parliament in 1867, the original Canadian Constitution was intended to create a highly centralized state with a powerful national government for the express purpose of avoiding what Canadians saw as the catastrophic failure of the decentralized U.S. Constitution, a failure that they observed at uncomfortably close range during the American Civil War. The resulting document – the British North America Act – did in fact create a powerful central government and weak provinces. Over time, however, the Canadian Constitution became something very different: a series of decisions by the Judicial Committee of the Privy Council, a British court that served as the highest judicial authority during the colonial period, reversed the polarity of the document to the point that Canada is today among the most decentralized of all federal states (Hogg 2007: " 5.3(b), (c)). Simultaneously, the United States Constitution evolved from its original design as the charter of a decentralized state with a weak central government to something that is, for many purposes and in many circumstances, very close to its polar opposite. Neither set of drafters, then, obtained what they wanted, and one of the main differences between the two constitutional cultures today is that the fact of constitutional evolution is obvious to and often welcomed by Canadians, whereas it is sometimes denied, and often regretted, by Americans.^{III}

The structure of Canadian federalism is complex, and needs to be described in some detail. This section begins by describing the formal features established by the Canadian Constitution, and then moves on to describe the many informal institutions and practices



that overlie the constitutional structure and account for the characteristic institutions of Canadian federalism.

2.1.1. The formal federal structure

The current constitution of Canada was enacted in 1982 by the British Imperial Parliament at Canadian request, and effected the ‘patriation’ of the constitution, the most significant step in a long and gradual – but still incomplete – process of Canadian disengagement from the British Empire and corresponding assumption of self-sovereignty. Although the Constitution Act, 1982, made a very significant change from previous constitutional documents by adding for the first time a bill of rights – the Canadian Charter of Rights and Freedoms – it left fundamentally intact the basic structure and institutions of government created under its 1867 predecessor.

Under the Canadian Constitution, national legislative power is vested in Parliament, which consists of a House of Commons and a Senate. Members of Commons are popularly elected. Senators are formally appointed by the Governor General, an official appointed by the Queen, but by long practice the Governor General makes appointments only upon recommendation of the cabinet (Hogg 2007: ' 9.5(d)). Senators serve no terms, leaving only once they reach the constitutional retirement age of 75.

The Senate was originally intended to serve as a forum for representation of provincial interests: the Constitution Act provides that Senators shall be appointed in equal numbers from Ontario, Quebec, the Atlantic Provinces, and the Western Provinces, the traditional four regions of Canada. However, the possibility that the Senate might serve as an effective forum for subnational power was thoroughly undermined by the constitutional method of appointment. Rather than vesting the appointment of Senators in the provinces or regions themselves, the constitution vests it for all practical purposes in the federal cabinet (Hogg 2007: ' 9.5(d)), with the predictable result that the Senate is comprised of cohorts of hand-picked allies of the governing party in Commons. In consequence, the Senate has historically served neither as a vehicle for the exertion of subnational influence on national power, nor even as an effective check on the national legislative power of the Commons. Indeed, when Canadians speak of Parliament they generally mean the House of Commons; like the British House of Lords on which it was modeled, the Senate is for most purposes an irrelevancy.



In Canada, then, national politics effectively does not take place in a bicameral legislature in which one house represents national and the other subnational interests; Canadian national politics take place in a unicameral parliamentary house in which national political parties are the primary organizing institutions (Smith 2010: 92-93). With the one exception of guaranteed provincial representation on the Supreme Court of Canada – three of the nine justices must be from Quebec – formal constitutional protections for subnational interests and autonomy are found primarily not in the blueprint of national institutions, but in the constitutional allocation of powers between the national and provincial governments.

The Canadian Constitution divides the powers of government principally into those that are exercised exclusively by Parliament and those that are exercised exclusively by the provinces. Under these provisions, the federal government has exclusive power over matters such as trade and commerce, unemployment insurance, military affairs, navigation, banking, currency, and patents and copyrights. It also has power over marriage and divorce, as well as the substantive criminal law. Most importantly, the national government is granted the power ‘to make Laws for the Peace, Order, and good Government of Canada’ (the so-called POGG power), a provision originally intended to reserve residual power to the national level (Hogg 2007: ' 17.1). Under the constitutional principle of paramountcy, validly enacted federal laws displace conflicting provincial laws. Exclusively provincial powers include provincial fiscal affairs, hospitals, intraprovincial public works, nonrenewable resources, education, the administration of justice, and, most notably, property and civil rights.

Things have turned out to be more complicated. Most importantly, judicial decisions by the Privy Council interpreting the constitution eventually reversed the originally contemplated balance of power, in two principal ways. First, the provincial power over property and civil rights, probably originally intended to do little more than permit Quebec to retain its private civil law following confederation with English-speaking, common-law provinces, was expanded by decisions of the Privy Council to make it one of the most significant powers exercised at any level. Much of what is now widely regarded as public law – regulation of the environment, labor, health, social services – has been deemed to fall within the exclusive jurisdiction of provinces as the regulation of property (Hogg 2007: ' 21.2). Second, the national POGG power, probably intended to be of very broad scope, was construed narrowly by the Privy Council. For example, the federal POGG power was held



inadequate to sustain federal regulation of economically significant industries of nationwide reach, relegating their regulation to the provinces, an extremely important power under contemporary economic conditions.^{IV}

Additional complications arise from the fact that many powers have turned out to be shared. In the area of immigration, for example, the federal government has power over the admission of immigrants, but the provinces exercise authority over settlement and integration of immigrants (Banting 2012: 262-263). In the realm of criminal law, although the federal government has authority to define crimes, provincial power over the administration of justice gives them substantial influence over the course of criminal justice. Control of trade and transportation are divided along a hazy line distinguishing interprovincial from intraprovincial activity (Hogg 2007: ch. 20). The federal government has authority to negotiate treaties, but cannot unilaterally implement them when they deal with matters falling within provincial jurisdiction (Bowman 2012).

National and provincial power are further entangled under the Canadian Constitution by the constitutional commitment to ‘equalization,’ a system of intergovernmental income redistribution:

Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation (Const. Act, 1982, '36(2)).'

The fiscal capacity of the provinces varies dramatically, and equalization payments by the federal government help smooth out inequalities in the ability of each province to provide its citizens with the kind of public services available elsewhere in the nation.^V In the Canadian context, however, equalization addresses another kind of mismatch: the mismatch between power and resources. In many issue areas, principal authority is vested in the provinces, yet it is the federal government that has greater access to the fiscal resources necessary to accomplish programmatic objectives (Simeon 1972: 146-147). Consequently, in many cases if nationally significant goals are to be accomplished, subnational power must be yoked to national funding, a task requiring intergovernmental cooperation on a broad scale.

One additional area deserves mention: the extraordinarily complex provisions for amending the constitution, a highly contentious issue in Canadian constitutional politics.



Under the Constitution Act, 1982, the general amending rule requires that any amendment proposed by Parliament be ratified by ‘at least two-thirds of the provinces that have, in the aggregate, . . . at least fifty per cent of the population of all the provinces.’^{VI} This is known colloquially as the ‘seven-fifty formula’ because it requires the approval of seven of the ten provinces having more than fifty percent of the population. Its significance, however, lies in the way it avoids giving any province a veto while at the same time ensuring that all amendments enjoy broad regional support. First, any group of seven provinces necessarily must include at least one of the four Western provinces and at least one of the four Atlantic provinces, all but eliminating the risk of outright regional exploitation. Second, the fifty-percent population threshold requires either Ontario or Quebec to be among the ratifying provinces, guaranteeing support by at least one of the major centers of wealth and population.

Complicating matters, however, is a provision that permits provinces to opt out of constitutional amendments enacted by this method: ‘An amendment . . . shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority its members. . . .’^{VII} The constitutional amending rules also provide that amendments relating to a small number of issues may be enacted only by unanimous approval of the provinces, and that an amendment applying to fewer than all provinces must be approved by the legislatures of those provinces to which it applies. These rules on their face establish the basis for an unusual constitutional regime of asymmetrical application. On the other hand, to the extent that non-uniform application of constitutional rules is seen by national majority coalitions as something to be avoided – generally the case outside of Quebec – the amendment rules create incentives to change the constitution by means other than formal amendment, a topic to which we shall return shortly.

2.1.2. *Canadian federalism in practice*

As Gerald Baier (2012: 79), among many others, has observed, ‘Canada’s federal system features a rather large gap between the jurisdictional map of the written constitution and the actual activities of its governments.’ It is therefore essential to describe some of the important informal institutions that have arisen on the constitutional landscape. I shall mention three: constitutional conventions, responsible government, and executive federalism.



Like the British constitution that served to a great extent as its model, the Canadian Constitution is found not only in written legal texts but also in conventions of official behavior that have, through long practice and the consolidation of widespread public support and expectation, come to be regarded as having constitutional status (Hogg 2007: ' 1.10). Although the lack of any textual warrant precludes their enforcement by judicial review, constitutional principles created by convention are nevertheless observed, often strictly, mainly through the force of convention. To give a prominent example, one very important constitutional convention institutionalizes the virtual elimination of formally granted British royal power. Section 55 of the Canadian Constitution plainly states:

‘Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen’s Assent, he shall declare, according to his Discretion, . . . either that he assents thereto in the Queen’s Name, or that he withholds the Queen’s Assent, or that he reserves the Bill for the Signification of the Queen’s Pleasure.’

This provision, by its incontrovertible language, gives the Governor General a power to veto federal legislation, yet by longstanding convention that power is never exercised. The Governor General’s assent to federal legislation is still required for its validity, and such consent is routinely given, but it is given on the advice of the Prime Minister and cabinet (Hogg 2007: ' 9.5(d)); the giving of royal assent has thus been reduced by convention to a ministerial task of ritual signature.

Other significant conventions apply to the operation of Canada’s constitutional federalism, and indeed have contributed significantly to the undermining of the original constitutional plan for a strongly centralized state. Among these is the disappearance of the federal power of ‘disallowance’ of provincial legislation. Under the Canadian Constitution, the Governor General appoints Lieutenant Governors for each province. Much as the Governor General is granted the power to veto federal legislation, so the Lieutenant Governors are constitutionally granted the authority to disallow provincial legislation. Two conventions have made these provisions virtually dead letters. First, the Governor General does not exercise actual discretion in the appointment of Lieutenant Governors; he or she makes these appointments on the advice of the Prime Minister and cabinet, thereby effectively transferring to the federal government the power to disallow provincial legislation



(Hogg 2007: " 5.3(f), 9.3). Another convention, however, restrains the federal government from exercising this authority; it was last exercised in 1943, and any attempt to use it now would likely precipitate what would surely qualify as a constitutional crisis. The result, of course, has been to grant to the provinces a kind of genuine autonomy not contemplated by the original constitutional design.

Yet another constitutional convention relating to the operation of federalism is the appointment by Prime Ministers of a cabinet that includes representatives of all the major Canadian regions – Ontario, Quebec, the West, and the Atlantic provinces. This convention was initiated by Canada's leading founder and first Prime Minister, John Macdonald, as a way to ensure high-level federal attention to sectional interests when other institutions of the newly-created constitution seemed ill-suited to serve this function (Smith 2010: 43).

By far the most important and wide-ranging constitutional convention, however, is the convention establishing 'responsible government.' Responsible government refers to the British or 'Westminster' system of parliamentary government, which Canadians have adopted. In that system, executive power is exercised not by its formal holder, the Queen, but by the Prime Minister, who is selected by the majority party or party coalition in Parliament, and his or her cabinet. The government is 'responsible' in the sense that the executive is answerable to, and must have the continuing support of, the Parliament. The system of responsible government was similarly adopted in each of the Canadian provinces, where the head of the dominant legislative party and first minister is known as the Premier.

Finally, there is the practice of 'executive federalism,' a process of policy making in which major decisions about national policy are made not in the deliberations of a broadly representative national legislature – the paradigmatic method in modern democratic states – but through intergovernmental negotiations among the chief executives of the national and subnational governments.^{VIII} Executive federalism is not so much a constitutional convention as an institutional consequence of an unusual set of interactions among Canadian constitutional structures, both formal and conventional. It is, in Ronald Watts's (1989: 1) apt description, 'a logical dynamic resulting from the marriage of federal and parliamentary institutions.'

Three principal conditions have underwritten the rise of executive federalism in Canada. First, Canada is not merely a federal state, but one in which the provinces exercise a very substantial degree of independent power, and the ability of the federal government to



accomplish its objectives thus often depends upon provincial cooperation. Moreover, the expansion of the scope of governmental intervention in daily life over the course of the twentieth century, in Canada as elsewhere in the West, has only increased the number of occasions on which programmatic cooperation at both levels of government is required to achieve widely desired public objectives (Simeon 1972: 3-4).

Second, Canadian national and provincial governments all employ Westminster-style parliamentary institutions. The Westminster form of government by design greatly concentrates power in the hands of the prime minister and cabinet (Watts 1989: 1). It does so by effacing any separation of legislative and executive power and placing control over both branches in the hands of the same individual – the prime minister – who simultaneously heads the executive branch and the majority party in parliament. As a result, the Canadian Prime Minister and provincial Premiers can ‘deliver’ their governments in a way that U.S. presidents and governors cannot (Savoie 2009: 125);^{ix} that is, they can with considerable confidence make representations and commitments to others about what their governments will do because they exercise a very strong degree of control over what their governments will do – as the Supreme Court of Canada has observed, ‘the reality of Canadian governance [is] that, except in certain rare cases, the executive frequently and *de facto* controls the legislature.’^x American chief executives, in contrast, must contend with independent and sometimes cantankerous legislatures whose cooperation they have no power to direct. Finally, because the number of Canadian jurisdictions is small – one national government, ten provincial governments, and three territorial governments – the agreement of only fourteen individuals, a very manageable number, is required effectively to make virtually any kind of national policy. Taken together, these conditions have created a system in which ‘the big issues of public policy have been settled in an elaborate system of intergovernmental accommodations presided over by the first ministers’ (Carty and Wolinetz 2004: 66).

2.2. Tools and methods of subnational influence

Having reviewed the main structures and institutions of Canadian federalism, we are now in a position to examine the concrete methods by which subnational units in Canada influence national policy and get what they want from the national government. In brief, due to the institutionalization of executive federalism, by far the most common method to which Canadian provinces resort to get their way is negotiation. So dominant is negotiation as a



mode of intergovernmental relations that it establishes a baseline against which all other modes are conventionally perceived in most of Canada as derogations. I describe two of these below: unilateral action and the making of threats, including the threat of secession. The subsection concludes with a brief examination of modes of subnational influence that are used widely in other federal states, but play a much smaller role in Canada: exploitation of political party channels, mobilization of popular political opinion, and constitutional litigation.

2.2.1. *Negotiation and deal-making*

The emergence of executive federalism in Canada has produced a system in which major national policy decisions are made primarily through ‘a process of direct negotiation between the executives of different governments’ – what Richard Simeon (1972: 5) has aptly termed ‘provincial diplomacy.’ In this system, characterized by ‘extensive consultation and negotiation on an issue-by-issue basis’ (Bakvis and Tanguay 2008: 130), Canadian provinces attempt to influence the actions of the national government through bargaining.

Comprehensive multilateral negotiations. In its purest form, the intergovernmental bargaining associated with executive federalism occurs by way of collective negotiation among all fourteen heads of government. These types of proceedings may occur within the formal confines of the institutionalized and routinized First Ministers Conference (FMC); on a more ad hoc basis in the form of First Ministers Meetings called to deal with occasional crises; or, from time to time, in quiet, behind-the-scenes consultations out of the public eye (Papillon and Simeon 2004). Not all such negotiations involve the prime minister and premiers directly; many Canadian intergovernmental negotiations are handled by ministers or bureaucrats with specific portfolios acting as representatives of their governments.^{XI} Such meetings at all levels have become so commonplace, and so much an accepted aspect of the permanent architecture of Canadian intergovernmental relations, that an elaborate administrative apparatus has evolved to support them, including the Canadian Intergovernmental Secretariat, the Intergovernmental Conference, and a wide variety of intergovernmental affairs agencies, especially at the provincial level (Pollard 1986). Together, these institutions are capable of supporting negotiations of great breadth and complexity on subjects of considerable political controversy, producing at their best ‘a broad multilateral agreement,



including common principles and goals and a broad funding structure' (Simeon and Nugent 2012: 65).

One of the most successful comprehensive intergovernmental negotiations is the Agreement on Internal Trade (AIT), a deal struck between the federal and provincial governments in 1994.^{xii} AIT grew out of longstanding problems rooted in the awkward constitutional division between the federal and provincial governments of regulatory authority over trade and commerce. Under the Canadian Constitution, the federal government is granted exclusive authority over 'The Regulation of Trade and Commerce,' but decisions of the Privy Council and the Supreme Court of Canada narrowed its scope considerably, simultaneously expanding the authority over trade of provinces under the heading of power to regulate property.^{xiii} This division of authority then encouraged the provinces to adopt protectionist policies that limited the mobility of goods and labor, impairing national economic performance (MacDonald Commission 1985: Vol. 3, 101-135). As concerns grew that these barriers to free internal trade were harming not only Canada's domestic prosperity but its ability to compete in an increasingly global economy, intense negotiations were initiated to bypass constitutional limitations and create by mutual agreement a system of unimpeded internal trade (Doern and MacDonald 1999). The final product, the AIT, prohibits the erection of internal trade barriers, guarantees non-discrimination in economic opportunities on the basis of origin or residency, and commits all governments to the liberalization of trade.

Another important example of multilateral negotiation is the Social Union Framework Agreement (SUFA). Reached in 1999, the SUFA agreement established a collaborative framework among the federal government and all of the provinces except Quebec – which did not in the end join the agreement – to develop and structure social programs on a basis of equality, respect for human rights, and geographical uniformity of access to social programs and services, and committed the governments to the elimination of barriers to mobility arising from residency requirements for social programs, and various other measures.^{xiv}

Bilateral negotiations. The opportunities for Canadian provinces to influence national policy by way of negotiation are not limited to comprehensive, nationwide initiatives. As Bakvis and Brown (2010: 485) observe, Canadian intergovernmental relations 'are not so much a matrix as a series of dyadic relations: of the executives of the federal government and the



executives of the provinces and territories, together, one-by-one, or, occasionally, in regional groups.’ On account of this flexibility, provinces can, and frequently have, successfully influenced national policy in their favor through bilateral negotiations with the federal government.

Sometimes bilateral negotiations can take place on a single issue of interest primarily to one or a few provinces. One well-known example is the negotiation between Ottawa and the provinces of Newfoundland and Labrador and Nova Scotia that led to what are known as the Atlantic Accords (Feehan 2009). Under the Canadian Constitution, provinces in general have exclusive authority over non-renewable natural resources located within their borders. Jurisdiction over offshore resources, however, had been less clear. When, in the 1970s, oil prices rose dramatically, settling ownership of oil deposits off the coasts of Newfoundland, Labrador, and Nova Scotia suddenly became a pressing issue. In 1984, the Supreme Court of Canada ruled that ownership of offshore oil reserves lay with the federal government. Rather than concluding the issue, however, the judicial ruling became the point of departure for lengthy intergovernmental negotiations in which the provinces took the position that the judicial ruling deprived them of something that was theirs, and for which they ought to be compensated (Feehan 2009: 176-177).

This was enough to bring the federal government to the table, and under the eventual agreements, an Offshore Petroleum Board was established as a joint federal-provincial agency to manage development of the oil resources. Provincial taxation was permitted as though the resources were provincially owned, so that the provinces were able to raise revenue from both royalties and corporate taxation. At the same time, the federal equalization formula was adjusted in favor of the two provinces. Normally, the receipt by a province of unanticipated revenue would result in an offset, or ‘clawback,’ of equalization payments by the federal government. Newfoundland and Labrador, and later Nova Scotia, received reprieves from operation of the clawback principle for periods of twelve and ten years, respectively (Feehan 2009: 177-183). Subsequently, complaints by other provinces, loud politicking by Newfoundland and Labrador, and changes in federal administrations, led to repeated renegotiations of the deal in the ensuing years.

Bilateral intergovernmental deal-making does not always occur in the context of issues of concern solely to specific provinces; it also can be embedded in more comprehensive negotiations among all the governments over programs intended to have nationwide reach.



In particular, in order to reach agreements of comprehensive scope, the federal government will sometimes cut side deals with individual provinces to secure their agreement to the broader programmatic framework. For example, in order to induce agreement to the AIT by British Columbia, Alberta, Quebec, and Newfoundland, the federal government agreed during negotiations to provisions creating narrow (and frankly protectionist) exclusions for British Columbia and Alberta's export of logs, Quebec's export approval measures relating to unprocessed fish, and Newfoundland's requirement for in-province fish processing.^{xv}

Another circumstance in which bilateral deals are struck is the negotiation of provincial authority to opt out entirely from a deal reached between the federal government and the other provinces. For example, negotiations over the Canada Pension Plan in the 1960s resulted in the inclusion at the insistence of Quebec of a provision allowing provinces to opt out and then recover lost funding on their own through an abatement of the federal income tax in the province exercising the option. This arrangement – not the first of its kind – authorized Quebec to 'take full responsibility for programs that in the rest of the country were managed jointly by the federal and provincial governments or even by Ottawa alone' (McRoberts 1997: 41). While opt-out provisions often are available to any province, they are frequently included because only one or two provinces express an interest in them.

Constitutional negotiations. The combination in Canada of executive federalism and a constitutional amending formula that does not require popular participation creates conditions in which Canadian intergovernmental negotiations can extend not merely to policy within the constitutional framework, but to the terms of the basic constitutional framework itself. During the mid-twentieth century, this process was both quiet and routine:

'Provincial consent was not obtained through high-profile conferences with all the players at the table and a wide range of constitutional issues on the block. On the contrary, the federal government sought each province's consent in turn for each amendment, and, with few exceptions, this consent was quietly given by provincial executives agreeing in correspondence, not by the provincial legislatures (Russell 1992: 65).'

Even when agreement to formal constitutional amendments has been impossible to obtain, intergovernmental negotiation has nevertheless from time to time produced their functional equivalent: '[f]ederal-provincial relations are often attempts to get around constitutional strictures, and in doing so they may result in *de facto* constitutional change'



(Simeon 1972: 41). An example is negotiated efforts to circumvent the constitutional allocation of powers through the practice of 'inter-delegation.' The Canadian Constitution, as indicated earlier, allocates power between the federal and provincial governments in ways that are sometimes seen at both levels of government as impediments to the enactment of desired programs. Initially, the various governments sometimes attempted to get around this problem by agreeing essentially to swap powers as needed through a process of direct mutual delegation. When this plan was judicially invalidated, a different arrangement was worked out whereby the federal government delegated federal programmatic authority to provincial administrative agencies (Hogg 2007: " 14.3(a), (b)), effectuating de facto a negotiated alteration of the constitutional allocation of power.

At the limit, provincial initiatives, especially at the insistence of Quebec, have precipitated rounds of metaconstitutional politics, in which the prime minister and premiers have agreed to rewrite the Canadian Constitution in comprehensive and far-reaching ways. In 1987, an agreement – the Meech Lake Accord – was concluded in principle. That agreement would, among other things, have recognized Quebec as a 'distinct society,' given it a greater and asymmetrical role in immigration, provided each province with the power to veto constitutional amendments, and placed limits on the federal spending power (Hogg 2007: ' 4.1(c)). After an agreement had been reached but before it could be implemented, unexpected changes in political leadership in New Brunswick and Manitoba eliminated the unanimity necessary to formalize the agreed constitutional amendments (Russell 1992: 141-142). A similar process of metaconstitutional negotiation was completed in 1992, this time with the sustained unanimous support of provincial leaders, resulting in the Charlottetown Accord. In an unusual move, however, the Accord provided for popular participation in the form of a national referendum, sending to a rare, narrow defeat the outcome of intergovernmental constitutional negotiations (Lusztig 1994).

Having reviewed in some depth the baseline method by which Canadian subnational units influence national political affairs, I turn to some other tools that Canadian provinces sometimes deploy to achieve their objectives.

2.2.2. *Ignoring the federal government*

Notwithstanding the dominant norm of mutual consultation and negotiation, Canadian provinces sometimes get their way simply by ignoring the federal government altogether and



pursuing provincial goals directly, through the direct and unmediated exercise of provincial power. This is to some extent more possible in Canada than in other federal states on account of the large measure of power constitutionally allocated to the provinces. Quebec, for example, has an elaborate provincial program of ‘interculturalism’ relating to the settlement and integration into French culture of immigrants (Banting 2012). In other settings, the provinces have made direct use of their powers to counteract unilateral uses of federal power of which they disapprove. For instance, some time after extensive intergovernmental negotiations produced a nationwide health insurance program, the federal government for financial reasons decided that it could not afford to continue the program at its negotiated scope, and unilaterally cut its funding. At that point, the provinces stepped up and raised the revenue necessary to continue the program in its original form (Taylor 1989).

Occasionally, however, provinces act unilaterally not to exercise power in areas of their acknowledged competence but as a kind of power entrepreneurialism meant to seize and expand their authority. A good example of this is the history of Quebec foreign policy adventurism. In 1965, Quebec claimed, on the basis of the Canadian Constitution’s requirement of provincial cooperation in treaty *implementation*, that provinces could have their own foreign policies, and it took the first step in this direction by signing an educational agreement with France. Federal officials first became alarmed when, in a 1967 visit to Montreal, French President Charles De Gaulle during a public appearance spontaneously – and to the horror of his advisors – exclaimed ‘Vive le Québec libre!’ Before Quebec could make any additional moves in response to De Gaulle’s prodding, federal officials quickly ‘rejected Québec’s claims for diplomatic independence, on the grounds that national sovereignty is indivisible in international law’ (Clarkson 1989). Nevertheless, consistent with Canadian norms of consultation and negotiation, they simultaneously invited the provinces to take a more active role in formulating foreign policy in areas related to their constitutional authority.

Quebec, however, pushed this principle further than Ottawa could tolerate. In 1968, Gabon invited Quebec’s minister of education to an international conference of francophone nations, without consulting or notifying Ottawa. Federal officials rebuked both Quebec and Gabon, but when the same behavior was repeated, Ottawa severed diplomatic relations with Gabon in retaliation (Mahler 1994). Quebec’s entrepreneurialism, however, eventually yielded a settlement it found acceptable: foreign policy in some areas was



thereafter conducted on a cooperative basis, and the federal government agreed to permit Quebec to become directly and officially involved on its own account in some international organizations. Given the ways in which the Canadian constitutional system is capable, in time, of transmuted practice to constitutionally entrenched convention, a degree of power entrepreneurship at the provincial level seems understandable.

A final way in which provinces act by ignoring the federal government is to exclude it from interprovincial negotiations. In 2003, the premiers of the ten provinces and the territories formed the Council of the Federation (COF), an organization similar to the more established First Ministers Conference, but without the presence of the federal government (Simeon and Nugent 2012: 67). Motivated in part by a growing feeling that recent federal administrations were not acting in a sufficiently consultative manner, the premiers organized themselves, in their own words, 'because they believe it is important for provinces and territories to play a leadership role in revitalizing the Canadian federation and building a more constructive and cooperative federal system.'^{xvi} Thus, the COF coordinates provincial policy on matters in which federal involvement is not needed, and attempts to develop consensus positions among the provinces to enable them to present a united front in collective negotiations with Ottawa.

2.2.3. *Threats*

The making of threats is the polar opposite of the Canadian default preference for intergovernmental consultation and negotiation, yet provinces have from time to time deployed this tool in efforts to get what they want. The most notable kind of threat is of course the threat of secession, a tactic deployed by Quebec periodically over the last thirty or so years. Although it has never been entirely clear how seriously Quebec's threats to secede ought to be taken, the threat of secession has been sufficient on at least two occasions to bring the federal government – and with it, the other Canadian provinces – to the bargaining table for metaconstitutional negotiations addressed mainly to accommodating Quebec's grievances in order to keep it within the dominion. After the failure of the Meech Lake and Charlottetown Accords, Quebec held an internal referendum on secession in 1995, which failed by a narrow margin (Hogg 2007: ' 4.1(c)).^{xvii} Since then, Quebec governments have threatened not so much to secede as to hold another referendum on secession. This occurred most recently in the Fall of 2012, when the Parti Québécois took control of the Quebec



parliament on a platform that included a pledge to hold such a referendum, a threat it did not carry out.

Unlike the United States, where subnational threats to engage in minor acts of defiance are often enough to get the attention of the national government, in Canada the availability of the secession threat seems to have helped create a context in which public threats of lesser disobedience are seen as insufficiently powerful to call attention to provincial grievances, especially given the ready availability of private, civil, and often meaningful bilateral negotiations with the federal government. As a result, other provinces have occasionally hinted at the possibility that they, too, might contemplate secession. Some Newfoundland premiers, for example, have found it expedient to invoke the threat of secession. In the 1970s, Premier Frank Moores raised eyebrows elsewhere in Canada by occasionally using slogans such as ‘masters in our own house’ (evoking the Québécois nationalist slogan *maîtres chez nous*) and ‘Vive Terre Neuve Libre’ (Marland 2010: 161). More recently, Premier Danny Williams ordered Canadian flags removed from provincial buildings. Williams’s tactics did indeed produce results in the form of a renegotiation of the Atlantic Accords. Rhetoric in Alberta has also occasionally flirted with threats to secede.

2.2.4. *Other tools of subnational influence*

Several other informal tools of influence that often receive heavy usage by subnational units in other federal states are invoked either infrequently or not at all by Canadian provinces. One such tool that is strikingly unavailable to Canadian provinces is the ability to exercise influence at the national level through the medium of political parties.^{xviii} In many federations, subnational officials can call upon fellow partisans in the national legislature to press their interests. This is all but impossible in Canada due to the extreme decentralization and fluidity of Canadian political parties: although national and provincial parties were more integrated in the past, today ‘Canadian parties, and the party systems they constitute, are now largely disconnected’ (Carty and Wolinetz 2004: 302-303). As a result, Canadian parties do not offer paths of political influence that cross constitutional lines of authority; indeed, the centralization of power associated with the Westminster system intensifies the autonomy of national and regional or provincial parties because under that system, a minority party in a province has no standing to approach the central government, even if it is controlled by the same party (Simeon 1972: 31).^{xix} Some idea of the degree to which Canadian national and



provincial parties fail to align can be gleaned from the career of Jean Charest, who after service as a cabinet minister in the Conservative government of Brian Mulroney and a career as leader of the federal Progressive Conservative Party – the opposition party to Jean Chrétien’s federal Liberals during the 1990s – went on to become the leader of Quebec’s Liberal Party and Premier of the province.

In addition, Canadian parties have long adhered to a tradition of forming minority governments rather than negotiating their way into majority coalitions (Bakvis and Tanguay 2008: 130). As a result, a national party with a regional base in one or a few provinces typically cannot use the occasion of formation of a national government to extract concessions regarding subnational interests as a condition of joining a coalition government.

Another extraconstitutional tactic of subnational influence that is used very infrequently by Canadian provinces is mobilization of popular opinion.^{xx} Although it has been tried occasionally, most notably by Newfoundland Premier Danny Williams to generate pressure on Ottawa to renegotiate bilateral deals concerning revenue from natural resources, it does not seem an especially effective tactic. One reason may be a Canadian political culture that stresses respectful consultation over dramatic confrontation, but another may be simply that Canadian politics is not highly democratic in the sense of cultivating broad popular involvement – the so-called ‘democratic deficit’ (Bakvis and Skogstad 2002: 19).

Finally, despite the availability of a widely respected constitutional court with a power of judicial review and a demonstrated willingness to elaborate the boundaries of constitutional powers, Canadian provinces over the last three decades have rarely resorted to litigation to get what they want from the federal government. At one time this was a relatively common tactic; as Russell (1992: 97) reports, between 1975 and 1982, the Supreme Court of Canada decided some eighty constitutional cases dealing with the allocation of power. Judicial rulings were subsequently shown, however, to be weak constraints on power because of the ability of federal and provincial officials to negotiate quasi-constitutional or even formal constitutional changes.^{xxi} Furthermore, ‘[i]n Canada, . . . frequent recourse to the courts is sometimes seen as an indicator of breakdown of these more consensual, administrative mechanisms’ (Simeon 2000: 148). Consequently, intergovernmental agreements of the kind described earlier have largely eclipsed the courts as the institutional vehicle for assigning power (Baier 2012: 86-91).



3. Conclusions: The Impact of Constitutional Design on Federal Stability

Unlike subnational units in many federal states, Canadian provinces have ready access to extremely powerful tools to influence national policy and actions, including negotiated alteration of the federal constitution itself. As a result, they do not need to resort to improvised weaker tools, as is often the case elsewhere (Gardner 2005: 87-98; Gardner and Abad 2011). The availability of such tools makes Canadian provinces potentially extremely effective advocates of provincial interests in the arena of national policy making. Nevertheless, this provincial effectiveness may come at a price to the extent that it results from what might be called the ‘hyperplasticity’ of the Canadian Constitution’s allocations of federal and provincial power.

By hyperplasticity in this context, I mean that the capacity of provinces to elevate policy disputes with Ottawa to the level of constitutional disputes – to convert negotiations over policy into negotiations over the constitutional allocation of national and provincial powers – seems to create an incentive structure in which governments have significant incentives to raise the stakes in every negotiation. In this environment, policy disagreements between the provincial and federal government carry inherently the potential to serve as an opening for constitutional dispute, and the constitution therefore need not be seen by the players as establishing a set of binding institutional structures and constraints within which other decisions are taken. Instead, governments engaged in conflict may be tempted to view the constitution as provisional and subject to renegotiation whenever it seems to offer them a losing position. If you are going to lose in a policy dispute conducted according to a particular set of rules, why accept the rules if they can be changed mid-negotiation? If the constitution allocates a power to the national level and the national government will not exercise that power in a way congenial to a province, why should a province hold out for its policy preference when it can instead press for a reallocation of the power in question to the provincial level? In these circumstances, the practice of intergovernmental relations has a distinct tendency to collapse into pure, unconstrained politics.^{XXII} Constitutional flexibility, of course, has its benefits; the ability of Canadian governments to negotiate their way past constitutional obstacles has ‘on many occasions . . . allowed constitutional rigidities to be



circumvented' (Bakvis and Skogstad 2002: 8). But it may be possible for this fluidity to go too far. As Marc-Antoine Adam has observed,

'what is striking with Canadian federalism is that we try to govern this country without the assistance of a legal framework, i.e., the Constitution. ... That we should constantly be negotiating is perhaps normal; that there should be no permanent agreed-upon rules to govern our negotiations and what we negotiate is more troublesome. But this is what a constitution is meant to provide: a set of fundamental rules or a framework within which the day-to-day political process can take place. Lack of agreement on day-to-day political issues is normal and healthy. Lack of agreement on the fundamental rules is a different matter. In fact, one could say that in our federation, because of this lack of agreed-upon fundamental rules, the management of what should be day-to-day political issues has a tendency to mutate into quasi-constitutional negotiations, with the ironical result that Canada, for wanting to avoid its constitution, finds itself locked in a state of permanent constitutional debate' (Adam 2009: 297-298).

Moreover, as Choudhry (2003: 78) notes, the fact that Canadian governments prefer to settle their disputes through judicially unenforceable intergovernmental agreements instead of through, say, the creation of mutually binding statutory law, suggests an underlying preference for remaining at all times completely free and unbound, just as states are in international diplomacy.

* * * * *

Federal constitutions do not attempt to preserve the state by suppressing conflict. Quite to the contrary, federal constitutions begin from the premise that intrasocietal conflict is inevitable and neither can nor should be suppressed. Instead, federal constitutions seek to preserve the stability of the state by creating a forum in which, if all goes well, conflict can emerge predictably and safely – the forum of intergovernmental contestation. In that, the Canadian Constitution has succeeded: conflict between the provinces and the central government is frequent and open, and the arena of intergovernmental contestation has become by far the most important and the most flexible forum within which policy conflicts among Canadians are resolved.

Yet it is by no means clear that the forces aligned in opposition during intergovernmental conflict are balanced in a way that achieve a Madisonian equilibrium revolving reliably around a politically consensual center of constitutional gravity. The design of the Canadian Constitution has encouraged the emergence of negotiation as the dominant mechanism by



which intergovernmental contestation is waged. Yet that same design has not been successful in containing the scope of such negotiations within the parameters fixed by the constitution. If the success of a federal state is measured by the robust endurance of a mutually agreeable division of authority among the orders of government, the Canadian Constitution may be guilty of purchasing short-term peace at the expense of long-term risk to constitutional stability.

* Bridget and Thomas Black SUNY Distinguished Professor, University at Buffalo School of Law, State University of New York. An earlier version of this paper was presented at a Symposium on the Constitution of Canada at Scuola Sant'Anna, Pisa, Italy, on May 24, 2017. I thank the organizers for their kind invitation and the participants for useful comments. The research on which this paper is based was undertaken principally in the fall of 2012, while I served as Fulbright Visiting Research Chair in the Theory and Practice of Constitutionalism and Federalism at McGill University. I thank Fulbright Canada for its support, and the members of the McGill Research Group on Constitutional Studies, most especially its director, Jacob Levy, for support and illuminating conversation during the period of my fellowship.

ⁱ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

ⁱⁱ Denning here quotes John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-1995* (1996), at 92.

ⁱⁱⁱ This distinction is perhaps most clearly manifest in the Supreme Court of Canada's embrace of the 'living tree' doctrine of organic constitutional evolution compared to the U.S. Supreme Court's adoption of originalism as the preferred mode of constitutional interpretation.

^{iv} *A.G. Canada v. A.-G. Alta. (Insurance Reference)*, [1916] 1 A.C. 588; Hogg, 2007: ' 17.4(a).

^v Recently, only two provinces – Ontario and Alberta – have been net resource exporters. All the other provinces receive equalization payments from Ottawa. Hogg 2007, ' 6.6.

^{vi} Constitution Act, 1982, ' 38(1)(b).

^{vii} Constitution Act, 1982, ' 38(3).

^{viii} As one commentator has put it, '[i]n Canada, intergovernmental relations have become the substitute for engagement through Parliament' (Smith 2010: 93). See also Russell (1992: 81): 'By the mid 1960s meetings of federal and provincial ministers and their expert advisers on virtually all topics became so numerous that they were supplanting legislatures as the primary arena of Canadian policy making.'

^{ix} Savoie (2009: 115-119) argues that the Canadian Prime Minister has an even stronger hand than most prime ministers in Westminster systems on account of a recent consolidation of executive power by the Harper Government in the hands of the prime minister at the expense of the cabinet. In his view, Canada's national government is developing into a modern version of monarchical court government in which '[a]dvisors, much like courtiers of old, have influence, not power' (130).

^x *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, & 54.

^{xi} Simeon's (1972) analogy to international diplomacy has great traction here: just as in the international realm, Canadian intergovernmental relations may be carried on by heads of state, or by progressively lower-level officials, depending upon the degree of interest and involvement governments wish to convey, consistent with diplomatic conventions.

^{xii} Available at <https://www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf>.

^{xiii} E.g., *A.-G. Canada v. A.G. Alta. (Insurance Reference)* [1916] 1 A.C. 588; *The King v. Eastern Terminal Elevator Co.* [1925] S.C.R. 434; *A.-G. B.C. v. A.-G. Can. (Natural Products Marketing Reference)* [1937] 2 S.C.R. 151.

^{xiv} A Framework to Improve the Social Union for Canadians, available at <http://www.scics.gc.ca/english/conferences.asp?a=viewdocument&id=638>. For contemporaneous analysis and critique, see, e.g., Lazar 2000 and Young 1999.

^{xv} AIT, supra note XII, Annex 1102.3.

^{xvi} Council of the Federation, <http://www.councilofthefederation.ca/aboutcouncil/aboutcouncil.html>.

^{xvii} The vote was 50.6% against separation and 49.4% in favor.



^{xviii} Compare the descriptions of party channels of influence in the United States and Spain in Gardner and Abad (2011: 508-509).

^{xix} Chhibber and Kollman (2004) attribute this to the strong decentralization of power in the system, i.e., because the provinces have such significant responsibility, voters have incentives to vote their policy preferences at the provincial level; whereas in more centralized systems they have incentives to vote their national preferences in subnational elections.

^{xx} Such tactics are used effectively elsewhere – in Spain, for example. Gardner and Abad (2011: 509-510). Cf., however, Wright (2016: 29), claiming that ‘Public criticism of federal initiatives by the provinces is a staple of intergovernmental politics in Canada.’ Wright later goes on to cast doubt on the efficacy of this tactic as a means by which provinces might discipline the national government (36-44).

^{xxi} Swinton (1990: 10-20) describes the court’s decisions as only an early move in what is often a series of strategic actions by provincial governments. Ryder (2006: 353) similarly describes ‘a familiar pattern in Canadian federalism’ in which an initial victory in court by the central government is followed by the losing province being ‘accommodated politically through intergovernmental negotiations.’ Scholars, moreover, seem to agree that the Supreme Court has in recent years backed away from an aggressive form of judicial review of structural issues, preferring instead to let the political branches work out their disagreements through negotiations (Wright 2010; Ryder 2006; Brouillet 2006).

^{xxii} Choudhry (2003: 82) argues that the ‘site for the evolution of the legal framework governing social policy has been in politics. The politics of social policy, in other words, has been an arena for constitutional politics.’

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ISSN: 2036-5438

Provincializing Constitutions: History, Narrative, and the Disappearance of Canada's Provincial Constitutions

by

Peter Price*

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





Abstract

Constitutional scholarship in Canada since Confederation has been characterized by two primary narratives. The dualist narrative, which characterized constitutional scholarship between the late-nineteenth and mid-twentieth centuries, focussed on the parallel developments of provincial and federal constitutions. The monist narrative, which has become the dominant model of interpretation since the mid-twentieth century, focusses on the federal constitution as a singular foundation of constitutionalism in Canada. As a result of the shift from dualism to monism, provincial constitutions have become largely ignored in Canada and subsumed by the “mega-constitutional” politics of the federal constitution. This paper examines provincial constitutions to highlight the significant reorientation of constitutional scholarship in Canada over the past 150 years, which has become primarily focussed on post-Confederation constitutional history and written constitutionalism.

Keywords

Canadian constitution, subnational constitutionalism, narratives, constitutional history, federalism



The newspaper reports say that two thousand people crowded the bunting-wrapped streets of Niagara-on-the-Lake in July 1892 to mark the centennial of the reading of the proclamation that established the province of Upper Canada and its system of representative government, as outlined in the Constitutional Act of 1791. The Lieutenant Governor of Ontario read verbatim the proclamation issued a century earlier by his predecessor John Graves Simcoe that called for the election of a Legislative Assembly. The importance of the occasion, Ontario Premier Oliver Mowat told the crowd, was that it marked “the first step in the political history of the Province” (“Responsible Government” 1892).¹ It was clear to him and to those assembled that the anniversary marked an important milestone in Ontario’s constitutional evolution. A century later, however, the event’s bicentennial passed largely unnoticed. Instead, the national referendum on the Charlottetown Accord, which proposed wide-ranging reforms to the Canadian constitution, crowded newspaper headlines and dominated constitutional discussion. Compared to the clamorous noise of constitutional reform in those years, the establishment and development of constitutional government in Upper Canada and other British North American colonies were barely-heard whispers from a very different era.

The contrast of anniversaries in 1892 and 1992 reveals a deeper change in constitutionalism in Canada, which since the mid-twentieth century has become almost exclusively focused on the *Constitution Act, 1867* and *1982*, and written constitutionalism more generally. This is nowhere more obvious than in the strange silence surrounding provincial constitutions in Canada, which form a great disappearing act in Canadian political history. Once regarded as foundational elements of Canadian constitutional law and politics, they have become largely ignored and subsumed by the “mega-constitutional” politics of the federal constitution (Russell 2004).

The diminishment of provincial constitutions in Canada is less a reflection of their secondary significance than the changing narratives of the constitution in Canada, which over time have come to focus almost exclusively on the federal constitution as the singular legal architecture of the state in Canada. A number of political scientists who have reflected on the paucity of attention to provincial constitutions have concluded that it is largely the result of their basis in varied documents and unwritten principles (Cheffins and Tucker 1976; Rowe and Collins 2015). What is often missed, however, is that a reorientation in



constitutional and legal scholarship over the past one hundred and fifty years has produced a constitution that is largely unmoored from the pre-Confederation foundations of its development. This article broadly traces this change in key writings of prominent constitutional scholars – those who wrote systematically about the historical development and legal principles of the constitution in Canada – revealing how the developing historical narrative of constitutionalism in Canada, which came to focus almost exclusively on the post-Confederation period, emphasized written constitutionalism and the federal constitution in particular. Provincial constitutional lineages, once central in Canadian constitutional scholarship, consequently became largely ignored and subsumed into a singular framework anchored in the *Constitution Act, 1867*.

As pre-Confederation constitutional history faded from the focus of constitutional scholars, so too provincial constitutions. This was not a coincidence. The growing concentration on the British North America Act as “the” Canadian constitution placed it as the primary focus of constitutional concern. Anything that came before, notably the development of political autonomy and constitutional government in British North American colonies, largely faded from view. By essentially regarding distinct British North American colonies as provinces in waiting and Canada as a nation founded in 1867, they reframed the constitutional development of those political societies into intimations of Confederation. Provinces are thus less likely to be regarded as constitutional communities in their own right, but rather as subsidiary cohorts of the Canadian constitutional order. This is often understood through the lens of the “act or pact” debate on the meaning of Confederation, but more substantially it is a reflection of the parameters of history in understanding constitutional law (Cook 1969). The diminishing presence of provincial constitutions in the writings examined here is a symptom of the wider diminishing (and almost near disappearance) of the pre-Confederation period from Canadian constitutional analysis.¹¹

The first part of this article lays out the legal foundations of provincial constitutions in Canada and compares them to subnational constitutions in other federal jurisdictions. It highlights the peculiar position of Canada’s provincial constitutions in this wider framework, and questions why Canada’s federal constitutional architecture has developed in a relatively unique way. The following sections turn to examine the writing of constitutional history in Canada, and traces the place of provincial constitutions and pre-Confederation



constitutionalism in key legal works published in Canada. This shows that the narrative of constitutional history bears greatly on our understanding of federalism today, though often in implicit ways. Much has been written about the development of federalism in Canada, especially in the early years of judicial review and post-Charter of Rights reorientations (Cairns 1971). It is not the intention of this paper to reengage these debates, but rather to add to the discussion an often overlooked element. The development of constitutional narratives serves to shape the common sense of what the constitution is and is not, and to understand the relative absence of provincial constitutions therefore requires careful attention to the historical narration of the constitution in Canada.

1. Subnational Constitutions in Federal States

It is not common to hear about provincial constitutions in Canada today. In fact, provincial constitutions are so absent from political discourse and academic scholarship that they seem almost non-existent. As Wiseman (1996: 143) notes, “provincial constitutions barely dwell in the world of the subconscious. They are apparently too opaque, oblique, and inchoate to rouse much interest, let alone passion.” Despite the perennial constitutional battles between levels of government that have become a regular feature of Canadian political culture, it is rare to hear provincial politicians invoke their province’s constitution in political debate. Constitutions are one of the strongest symbols of legitimacy in politics, and yet for Canadian provinces, they are not part of the toolbox of political rhetoric. As Baier suggests (2012: 191), this may be in part because of the “national unity imperative” that has dominated Canadian politics from the mid-twentieth century.

It is not the case that provinces do not have constitutions, but rather, that their constitutions are less readily identifiable than the federal constitution. Of course, as is the case in the British constitutional system inherited in Canada, many of the most important and practical aspects of the constitution are unwritten conventions. Unlike the *Constitution Act, 1867* and *1982*, which might be readily pointed to as Canada’s constitution (the renaming of the *British North America Act* to the *Constitution Act* in 1982 certainly removed room for ambiguity in this regard), most provinces do not have clear constitutional documents. British Columbia, which has had a *Constitution Act* since it entered Confederation in 1871, is the exception here, and as Campbell Sharman has argued, it “provides a good example of the



scope and importance of provincial constitutional documents quite independent of the *BNAC Act* (1983: 88). There have been more recent calls in Quebec to create a written provincial constitution, but most provinces have not expressed interest in enshrining formal written constitutional documents (McHugh 1999/2000; Turp 2013; Richez 2016).

In this regard, Canada is rather unusual compared to other federal states around the world. Most other subnational jurisdictions have some form of a constitution that provides a clear legal and political apparatus (Tarr, Williams, and Marko 2004). American and German states and Swiss cantons, among the world's oldest federal jurisdictions, have formal constitutions. Australian states, perhaps the most analogous jurisdictions to Canadian provinces, each have a written constitution, many of which have been subject to formal amendment. It is clearly established that Australian states entered the Commonwealth of Australia as distinct constitutional jurisdictions maintaining their separate constitutions and constitutional lineages. Section 106 of the Australian constitution recognizes "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission of the State." The explicit recognition of the continuation of state constitutions is vital to understanding Australian federalism, and constitutional scholars there have noted that "the colonies were deliberately called 'States' and not merely 'provinces' to indicate their status as constituent self-governing political communities" (Aroney, Gerangelos, Murray, and Stellios 2015: 608). While state constitutions have not been popularly ratified, they nevertheless form an important element of the constitutional architecture of modern Australia.ⁱⁱⁱ

2. Pre-Confederation Constitutional Development in British North America

Provincial constitutions in Canada are varied and are less visible in part because they are based on a history of gradual development, which is anchored in a period before the province's entry into Confederation, with the exception of Alberta and Saskatchewan, which were jurisdictions created by the Canadian government after Confederation. It is critical to note that the constitutional narratives examined here are settler expressions of legal and political order, which rarely account for indigenous practices and norms of governance. The focus on settler constitutionalism is, as Borrows (2010) argues, only a partial understanding



of constitutionalism in Canada. The development of European constitutional cultures in British North America was divided among different colonies that, despite shifting boundaries, eventually became Canadian provinces. In each of these cases, a myriad of statutes, conventions, royal instructions, and orders in council may be cited as elements of provincial constitutions. Most important among these is the principle of responsible government, which remains the foundation of parliamentary democracy in Canadian provinces but which is not spelled out in any particular constitutional document.

The disappearance of provincial constitutions is directly connected to the diminishing place of pre-Confederation history in modern legal scholarship, a process that began following the turn of the twentieth century. Baker (1985: 287) has illustrated how Upper Canadian legal culture quite literally dissipated in legal studies as a result of the disbursal of law libraries, creating a “discontinuity in the organic development of Canadian legal culture.” As many of the sources that formed the basis of a distinct local legal culture vanished, so too did the historical narrative on which it was largely based. Though later constitutional scholars would seek to uncover the roots of an autochthonous Canadian constitution – one that developed as a consequence of growing autonomy and expressions local political sovereignty – by focussing on the period after Confederation, they in fact helped to deracinate Canadian constitutionalism, pulling it away from the roots that had germinated from the eighteenth century.^{IV} The practical consequence of this, as this essay examines, is that provincial constitutions are not typically part of considerations of Canadian constitutional law and history.

The late eighteenth and early nineteenth centuries saw the remarkable transnational spread of constitutions and constitutional innovation in the Americas and Europe, or what Linda Colley (2014: 263) has called a “contagion of constitutions.” Societies in British North America were certainly not impervious to this.^V It was during this pivotal period that the foundations of modern Canadian constitutionalism developed, with the shaping of local constitutions occupying considerable space in political debate and public sphere deliberation (McNairn 2000). This pattern was echoed in pre-Confederation colonies that adapted cardinal elements of the “British constitution” – notably representative institutions and responsible government – to their North American societies (Buckner 1985). Throughout the late-nineteenth and early-twentieth centuries, commentators pointed to pre-Confederation constitutions as the local foundations of self-government and political



autonomy (Aizenstat 1990). For example, on the centenary of the Constitution Act, 1791, Toronto politician Oliver Aiken Howland (1891) described it as the watershed in the development of self-government in Canada.

Understanding provincial constitutions therefore requires understanding the deeper historical lineages from which they developed.^{VI} In the case of Nova Scotia, the 1749 Instructions to Edward Cornwallis, the colony's first British governor, established a legislative and judicial framework that are considered foundations of the province's constitution (Beck 1957: 143). By contrast, the Constitutional Act, 1791, may be considered a statutory foundation of Ontario's constitution. For provinces that joined after the initial union of 1867, specific statutes may form part of the province's constitution. The Manitoba Act, 1870 or the Alberta and Saskatchewan Acts of 1905 are examples where a statute may be recognized as the constitutional foundation of the province. Beyond these individual constitutional developments, the Constitution Act, 1867 recognizes "provincial constitutions" in Part V, which outlines the provinces' legislative, judicial, and vice-regal composition. The varying and uncodified nature of these constitutions means that, as Wiseman (1996: 156-159) discovered, even provinces themselves seem to struggle with defining precise parameters of their constitution.

The largely uncodified nature of provincial constitutions has meant that they are almost perceived not to exist. Yet, with the exception of changes to the office of the Lieutenant Governor, provinces have wide control over their constitutions. As a result, changes to provincial constitutions are relatively uncomplicated, and tend to elicit less sustained notice as a result. Most notably, the lack of entrenched constitutions has allowed several provinces to abolish their second legislative chambers with relative ease, especially compared to the recurrent frustrations of Senate reform at the federal level.^{VII} There has been little effort in Canada's provinces to entrench statutory provisions as a way of formalizing the constitution, or implementing clearer regulations for amending provincial constitutions. This could mean, for example, requiring a "super majority" of legislators or a public referendum to approve changes to fundamental aspects of the constitution, such as the formation of the legislature or the electoral system. The absence of such an entrenchment, Tarr (2012: 190) argues, "may suggest that provincial constitutions are viewed as different in dignity from the federal constitution. They are more akin to ordinary statutes than to fundamental law." The laws



and conventions that form provincial constitutions are therefore less likely to be described as such, though this has not always been the case.

3. Constitutional Dualism in Early Post-Confederation Scholarship

From the initial legislative debates on the subject of Confederation, there were concerns that a new written federal constitution would overshadow provincial constitutions. Christopher Dunkin commented on the “absence of a feature from the scheme – the non-provision of anything like provincial constitutions,” adding that as a result “there may be no two of our six or more local constitutions framed on the same model” (Canada 1865: 501). Antoine-Aimé Dorion shared Dunkin’s concern about the vagueness of local constitutions, noting that they were essential aspects of the federation plan, and should be “laid at the same time before the House” (Canada 1865: 267). Others like Dorion who opposed the federation scheme believed that the ambiguity of local constitutions would exacerbate the dominance and status of the federal powers. Leonidas Burwell, for example, argued that provinces should have separate written constitutions that could be regulated by judicial review (Canada 1865: 446). Similarly, in Nova Scotia, opponents of Confederation like Thomas Coffin worried that the plan was “one calculated to sweep away our constitution” (Nova Scotia 1865: 292). In deliberating on the plans for a federal union, the desire to maintain and even formalize local constitutions was thus an important element, especially for those who worried about the centralizing effects of Confederation.

When the British North America Act came into effect in 1867, its historical development and future prospects quickly became popular topics for legal scholars and public writers alike, generating sustained public interest in a way that would not be seen again until the major constitutional reforms of the late twentieth century. Even if its contents were rhetorically dull and uninspiring, the British North America Act provided a document that could be pointed to as the basis of Canada’s constitution. Though some were initially reluctant to recognize a “written” constitution for a British society that typically venerated the mythos of an “unwritten” constitution, it was impossible to escape the fact that within a few short years of its enactment, the British North America Act was a central feature of constitutional politics and adjudication.



Compared to the new federal constitution, provincial constitutions seemed much more ambiguous. The concern that Christopher Dunkin expressed about the vagueness of local constitutions and their inherent dissimilarities led to attempts to clarify provincial constitutions so that they could be examined and understood alongside the federal constitution. Shortly after Confederation, Liberal Opposition Leader Alexander Mackenzie rose in the House of Commons in Ottawa to ask that some order be given to **the** muddled morass of provincial constitutions in Canada. His motion asked for all documents pertaining to the pre-Confederation British North American colonies, including imperial despatches, Orders in Council, royal instructions, statutes, and charters, be organized together in a readily accessible volume. Some of these documents, he argued “conferred certain political rights, which will not be found in the particular charter respecting that Province” (Canada 1882: 167). Prime Minister John A. Macdonald, who was certainly no proponent of provincial rights, expressed surprise that such a compendium did not already exist, and agreed that various aspects of provincial constitutions should be gathered up and catalogued together. The House decided to have the Library Committee look into the “important” matter and assemble a more definitive volume of provincial constitutions in Canada.

The motion would not make much of a difference, as it turned out. Six years later, constitutional scholar John George Bourinot (Canada 1888: 232) complained to the same parliamentary committee that “all the organic laws and documents establishing changes in the constitutions of those countries are only found scattered in a large number of volumes to be consulted at much inconvenience by the parliamentarian, publicist and historical student.”^{viii} The particular difficulty here was that the federal and provincial constitutions seemed to follow two different timelines, with the provinces that pre-existed the federal Canadian state claiming a much longer lineage of constitutional history than the new federal state. As a result, a quandary of post-Confederation constitutional scholarship was the question of what happened to the constitutions of the separate British colonies that joined Confederation. Did they continue to form independent constitutions of these provinces, or were they superseded by the Canadian constitution? The practical effect of this question was largely inconsequential; the legislative institutions of these provinces continued to exist after Confederation unaffected by the British North America Act, which in any case guaranteed provinces the ability to amend their local legislative institutions. Nevertheless, the issue of



provincial constitutions had important symbolic value for constitutional writers who sought to trace unique constitutional lineages of provinces beyond the British North America Act.

Two important features distinguished the first generation of post-Confederation constitutional scholarship. First, most of the authors who popularized constitutional scholarship were born and raised in the colonies that formed British North America before Confederation, and they wrote at a time when the meaning of Canada as a nationality and as a constitutionally distinct entity was uncertain and thought to be in a continuing state of transition. The constitutional nationalism that would come to define scholarship in the later twentieth century was largely absent in this period.^{IX} Second, the prevailing legal logic of the time informed constitutional scholarship, especially the emphasis on legal liberalism and the focus on separate and autonomous jurisdictions.^X Federalism thus formed a central place in late-nineteenth century constitutional scholarship, especially the unfolding understanding of autonomous federalism, based on the separate and independent spheres of provincial and federal levels of government. What tends to be lost to the more pronounced political controversies about the nature of federalism in those years is attention to the distinct transformation of constitutional narratives. Based on the compact theory of Confederation, the “provincial rights” movement, as Vipond (1991: 10) points out, germinated chiefly from a concern “to show how a federal constitution could be fit squarely and comfortably into a larger, pre-existing, and deeply rooted cultural system” and to ensure that the federal constitution “reconciled with the constitutive symbols that anchored their self-identity.”^{XI} The provincial rights movement was, from this perspective, less about “decentralizing” the federal constitution than it was about maintaining commitments to the existing constitutional architecture that defined the evolution of political life in the province.

The most prominent works of constitutional scholarship published in Canada in the decades following Confederation unambiguously argued that pre-Confederation constitutions continued to operate in Canada as the bases of provincial constitutions. Bourinot was the most widely recognized authority on constitutional law and history in late-nineteenth century Canada (Banks 2001). In addition to his work as a parliamentary clerk, he published dozens of books, pamphlets, and articles on Canadian constitutionalism and political history. In his *Federal Government in Canada*, based on a series of public lectures he delivered in Toronto, he traced the independent constitutional lineages of the provinces most vividly. Examining the constitutional acts of the province of Canada and the collected



statutes and documents pertaining to the other pre-Confederation provinces, he rejected the idea that the provinces were created anew at Confederation. He wrote (1889: 124-126), “the provinces never intended to renounce their distinct and separate existences as provinces, when they became part of the confederation... The constitutions of the four provinces, which composed the dominion in 1867, are the same in principle and details.” He added that this extended to provinces that subsequently joined Confederation, so that “local or provincial constitutions are now practically on an equality, so far as the executive, legislative and all essential powers of self-government are concerned.”^{xii} As much as Bourinot sought to illustrate the development of a new Canadian constitution in much of his writings, he stressed that it should not be seen to signify the extinction of provincial constitutions. Importantly, he regarded the federal and provincial constitutions as “equal,” and his narrative of constitutionalism in Canada reflected the duality of constitutions at the federal and provincial levels. It was clear to him that understanding the constitution in Canada required examination of provincial constitutions.

Bourinot’s framing of provincial constitutions related directly to his emphasis on the pre-Confederation constitutional history of Canada. In his widely circulated book *How Canada is Governed*, which was aimed at a general readership and went through twelve editions, Bourinot emphasized pre-Confederation constitutional development as the foundation for understanding contemporary constitutionalism. The fundamental political freedoms and constitutional government enjoyed in modern Canada, he wrote, could only be discovered “as we look back of the century that has passed between the Treaty of Paris, which ceded Canada to England in 1763, and the Quebec convention of 1864” (1895: 33). Similarly, a chapter on provincial constitutions in his *Manual of the Constitutional History of Canada* (1888: 90-102) traced the development of legislative institutions in separate colonies in the eighteenth and nineteenth centuries. These were not matters of purely historical interest, but were central to understanding contemporary constitutionalism in Canada, especially the civil rights that were central elements of provincial jurisdiction.

Bourinot was not alone in emphasizing the pre-Confederation development of provincial constitutions. The nature of provinces’ constitutions was also a central concern for William Henry Pope Clement, who published his influential *Law of the Canadian Constitution* in 1892. Clement was a Toronto lawyer who later became a judge in the Yukon and on the Supreme Court of British Columbia. The first chapter of the book traced the history of pre-



Confederation constitutions, dating back to the creation of the Nova Scotia Assembly in 1758, because, he explained, “the slate was not cleaned” by Confederation (25). He expanded this point further in the following chapter, titled “What Became of Pre-Confederation Constitutions?” Its purpose, he averred, was “to ascertain whether, under the B.N.A. Act, the provincial constitutions *continue*; for if so, then the same connection between the legislature and the executive, which existed before confederation, must still continue with respect to subjects of provincial cognizance” (46). It was clear to him that provincial constitutions that antedated the British North America Act were not “wiped out” by that Act and continued to operate in Canada. A strong defender of classical federalism, Clement emphasized the importance of recognizing the separate constitutional lineages and frameworks of provincial and federal governments in Canada.

Other constitutional authorities shared a similar emphasis on constitutional duality in Canada by stressing the separate historical development of provincial constitutions. This is especially evident in the writing of Toronto lawyer Dennis Ambrose O’Sullivan, whose emphasis on the separate and distinct nature of provincial constitutions became more pronounced over time. His popular *Manual of Government* was published in 1879 with the instructive subtitle *The Principles and Institutions of Our Federal and Provincial Constitutions*. In the revised and expanded reissue of the book in 1887 under the main title *Government in Canada*, O’Sullivan extended his chapter on provincial constitutions and stressed the continuity of the pre-Confederation constitutions of former colonies. The constitutions of Nova Scotia and New Brunswick, which were both based originally on royal instructions, were “unaffected by the [British North America] Act and continued as they were before 1867” (128). Ultimately, he claimed, constitutional jurisprudence had given credence to the provincial perspective that they had not voided their own constitutions by joining Confederation and that “the old Constitutional Acts were not repealed” (136). His emphasis was clear in the updated preface, in which he voiced his concerns that the federation was becoming “something different from what the framers of it intended.” The federal government’s veto power was an “accident of the Canadian federation,” according to O’Sullivan (1887 vi), stressing the absolute sovereignty of provinces within their legislative jurisdictions.

The importance of provincial constitutions was perhaps most evident in Quebec, where the development of a constitutional culture that ensured religious, linguistic, and legal



protections had long been germinating. Not surprisingly then, one of the most explicit calls for the recognition of pre-Confederation provincial constitutions in the late nineteenth century came from Thomas-Jean-Jacques Loranger, a Quebec judge who wrote extensively on legal matters. His *Letters Upon the Federal Constitution Known as the British North America Act, 1867* was published in English in 1884 after being originally published in French. Throughout the pamphlet, Loranger **avoided** referring to the British North America Act as the constitution, instead using the term “Federal Union Act.” The provinces, he argued, continued to be governed by their pre-Confederation constitutions, particularly the endowment of parliamentary authority on provincial legislatures.

For Loranger, therefore, the Constitutional Act of 1791 marked the beginning of provincial constitutional existence in Quebec and Ontario because it provided them with parliamentary institutions. This, he added emphatically, was not repealed by the 1867 Act (1884: 14). Pointing to recent court appeals, he concluded that the “principle, that the provinces retained their old powers when they entered confederation and have continued to be governed by their former constitutions, was judicially consecrated” (41). The importance of this matter was clear in his pamphlet, as he feared that the attempt to deny the enduring existence of provincial constitutions threatened the “French race” in Quebec. Inhabitants of the provinces, he wrote, “have a common interest in opposing the excessive centralization of federal power, the lowering of their legislatures, and the gradual disappearance of their constitutions” (vi). For Loranger, the need to stress the fact that provinces maintained unique “constitutions” was an essential element of his forceful defence of provincial rights.

4. Monist Counter-Narratives

The sense of a creeping centralization of constitutionalism that prompted Loranger’s pamphlet was not without foundation. A number of writers in the decades following Confederation put forward an argument that the British North America Act marked a complete break from the past. Loranger’s worry about the “lowering” of provincial legislatures, for example, was illustrated in a book written by Fennings Taylor (1879), the Deputy Clerk of the Senate, which argued that provincial “legislatures” were subordinate bodies to the Parliament of Canada, which as a “parliament,” had inherent rights and privileges not accorded to ordinary legislatures.^{xiii} This was obvious, Taylor believed,



because the British North America Act expressly described a federal parliament, whereas the term was never used to distinguish provincial assemblies. This semantic dispute highlighted a growing tendency following Confederation to regard the British North America Act as a moment of constitutional rupture, especially for many defenders of the federal government's position in unfolding constitutional adjudication.

From this perspective, there was only one level of constitutionalism in Canada after 1867, which effectively extinguished prior constitutional development. Edward Douglas Armour, who served as editor of the *Canadian Law Times* between 1881 and 1900, frequently used his editorial prerogative to reinforce his preference for highly centralized federalism. In an otherwise positive review of Clement's *Law of the Canadian Constitution*, for example, he took exception with the book's focus on provincial constitutions, insisting instead that "the British North America Act is a new departure from an old system of government" (1892: 301). This meant, as he stated elsewhere (1884: 631), that "the pre-confederate Provinces as political societies, are extinct, and their territories constitute the several provincial sub-divisions of the Dominion." Though this position was at clear odds with prevailing constitutional scholarship, it was a powerful way for opponents of the provincial rights movement to narrate an alternate understanding of the "new" Canadian constitution. As James Cockburn (1882: 430), a strong centralist member of Macdonald's caucus, stated bluntly, at Confederation "we surrendered our Provincial systems and existences. We had nothing left; nothing in reserve. All the old chartered constitutions were repealed and swept away as if they had never been." According to his argument, the British North America Act was not merely a federal constitution, but a revolutionary constitutional order that rendered void all aspects of pre-Confederation constitutions. His insistence here that those constitutions were erased "as if they had never been" is a particularly striking admission, and reflects the minimization of pre-Confederation history in the narratives that would come to characterize later constitutional scholarship in Canada.

While provincial constitutions figured centrally in earlier constitutional treatises, the term virtually disappeared in later works. The authors, part of a generation that Paul Romney considers errant centralists (1999: 161-180), contributed to a narrative of constitutional development that repositioned provinces as subconstitutional units. They tended to follow the nationalist teleology of Canadian history that was perhaps most vividly captured in historian Arthur Lower's popular *Colony to Nation* (1964: 332), first published in 1946, in



which he made it clear that Confederation had “wiped out [the] old provinces of Canada, New Brunswick, and Nova Scotia and created in their place four new provinces, Ontario, Quebec, New Brunswick, and Nova Scotia.” As a result of this perspective of history, provincial constitutions, insofar as they were mentioned, were largely limited to the legislative configuration outlined in the British North America Act. In distinct contrast to earlier constitutional scholarship, these writers did not devote much space to pre-Confederation history. The implication was that Confederation marked not only the genesis of a new political jurisdiction, but also of an entirely new and different constitutional order. The constitutional narrative that emerged in the mid-twentieth century was one that placed strong emphasis on the British North America Act as a constitutional watershed and largely displaced pre-Confederation constitutionalism from the picture. Scholars consciously moved away from the focus on British legal contexts that had become popular at the outset of the century.^{xiv} It is hardly coincidental then that many of the constitutional centralists of the twentieth century – proponents of what Adams (2006) calls the “newer constitutional law” – were also strong Canadian nationalists who were especially preoccupied with the growth of Canadian political autonomy.

The increasing professionalization of the social sciences at the turn of the twentieth century meant that legal and historical studies tended to be more rigidly divided, with pre-Confederation constitutional matters, especially the development of responsible government, becoming a common focus of historians in the early part of the century.^{xv} For example, Chester Martin’s popular *Empire & Commonwealth*, published in 1929, focussed extensively on history before 1867; Confederation does not appear until the book’s last chapter. As an historian, Martin evidently worried about the development of contemporary legal constitutional scholarship, and particularly the “tendency to regard the *British North America Act* of 1867 as the ‘constitution of Canada’” (327). He emphasized instead that the development of constitutional self-government in Canada “is to be sought not in the written statute but in those unwritten ‘conventions’ which came to govern the relations between Crown, councils, and Assemblies in the old ‘royal’ provinces. In that sense the most fundamental part of our constitution – both provincial and federal – is not, and never has been, ‘written’” (328).

For legal scholars, however, the focus on written constitutionalism became the central focus, especially as it related to judicial review. The growing preoccupation with written



constitutionalism is perhaps clearest in the writings of William Paul McClure Kennedy, one of the most influential constitutional scholars of the twentieth century. His most famous work, *The Constitution of Canada*, was first published in 1922 and has been reissued as recently as 2014. Impressive in size and scope, it would be the last major work on Canadian constitutional law to dedicate extensive space to pre-Confederation constitutional development.^{xvi} The bulk of the book examines constitutional development in British North America before Confederation, and again, it is only in the final chapters that Confederation is considered in detail. Despite the fact that it remains Kennedy's most well-known work, it was after its initial publication that he started to voice a more robust sense of centralized constitutionalism. In particular, he pointedly criticized the Privy Council's regard for the British North America Act as an ordinary British statute rather than fundamental constitutional law. Writing in the *Canadian Bar Review* (1937: 400), Kennedy claimed that "In the far-off days of 1864-67, the men who made the Dominion of Canada had express vision that its peoples would forget that they were Lower Canadians, Upper Canadians, New Brunswickers or Nova Scotians and would become Canadians in a new nation." The failure of that vision in the intervening years of constitutional jurisprudence meant that the British North America Act needed to be repealed and reconstructed. It was an astonishing admission from Canada's leading constitutional scholar, but marked a wider change in constitutional thought that increasingly displaced the constitution in Canada from its historical development. Small wonder then that Kennedy (1931: 554) complained about the "dull" nature of older constitutional writing, saturated deep with historical detail, which seemed to him to be impervious to "actual modern issues."

The source of Kennedy's barely-concealed anger was the belief that the Privy Council deviated Canadian constitutionalism from the centralized course intended by its framers, a sense that would define much of the constitutional scholarship of the mid-twentieth century. The pertinent point here is less about the conflicting views of federalism that this divide reflected than the fact that the focus on the Privy Council became so pervasive that it effectively erased provincial constitutions from constitutional discussion. Defining the scope of provincial constitutions and detailing their development before Confederation would seem at odds with the mission of recasting Canadian federalism as a strongly centralized system. In his numerous articles on the perceived errors of the Privy Council, for example, Dalhousie Dean of Law Vincent MacDonald (1948: 23) argued that, contrary to the court's



interpretation, the Canadian constitution embodied a “special kind of centralized or quasi-federalism.”

The decline in consideration of provincial constitutions is particularly overt in Robert Dawson’s 1933 collection titled *Constitutional Issues in Canada, 1900-1931*. The first excerpt included is Charles Stuart’s 1925 speech to the Saskatchewan Bar Association (Dawson 1933: 6), in which he commented on the relative lack of mention of provincial constitutions, especially when compared to state constitutions in the United States. The reason for this, he averred, was that while states had written constitutions, Canadian provincial constitutions were of the “utmost variety in their origin.” His fundamental point, however, was that provincial constitutions “are entirely outside the British North America Act” (7) found instead in the separate and largely unwritten development of political institutions of separate colonies. Interestingly, however, the next document in Dawson’s collection was a 1925 speech by federal Minister of Justice Ernest Lapointe (1933: 15), who claimed that provinces “have no Constitution other than the British North America Act; all their powers they derive from that Act.” The apparent contradiction in these two sources from the same year is a telling reflection of the changing attitude toward the relationship between provincial constitutions and the federal constitution.

It was an assumption that became pervasive in constitutional scholarship in the mid-twentieth century. Adams (2006: 438) notes that “the scholars of the newer constitutional law fundamentally altered the landscape of Canadian constitutional thought by abandoning the formalist traditions of early twentieth-century scholarship.” This alteration is perhaps most pronounced in the ideas of Frank R. Scott, whose many writings on the constitution were unambiguous in their effort to bolster a strongly centralized federal structure. In his various essays on the Canadian constitution, Scott rarely mentioned provincial constitutions and devoted little space to pre-Confederation history. He wrote bluntly (1950: 203) that “the phrase ‘Constitution of Canada’ includes the provincial constitutions.” It is very clear that for Scott, the British North America Act was a radical point of departure from the past and effected a total reconstitution of political order in British North America. He stated, for example (1977a: 252), that the purpose of Confederation was “to take away from local governments many of their existing powers,” meaning that “the post-Confederation provinces therefore started with their previous autonomy much reduced.” Not only did Scott exclude provincial constitutions from his writing, but he also claimed (1977b: 246) that all



laws and political rights exercised by provinces were derived from the British North America Act, and not pre-Confederation constitutions.

A dedication to written constitutionalism emerges in many twentieth century sources. Most works on Canadian constitutional law and politics from the mid-century onward featured a chronology of constitutional development that began in 1867 and were largely understood according to the written provisions of the British North America Act. The narrative laid out in Peter Russell's *Constitutional Odyssey*, one of the most important works on constitutional history written since the mid-twentieth century, starts with the deliberations on the British North America Act. Most constitutional scholars in the second half of the century echoed Quebec lawyer Paul Gérin-Lajoie's definition (1950: 4) of capital-C "constitution" as "the document or set of documents containing the 'fundamental law.'" From this definition, he could conclude that "the provinces of Canada have no rigid constitution" (41). The implication was that the political structures of provinces were to be understood through the written words of the Canadian constitution. "The starting point for the study of provincial constitutions is the British North America Act," Cheffins and Tucker claimed (1976: 257). As the written constitution of 1867 became the primary focal point for describing constitutionalism in Canada, much of the history that preceded Confederation vanished from sight.

5. Implications of Monist Narratives

The term provincial constitution may seem rather peculiar today because of its general diminishment in constitutional scholarship over the twentieth century. It is not that the protection and assertion of provincial rights declined over the twentieth century (indeed, it can be said that it amplified during that time), but that claims of provincial rights became restricted almost entirely to debate over the federal constitution. This was certainly cemented by the mega-constitutional controversies and political clashes, as well as the preponderant attention to rights adjudication following the "Charter revolution" in the 1980s. The consequence of this shift has in large part been that pre-Confederation constitutional history has been either largely ignored or problematically recast as the anticipatory antecedents of the modern federal constitution. The problem of the Confederation chasm, which rather arbitrarily divides much in Canada's history, is thus particularly acute in constitutional studies.



Beyond the implications for constitutional history, however, a few further points highlight how the diminishment of provincial constitutions and the longer narrative of constitutional development in which they are anchored has influenced public policy and constitutionalism today.

A key risk in not acknowledging or understanding provincial constitutions is that gradual changes to them may go unnoticed or under-examined. Over the past few decades, a number of provinces have codified greater centralization of executive authority, though such changes are rarely deemed to be “constitutional” in nature.^{xvii} This was a problem that began to develop soon after Confederation.^{xviii} In the late nineteenth century, Ontario legislator William Macdougall (1875: 20), concerned by what he considered the virtually unrestrained power of the provincial government to amend its constitution, suggested that the province’s constitution be subject to formal ratification to be altered or amended. Ironically, his criticism was aimed at Oliver Mowat – a primary actor in the early constitutional battles over the British North America Act – for what he considered to be his disrespect of the province’s constitution.

Canadian provinces have exercised their ability to amend their (unwritten) constitutions – obvious most recently in a number of attempts to reform the electoral system in British Columbia, Prince Edward Island, and Ontario. In all three cases, the proposed changes were seldom qualified as constitutional reform, and given the grumbling that the very idea of constitutional change tends to elicit in Canada, that may have been advantageous to provincial politicians. Even though the proposed reforms would have been constitutional changes, they were not recognized as such. Proposals to introduce electoral reform at the federal level, on the other hand, have prompted some legal observers to point out that it is a constitutional issue, perhaps even requiring formal constitutional amendment (Macfarlane 2016).

Despite the long history of unwritten constitutional principles in Canadian provinces, some have argued for the formalization or entrenchment of provincial constitutions, particularly in Alberta and Quebec.^{xix} The matter of enshrining the provincial constitution has been most prevalent in Quebec, owing to the unique constitutional politics of the province. The vital importance of language and culture in Quebec has been reflected in concerns for their constitutional protection. Quebec’s language law, for example, as a provincial statute does not have formal recognition or protection as a “fundamental law,”



which is a key reason that advocates argue for an enshrined provincial constitution. It is particularly interesting to note that most references to a new Quebec constitution tend to be characterized by the assumption that Quebec does not currently have a constitution; there are few references, for example, to the nineteenth century development of responsible government or the expansion of representative institutions. Thomas-Jean-Jacques Loranger's nineteenth-century plea to guard against the "gradual disappearance" of separate provincial constitutions seems entirely unrequited in this modern constitutional debate. Instead, discussions of developing a provincial constitution tend to proceed from the premise that a constitution must be written in order to exist, and that the "unwritten" historical development of political rights have little bearing on modern constitutionalism.

6. Conclusion

For the first generations of post-Confederation constitutional scholars, the subject of the constitution in Canada typically included consideration of two levels of constitutions – provincial and federal. This was based on a narrative of constitutionalism that located constitutional origins of different provinces in their pre-Confederation development. Alongside this narrative, however, gradually emerged a tendency to understand the British North America Act as a radical departure in Canadian constitutional history. The narrative that followed from this perspective was one that favoured a more centralized federal government and traced a timeline of development that usually began in 1867. As a result, the separate constitutions of provinces tended to be subsumed into the larger story of Canada's federal constitution.

The shift in constitutional narrative mirrored the more recognized constitutional debate about the nature of federalism in Canada and its interpretation (or transformation, as the argument may be) by the Privy Council. The irony here is that the preoccupation of the provincial rights advocates on the adjudication of the British North America Act contributed to a constitutional culture focussed almost exclusively on that legislation. By focussing on the meetings of British law lords in central London, the defence of provincial rights became refracted almost exclusively through the adjudication of the act – of "the constitution" – and less through the claims to inherited constitutional identities. The later push back against the provincial rights advocates only further bolstered the monist narrative of the constitution in



Canada. The practical consequence of the tendency to minimize pre-Confederation Canadian history is that it homogenizes distinct constitutional origins and cultures as aspects of Canadian constitutional history rather than the contours of discrete constitutional communities.

The study of provincial constitutions in Canada has thus become a study of the effects of historical narrative in constitutional scholarship. The relative absence of provincial constitutions in Canada is the product of a largely deracinated constitutional history that tends to position the establishment of a new constitutional order in 1867 as a *de novo* foundation. It is also a significant reflection of the growth of the culture of written constitutionalism in Canada. Aside from the “unwritten” conventions that continue to govern parliamentary affairs and the crises that they have engendered, there is little attention given to the development of constitutional institutions in Canada and its provinces.^{xx} In the post-Charter era of Canadian constitutionalism, political rights and individual freedoms are predominantly understood as protections guaranteed by written law.

The sesquicentennial of Confederation in 2017 is often described as the anniversary of the Canadian constitution. That anniversary, however, is only one milestone in a much longer and varied narrative of constitutional development in Canada’s past, which continues to bear resonance today. Pre-Confederation constitutional history did not cease to be relevant in 1867, though its imprint on Canadian constitutionalism today may be hard to see, as both public and scholarly attention focusses on more recent constitutional developments. Amidst the attention to the one hundred and fiftieth anniversary of Confederation, then, it is worth looking again at the Upper Canada centennial celebrations in Niagara-on-the-Lake in 1892 to see what all the fuss was about.

* Peter Price is a Social Sciences and Humanities Research Council of Canada Postdoctoral Fellow in the Department of Politics and International Studies at the University of Cambridge. This essay extends on his presentation at the Symposium on the Constitution of Canada held at Scuola Sant’Anna in Pisa, Italy.

ⁱ Despite the headline of the article, the anniversary marked the establishment of representative government. The proceedings of the centennial event were published in 1893 as *The Centennial of the Province of Upper Canada, 1792-1892*.

ⁱⁱ An important exception is the tracing of the constitutional history of Quebec since the sixteenth century in Jacques-Yvan Morin and José Woehrling 1994. For a recent anthology of constitutional history before 1867 in Quebec and Ontario, see Laforest, Brouillet, Gagnon, and Tanguay 2015.

ⁱⁱⁱ Though as Nicholas Aroney (2012: 222) argues, popular ratification of state constitutions could bring about dramatic changes in Australian constitutional practice and the “logic upon which the constitution operates.”

^{iv} Russell (2004: 125) notably considers the quest for constitutional autochthony in Canada as the objective of developing and ratifying a written constitution in Canada.

^v Enlightenment ideals of liberty and constitutional government circulated widely in early Canadian politics, as



Ducharme (2010) persuasively illustrates.

^{vi} For a brief overview of the pre-Confederation development of provincial constitutions, see Read (1948).

^{vii} Upper legislative chambers were abolished in Manitoba in 1876, New Brunswick in 1891, Prince Edward Island in 1893, Nova Scotia in 1928, and Quebec in 1968. As with the absence of written constitutions, Canadian provinces are relatively unique among subnational jurisdictions in having unicameral legislatures.

^{viii} Bourinot (1888) published his petition, along with a list of relevant constitutional documents, as a pamphlet for wider public circulation, notably titled *Federal and Provincial Constitutions*.

^{ix} On the rise of constitutional nationalism, which was closely tied to constitutional centrism, see Adams (2015).

^x See Risk (2006). As Vipond (1991) has indicated, legal liberalism was a central tenant in the provincial rights movement in Ontario.

^{xi} For a similar argument, see Hodgins (1972: 56).

^{xii} This point is also raised in Bourinot's famous *Parliamentary Procedure and Practice* (1884: 64-72).

^{xiii} For a critical rejoinder to Taylor, see Watson (1880).

^{xiv} Baker (1985: 278) calls this the development of "legal neo-colonialism." The writings of A.H.F. Lefroy and Alpheus Todd, both committed to the imperial unity, are primary examples of this tendency.

^{xv} On the professionalization of history in Canada, see Wright (2009).

^{xvi} An exception here is Lederman (1981), who emphasizes the pre-Confederation development of responsible government in his collection of essays.

^{xvii} See for example O'Flaherty (2008).

^{xviii} See for example Banks (1986).

^{xix} For a brief commentary on the idea of a written constitution for Alberta, see Morton (2004).

^{xx} Most notable in recent times was the 2008 prorogation controversy; see Russell and Sossin (2009).

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ISSN: 2036-5438

Immigration and Federalism in Canada: beyond Quebec Exceptionalism?

by

Davide Strazzari*

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.¹ 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’,¹¹ 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 legislatures, 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 Quebecer 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 through 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 Columbia 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.



* Researcher in Comparative Constitutional Law, Trento University, Sociology and Social Sciences Department.

^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 through 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 *Kabermal 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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ISSN: 2036-5438

*The Canadian *Living Tree Doctrine**
as a Comparative Model of Evolutionary Constitutional
Interpretation

by

Leonardo Pierdominici*

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





Abstract

This paper starts with a general contextualisation of how Canadian constitutional law acquired an important role in global constitutional conversations in recent decades. It then considers, in particular, the well-known Canadian *Living tree doctrine* as a model of evolutionary constitutional interpretation, and argues that it is a relevant case study for our purposes since it is able to precisely link the ‘history, evolution, influence and reform’ of constitutional law in a comprehensive doctrine. The doctrine's comparative influence will be analysed in particular: the *Living tree* is especially relevant, since its comparative influence is traceable both in the work of courts that are historical participants in *transnational judicial conversations*, and courts that are new players in the game.

Keywords

Canada, constitutional law, constitutional interpretation, comparative influence



1. Introduction

The symposium, and this special issue, are appropriately devoted to the history and evolution of Canadian constitutional law, and aim at exploring its comparative influence as a complementary dimension. These sought to examine the ‘history, evolution, influence and reform’ of the Canadian constitutional experience. I am sympathetic with this organic approach: after all, in an age of the renaissance of comparative constitutional law (Hirschl 2014), one could even argue that the comparative influence of a national constitutional law is actually part of its history and evolution, and can even have consequences at the internal level.

In this light, my reflections will start from a general contextualisation on how Canadian constitutional law acquired, over recent decades, an important role in global constitutional conversations. I will then consider in particular the well-known Canadian *Living tree doctrine* as a model of evolutionary constitutional interpretation (Waluchow 2007), and will argue that it is a relevant case study for our purposes since it is able to precisely link the ‘history, evolution, influence and reform’ of constitutional law in a comprehensive doctrine. I will then look in particular at the comparative influence of such a doctrine, especially relevant, I argue, since such an influence is traceable both in the work of courts that are historical participants of *transnational judicial conversations* (Slaughter 1994; McCrudden 2000) and courts that are new players in the game.

2. Contextualisation

Canadian constitutional law is widely discussed today: the organization of our symposium is an example of how Canadian constitutional law is studied and discussed beyond national boundaries. But a proper contextualization of our discussion is not simply that of an abstract comparative analysis. There is something more: in the current age of the global evolution of constitutionalism (Law and Versteeg 2011), when the migration of constitutional forms and ideas is at a historical peak (Choudhry 2006), Canada has become more and more a source of inspiration and a model in comparative terms.

This is true in general sense for Canadian constitutional sources.



In this respect, anecdotally but quite significantly, we are reminded of a recent famous interview with Justice Ruth Baden Ginsburg on the Egyptian television ‘Al-Hayat’ on January 30th 2012.¹ In the middle of constitutional turmoil in Egypt, Justice Ginsburg delivered some basic suggestions on how to draft a new constitutional text, and on where to look for inspiration for such an endeavour. In this sense, she stated quite openly that she could not ‘speak about what the Egyptian experience should be’, since her experience was that of a judge ‘operating under a rather old constitution [and] would not look to the US constitution [for] drafting a constitution in the year 2012’. Importantly, she referred in this respect to the examples of more recent and supposedly progressive constitutional documents, mentioning the examples of the South African constitution of 1996, of the European Convention on Human Rights, and of the Canadian Charter of Rights and Freedoms of 1982. This attracted several criticisms by US scholars, since it was considered as an exercise of rebuttal of ‘the U.S. Constitution’s relevance today’ (Volokh 2012), made by an authoritative interpreter of it: and in a certain sense, it is precisely an example of how, today, the comparative influence of a national constitutional law is actually part of its history and evolution, also discussed at the internal level.

But the anecdote is an example of something that has been studied by scholars in a more comprehensive way; recent and very popular quantitative studies were devoted precisely to the effort of proving the ‘declining influence of the United States constitution’ (Law and Versteeg 2012). For the sake of our reflections, it is not relevant to discuss whether they succeeded or not: what is actually relevant, I think, is that in these articles the authors highlighted the influence, as comparative models, of other competitive ‘transnational constitutional paradigms’, and explicitly designated Canada as the first new ‘constitutional superpower’ (Law and Versteeg 2012: 809 et seq.). In this sense, again, the Canadian Charter of Rights and Freedoms, which was adopted in conjunction with the patriation of the Canadian Constitution in 1982, has been described as the leading influence on the drafting of the South African Bill of Rights, the Israeli Basic Laws, the New Zealand Bill of Rights, and the Hong Kong Bill of Rights, amongst others (Law and Versteeg 2012: 810; Choudhry 1999: 820-821). All in all, new codifications of human rights in the global arena proved to become more and more similar to the Canadian examples of the 1960 Bill of Rights (technically a statute, but constitutional in character) and of the 1982 Charter, and less and less modelled after the US classic paradigm (Law and Versteeg 2012: 810-811).



But, again, this is only part of the story. What I described could be labelled as a sort of ‘material’ influence of Canadian constitutionalism: it experienced a relatively recent codification, and this new material structure became influential for other subsequent codifications, and more than other older material. Indeed, the transplant of old paradigms forged by natural evolution in a liberal context, such as for instance the American presidential system, proved very dysfunctional in several settings (e.g. South America, Asia: see Sartori 2004: chapt. 5).

There is also another, less obvious, dimension of influence of Canadian constitutionalism that could be termed ‘doctrinal’.

Let us consider again the words of famous scholars and Supreme Court judges.

Aharon Barak, the famous former president of the Israeli Supreme Court, wrote in 2002 a celebrated Foreword to the Harvard Law Review, titled ‘A Judge on Judging: the Role of a Supreme Court in a Democracy’ (Barak 2002). The reflections of the Author were, in that context, once again phrased in terms of the migration and influence of constitutional ideas. But here, the renowned scholar and judge did not focus in general on the structural forms of national constitutional texts to be replicated/transplanted elsewhere. In the Foreword, the focus was explicitly on judicial interpretative activity: Barak somehow replicated the critical remarks discussed above, on declining and rising comparative constitutional influences, but he did so by specifically discussing the importance of judicial interpretation provided by national apical courts, and its relevance in *transnational judicial conversations*. He was so explicit in this respect that he distinguished the two levels of discussion, and acknowledged that ‘we foreign jurists all look to developments in the United States as a source of inspiration’, but ‘out of deep appreciation for the impressive accomplishments of United States constitutional law and of its Supreme Court in particular’ in historical terms, critical remarks could be based on the fact that ‘the American Supreme Court (...) is losing the central role it once had among courts in modern democracies’ (Barak 2002: 27). In this context, the Canadian Supreme Court was praised by Barak in several senses: as ‘a source of inspiration for many countries around the world’; for ‘its frequent and fruitful use of comparative law’ (Barak 2002: 114); and as the first cited example of a court from one on the ‘enlightened democratic legal systems’ which extricate themselves from the heavy hands of intentionalism and originalism in interpreting the constitution and adopt a ‘purposive interpretation of the



constitution' (Barak 2002: 72-73). In this context, the words of several judges of the Canadian Supreme Court were cited *in extenso* (Barak 2002: 39, 42, 44, 51, 68, 114).

In the same vein, Anne Marie Slaughter, one of the first and more renowned scholars to describe and discuss *transjudicial communications* through which judges are 'building a global community of law', singled out the South African Constitutional Court and the 'Canadian Constitutional Court' (sic) as 'disproportionately influential' and 'highly influential, apparently more so than the U.S. Supreme Court and other older and more established constitutional courts' (Slaughter 2004: 74). Other scholars working on transnational judicial dialogue identified, accordingly, the Canadian Supreme Court as 'one of the most influential domestic courts worldwide on human rights issues' (Waters 2005: 558). Newspapers commentators spread this debate among a non-specialist public noting again that 'many legal scholars singled out the Canadian Supreme Court and the Constitutional Court of South Africa as increasingly influential' (Liptak 2008).

So in a certain sense one could take for granted the comparative relevance not only of Canadian constitutionalism in general, but also of the Canadian Supreme Court as its authoritative interpreter in particular. As said, its influence is recognized and traced by scholars and even in non-specialist publications. And here as well, quantitative studies confirm such an impression, and show that at least in certain relevant jurisdictions Canadian decisions are cited abundantly. For instance, in a study of 2007, Allan, Huscroft and Lynch demonstrated that in another common law jurisdiction, New Zealand, judges cite Canadian precedents far more often than those of any other nation from 1990 to 2006 (the United States comes next but with just over half as many citations) (Allan, Huscroft, Lynch 2007). A recent study by Navot shows that in the case of the Israeli Supreme Court an average of more than one fourth of the constitutional cases decided between 1994 and 2010 included foreign citations, and 64% of all foreign law citations in constitutional cases (both institutional and human rights related) were from American cases, 13% from Canadian, 9% from English and 5% from German cases (Navot 2013: 141 et seq.).

Such a success of the Canadian Supreme Court in comparative influence comes for many interrelated reasons.

It is of course a by-product of the success in structural influence of Canadian constitutional sources. As many foreign legal texts are modeled on Canadian ones, it is natural for their interpreters to look at what the authoritative interpreter of the original model



has done in the past. This is true in particular for the aforementioned case of Israel: as well known, the local Basic Laws on human rights enacted in 1992 are drafted according to the Canadian example, and contain similar notwithstanding clauses, so that the Israeli Supreme Court in adjudicating on those has made reference to the Canadian Supreme Court's jurisprudence on the same matter.¹¹

The success of the Canadian Supreme Court comes also from the specific nature of an apical court of a common law jurisdiction in which a prototypical bill of rights was enacted. This proved decisive, for instance, in the aforementioned case of New Zealand, which is a perfectly comparable environment: the same study of 2007 by Allan, Huscroft and Lynch traces back the influence of Canada since its 'judges are, by most accounts, the most judicially activist in the common law world – the most willing to second-guess the decisions of the elected legislatures' (Allan, Huscroft, Lynch 2007: 5).

Moreover, Canada is a young state with a stratified tradition of sources and, given the presence of Quebec, includes a mixed private legal system (Walton 1899: 282; Palmer 2007): in this respect, a former Canadian Supreme Court Justice, Gérard V. La Forest, for example, wrote that Canadians use foreign legal materials because they are naturally and 'genuinely interested in the comparative approach, in learning how other traditions have dealt with the problems with which we are wrestling', in a sort of exercise of inherent legal cosmopolitanism that is also a valuable source of both 'effectiveness and sophistication' (La Forest 1994: 217-218).

In fact, in this vein, it is well known that the Canadian Supreme Court championed the use of comparative law and international law in performing its interpretative tasks. Important studies noted that this was the case in the extensive use of comparative law in constitutional or human rights cases (La Forest 1994; Lefler 2001), but also in statutory interpretation (Neudorf 2017), and in the blossoming use of international law in defining the guarantees found in the Canadian Charter of Rights and Freedoms (Warner La Forest 2004; Arbour, Lafontaine 2007; Oliphant 2014). Much could be said on this: but suffice is to say that the Canadian Supreme Court is clearly a well-recognised participant in *transnational judicial conversations* as both a borrower and a recipient of comparative influence.

After all, since *transnational judicial conversations* comprise not only formal citations among judicial bodies, but also cross-fertilization in general (Teitel 2004), it must be noted that a remarkably large number of Supreme Court members also engaged in personal terms in such



an endeavour. Important works published – during their mandate – by Justices Claire L’Heureux-Dube (L’Heureux-Dube 1998), Gérard V. La Forest (La Forest 1994), Michel Bastarache (Bastarache 1998), Beverley McLachlin (McLachlin 1998), among the others, expressly preached the comparative role of the Canadian Court and its openness towards the global legal arena.

3. The *Living Tree doctrine* as a distinctive model of evolutionary interpretation

So, we have a background of general openness of Canadian constitutionalism - in material/structural terms - and the Canadian Supreme Court in particular - in doctrinal terms - towards global legal conversation. Several interrelated dynamics concurred in shaping such an influential position.

Here, I would like to focus my attention on one of the specific judicial doctrines which proved successful in determining the influence of the Canadian Supreme Court and of its much discussed interpretative work in the comparative ‘market of ideas’ (Goldman 1999).

Funnily enough, I am talking of a very famous interpretative doctrine that was not forged, originally, by the Supreme Court and in relation to current Canadian constitutional sources. The *Living Tree doctrine* was first conceived of in a 1929 decision, *Edwards vs Canada* otherwise known as the ‘Persons Case’,^{III} issued by the Canada’s highest court at the time, the Judicial Committee of the Privy Council (JCPC) in Britain. After analyzing the Constitution’s use of the term ‘persons’, which had always referred to men, the JCPC decided that both men and women were now ‘persons’, and therefore could be equally called to sit in the Canadian senate. According to the historically celebrated words of Justice Sankey, while constitutional stability and integrity are of crucial importance, the Constitution ‘also planted in Canada a living tree capable of growth and expansion within its natural limits’. Women may not have been able to vote or hold office in 1867, but times had changed and so had to change constitutional interpretation: the decision led women to gain a measure of equality to men in the political arena.

Such a *Living Tree doctrine* has since been endorsed multiple times by the Supreme Court of Canada when analyzing constitutional rights;^{IV} it has become the Court's preferred method of constitutional interpretation when dealing with division of powers provisions.^V Moreover,



it was associated not only with a progressive but also a purposive/teleological construction of the Charter of Rights and Freedoms provisions (Tremblay 1995; Karazivan 2017: 631).

The Supreme Court adopted the doctrine, and therefore a method of constitutional interpretation that openly aims at allowing the Canada's constitution to change and evolve over time ('a living tree capable of growth and expansion (...)'), while still acknowledging its original intentions ('(...) within its natural limits') (Hogg 2007: 36.8(a)). In doing so the doctrine shapes a balance between two seemingly contradictory, but ultimately complementary, goals: predictability and flexibility. It was already clear in the words of Justice Sankey in *Edwards*: to be effective, the constitution must consist of a set of predictable rules, in order to let citizens know how their activities are treated, and the federal government and the provinces can be overseen in a consistent matter. Still, on the other hand, the necessity of a flexible interpretation is acknowledged (and it was acknowledged already in 1929!), to accommodate the realities and the challenges of changing modern life. The Supreme Court explicitly stated that this is, ultimately, to preserve the vitality of the constitution: unless interpreted in this way, it would be frozen in time and become more obsolete than useful (Hogg 2007: 36.8(a)).^{VI}

The approach consists of identifying the purposes or goals of the constitutional provisions in order to provide them with meaning: by constructing them according to those purposes or goals. Such a technique of interpretation is also adopted when there is no clear guidance as to the nature or the meaning of the protected interest at stake (Tremblay 1995: 473), which is in any case researched by the Supreme Court, not necessarily in an historical light, but also in a 'contemporaneous' one (Tremblay 2006: 86; Karazivan 2017: 631).

To give some well-known examples, such an approach led the Court in 2004 to include same-sex marriage in the capacity to enter into marriage provided by Section 91(26) of the Constitution Act 1867, even though such a provision probably did not include it in terms on unspecified intentions at the time in which it was enacted, since it deemed impossible to infer, in looking at the constitutional goals implied, 'natural limits' to the definition of marriage.^{VII} Seemingly, it led the Court in 2005 to include maternity leave in the competence transferred to the federal parliament in 1940 on 'unemployment insurance', even though such a provision probably did not include it in terms on unspecified intentions at the time in which it was enacted. In looking at the constitutional goals implied, the Court highlighted that Parliament considered unemployment to be an historical urgent national problem,



and ‘over the years, numerous amendments were made to the original Act, generally to expand qualifying conditions, increase benefits and eliminate inequities’, and therefore, given the social transformation occurred, this has to include maternity leave nowadays.^{VIII} Again, such an approach led the Court in 2007, when dealing with the historical division-of-powers provisions of Sections 91 and 92 of the Constitution Act 1867 vis-à-vis the competence to rule on licensing scheme governing the promotion of modern insurance products, to state that the meaning those provisions had in 1867 does not reflect judicial practice. Here, ‘the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society’ (and, in looking at the constitutional goals implied, the promotion of authorized insurance ‘is not part of the core of banking because it is not essential to the function of banking’).^{IX}

It must also be noted that, here again, the *Living tree* as an interpretative doctrine was formally endorsed not only by the Supreme Court, but also by its Justices in a personal academic capacity (L’Heureux-Dube 1998; Binnie 2004), and by major Canadian scholars (Hogg 2007: 15; Tremblay 2006; Cyr 2014); it became an orthodoxy.^X

For our purposes, in any case, it is important to evaluate the *Living tree doctrine* in a comparative perspective. And in this sense, I argue, the doctrine has something specific and distinctive that fed its success in a comparative perspective, as a model of constitutional interpretation with an important comparative influence.

As has been already said (Jackson 2006), the *Living tree doctrine* could be considered as just one of the many metaphors used in different legal settings to describe the classic claim that, in a judicial pragmatic perspective, a constitution has a dynamic meaning, or that it has the properties of animate being or other object capable of change.^{XI} The idea, as well-known, is associated with views that contemporaneous society should be taken into account when interpreting key constitutional phrases.

In this respect, the best known example of a similar metaphor can be found in the United States, where doctrines of constitutional interpretation have been intensely discussed for decades and decades. Interestingly, the American idea of a ‘Living constitution’ also derives from the 1920’s, probably from the title of a 1927 book by Professor Howard Lee McBain (McBain 1927). Efforts at developing such a concept have been credited to both judicial and political figures such as Oliver Wendell Holmes Jr., Louis D. Brandeis, and Woodrow Wilson. The latter famously argued, in his 1908 book *Constitutional Government in the United*



States, that ‘living political constitutions must be Darwinian in structure and in practice’ (Wilson 1908). Such a trend gained more and more success also a tool of constitutional interpretation (Kammen 1987: 325), starting from the assumption that the old American constitution was deliberately written to be broad and flexible to accommodate social or technological change over time. A famous historical explicit application of such a framework is evident, for instance, in the Supreme Court’s reference to ‘evolving standards of decency’ under the Eighth Amendment; in 1958 in the famous case *Trop v. Dulles*^{XII} the Court stated that ‘[T]he words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society’. As also well-known, such an interpretative framework is opposed to other conservative ones, again phrased in metaphorical terms, such as the various forms of originalist interpretations, which aim to stick to the original meaning of the constitutional text or to the historical intent of the legislator (Strauss 2010).

Similar approaches can be seen in continental Europe as well. For instance, scholars look at the decisions of the Federal Constitutional Court of Germany as examples of eclecticism, in which judges ‘employ a set of arguments and analytical techniques that go beyond the text and typically involve resort to prior decisions (even in systems not formally built on judicial precedent), as well as constitutional purpose, and, on occasion, the likely consequences of alternative interpretations or the experience of other democracies’. They also recognize in any case that the principal approach adopted by the Federal Constitutional Court is a ‘value-oriented’ one, ‘involving an “objective ordering of values”’ and often beginning ‘with a statement of the fundamental constitutional principle at stake’, so that such a principled interpretation cannot but depart from the plain text, and thus make the constitution a living instrument (Jackson 2006: 929). Such an approach is even more explicitly theorized in Italian constitutional law and adjudication, where a similar interpretation is adopted; both scholars and the Constitutional Court talk of Article 2 of the Italian Constitution as a ‘page left open’ by the Framers in the specification of constitutional basic principles and values, to be filled by interpretative means in a broad and flexible way to accommodate social and technological change over time (Mortati 1969: 949 et seq.; Barbera 1975: 50-53).^{XIII}

Again, similarly, even in settings where a sort of moderate originalist model of interpretation is in vogue, such as Australia (Goldsworthy 2000), famous doctrinal calls for interpreting the constitution as a ‘living force’ have been issued (Kirby 2000), again framed



in the same metaphorical terms and therefore using 'life' as an idea to express a capacity for dynamic change through interpretation.

In terms of metaphors, it is relevant to notice in comparative perspective that the opposite idea of a 'petrification' of the constitution, and of its text and meaning, was used in different contexts to oppose such an idea of interpretative dynamic change.^{xiv} This is relevant because the Canadian Supreme Court itself, in cases like *Reference Re SameSex Marriage* in which the *Living tree doctrine* was adopted and updated, explicitly confronted and refused the idea of a static nature of constitutional concepts: Chief Justice McLachlin introduced a very similar metaphor to that of 'petrification', stating that the '(I)he "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life'.

I stress the point, since I argue that therein lies the distinctiveness of the *Living tree doctrine*, precisely as refined and updated by the Supreme Court of Canada throughout the decades: in constructing predictability and flexibility as complementary dimensions, in requiring adherence to the roots, while paying attention to nurturing the fruits of constitutional interpretation at the same time.

Metaphors are widely employed in law since they are, after all, necessary: they *reveal* what technical language might not convey (Ricoeur 1975). Still, because of their ultimately undetermined nature, they can nonetheless obscure as much as they illuminate (Jackson 2006: 926).

Nonetheless, I agree with the idea that the *Living tree doctrine* is distinct from 'the less tethered 'living constitution'' metaphor, or the others we briefly described: it captures not only the idea of progressive interpretation, but the multi-dimensional idea of a purposive/teleological interpretation 'constrained by the past, but not entirely', in which both 'the idea of constraint, the role of text and original understanding in the roots of the constitutional tree and the role of precedent and new developments in its growth' are crucial, in which 'the multiple modalities - text, original intentions, structure and purpose, precedent and doctrine, values and ethos, prudential or consequentialist concerns - of contemporary constitutional interpretation' are distinctively embraced (Jackson 2006: 926).



And in this sense, I argue that such a precise and distinctive nature of the Living tree doctrine as a model of constitutional interpretation proved crucial for its comparative influence and thus also for the comparative influence of the Supreme Court of Canada.

To support my argument, I will look at a sample of relevant cases from different jurisdictions.

4. The *Living Tree doctrine* as a distinctive model of evolutionary constitutional interpretation

We will look at three cases from different jurisdictions where comparative arguments based on reliance of the Canadian Supreme Court's precedents were put forward.

I argue that they are relevant for several reasons. It is noteworthy that, in their chronological order, they show a progressive comparative influence of the Canadian Supreme Court's model of constitutional interpretation: it was firstly cited by well-known participants of *transnational judicial conversations* such as the South African Constitutional Court and the Israeli Supreme Court, but ultimately it also influenced a rather traditional judicial body such as the Spanish Tribunal Constitucional. Moreover, I argue that in the cases selected the reliance on the model is not random, and is not interchangeable with the reliance on other 'metaphorical' but less specific models of interpretation: quite the opposite, it was carefully chosen because it was important to express that precise idea of both constraint and dynamic development, with 'the role of text and original understanding in the roots of the constitutional tree and the role of precedent and new developments in its growth'.

The first case comes from South Africa: it is the well-known *Makwanyane* case.^{xv} It was one of the first cases decided by the local Constitutional Court once established by the Interim constitution of 1993 and after beginning its first session in 1995. In its landmark decision, the Court investigated the constitutionality of a provision of the 1977 Criminal Procedure Act on capital punishment in relation to section 8 (equality before the law), 9 (right to life), 10 (protection of human dignity), and 11 (unlawfulness of cruel, inhuman and degrading treatment and punishment) of the new Interim constitution of 1993. The Court went through a critical assessment of various countries' constitutional jurisprudence on death penalty, discarded the usefulness of American and Indian precedents in this respect, and turned its attention mainly to Canadian case law. The Canadian Supreme Court faced, from



1991 to 2001, an important set of cases on the question of whether it would violate the Charter of Rights and Freedoms to permit the extradition of a person to the United States to face a possible death sentence. In *Kindler v. Canada*,^{XVI} the Supreme Court of Canada rejected a claim that section 7 of the Charter (prohibiting deprivations of liberty inconsistent with fundamental principles of justice) prohibited the extradition of the defendant, who had already been sentenced to death, to the United States; three of the seven judges nonetheless dissented with strong arguments, based upon ‘the historical reluctance displayed by jurors over the centuries to impose the death penalty, the provisions of s. 12 of the Charter and the decisions of this Court pertaining to that section. It is also built on the pronouncements of the Canadian Court which emphasised the fundamental importance of human dignity, and on international statements and commitments made by Canada stressing the importance of the dignity of the individual and urging the abolition of the death penalty’, and therefore on arguments based precisely on that blend of tradition and development which is typical of Canadian constitutional interpretation. Those dissenting arguments proved successful internally, since *Kindler v. Canada* was basically overturned in 2001 with *United States v Burns*,^{XVII} and again with diachronic arguments: the Court explained its change of position in light of intervening developments, including international initiatives, change in other state practices, and accelerating concern in Canada over wrongful convictions in Canada and the United States. Although ‘the basic tenets of [Canada’s] legal system... have not changed since 1991 when *Kindler* and *Reference re Ng Extradition* were decided (...) their application in particular cases (the ‘balancing process’) must take note of factual developments in Canada and in relevant foreign jurisdictions (...) [The] balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome’. But in particular, those dissenting arguments were relevant for the South African Court’s decision in *Makwanyane*, which relied on the Canadian Supreme Court’s idea that ‘a right or freedom guaranteed’ is ‘to be ascertained by an analysis of the purpose of such a guarantee’ and ‘in other words, in the light of the interests it was meant to protect’, ‘and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated’, to state that ‘(T)he death penalty not only deprives the prisoner of all vestiges of human



dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity’.

The second relevant comparative case comes from Israel. I already hinted at how the Canadian example is ‘materially’/‘structurally’ relevant for Israeli constitutional law and adjudication, since the drafting style of the local Basic Laws on human rights of 1992 is modelled after the Canadian charter of rights. I also touched on how Canadian precedents have been quantitatively important in shaping the Israeli jurisprudence.

But there is also a qualitative doctrinal relevance of the Canadian model to be appreciated. This comes from the times in which the ‘constitutional revolution’ founded on the Israeli Basic Laws on human rights of 1992 had not yet been sanctioned by the Israeli Supreme Court,^{xviii} and the Court was shaping its own judicial-made bill of rights through mere interpretative activity (Barak-Erez 1995). In a famous case on free speech, *Station Film Co. Ltd. v. The Film Review Board*,^{xix} the problem of censorship on pornography was discussed. The classic question at stake was whether freedom of expression should be extended to pornography, and under what limits: should a work's artistic value be examined as a whole when the pornographic parts are seen as part of the entire work? The case heavily relied on a Canadian precedent, *R v. Butler*, and decisively: ‘a work's artistic value is evaluated on the basis of the work as a whole. Thus, the artistic value of individual sections per se is not examined. This approach is also accepted in Canada. In *Butler*, Justice Sopinka wrote: “The “internal necessities” test, or what has been referred to as the “artistic defence”, has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent “dirt for dirt's sake” but has a legitimate role when measured by the internal necessities of the work itself. Thus, the Israeli Court relied here on a case in which the Canadian Supreme Court was evaluating the constitutionality of provisions of the Criminal Code dealing with obscenity, and specifically the phrase ‘undue exploitation’, by acknowledging that the concept meant different things at different times, appealing far more to conceptions of morality than to law, and is therefore inherently subjective. The Canadian Court implicitly argued that Parliament intended for the term to reflect evolving standards, since the term ‘undue’ invariably requires a fact specific inquiry that, like the term ‘reasonable’, cannot be divorced from modern standards and conceptions. In the face of an ambiguous meaning, the Court rightly adopted the less intrusive option: this was based on the argument according



to which the overriding objective of the Charter (s. 163) was not moral disapprobation but the avoidance of harm to society, and therefore the constitutional interpretation was based on a specific quest for the constitutional goal or purpose to be compared with the legislative decision of the Parliament: a move that the Israeli Supreme Court effectively replicated in *Station Film Co. Ltd. v. The Film Review Board*, arguing that the respondent's order to delete the pornographic parts of the film was invalid, except for the portions which the petitioner had agreed to delete.

The third relevant comparative case comes from Spain. It is a very well-known one, and, here as well, the *Tribunal constitucional* had to deal with the classic problem of a possible change in meaning of a legislative provision. The Spanish Court in the famous case n. 198/2012 of November 28th 2012 upheld Law n. 13/2005 which guarantees same-sex marriage in Spain. The Tribunal explicitly referred to the model of the *Living tree doctrine* of the Canadian Supreme Court, and, as said, this alone is relevant, as the tradition of quoting foreign law in Spanish constitutional adjudication was scarce, and on the decline (after a first period of ample use in the 1980's: Santana Herrera 2010). It made explicit reference to both the *Edwards* and the *Reference re Same Sex Marriage* cases. But what is more relevant is that the reliance of the Tribunal on the cited *Living tree doctrine* was not generic, as one of the many metaphors one can use to suggest a dynamic constitutional interpretation; quite the opposite, it was carefully planned. The Tribunal emphasized the need to guarantee full equality in marriage regardless of sexual orientation because of the constitutional protection of dignity and personality, and openly declared its adoption of a non-originalist interpretation of the constitutional text, which was to be interpreted as an evolving document in the perspective of its historical origins and within the limits of those, and therefore precisely as intended by the Supreme Court of Canada. The Tribunal looked, in fact, precisely at the *historical purpose* served in 1978 by Article 32, paragraph 1 in establishing legal equality between men and women, and recognized that the institution of marriage have developed in a different and more liberal framework precisely because of the *natural evolution* of that *historical purpose*. The Court explored the evolution of the social concept of marriage, its detachment from the right to create a family, and the parallel legislative acknowledgement of same-sex marriage in the vast majority of European legal orders: it stated that all required a changed interpretation of the Spanish Constitution, which should not be considered 'frozen' in time.^{xx} As the concurrent opinion of Justice Aragón Reyes made clear, the decision was based on the



argument that, given the evolution of the historical purpose of equality, the principle of heterosexuality was no longer an essential element of the guarantee of marriage based on the current social conscience and legal culture of Spain. The Tribunal established the need for a new, evolutive interpretation of the Spanish Constitution, to make of it an 'árbol vivo' and not 'letra muerta', as an exercise of continuous legitimation. The adherence to the Canadian model was therefore explicit, both in principle and in the jargon employed.

5. Some tentative conclusions

What I have tried to demonstrate in the paper is, in short, the multi-faceted influence of Canadian constitutionalism, for reasons ranging from the general to the particular.

It is widely discussed and influential in comparative terms in a sort of material/structural sense: it has experienced a relatively recent exercise of codification, a fruitful one, and this was then adopted elsewhere as a model, and much discussed by scholars, even attracting controversy.

The Supreme Court of Canada is, then, the paradigmatic example of a modern judicial institution open to the influences of global constitutionalism, and much present in today's *transnational judicial conversations*. It makes frequent use of comparative and international law; it is much cited in foreign jurisdictions; its members do not shy away from theorising such an endeavour.

But there is something more: a specific comparative influence of the *Living Tree doctrine*, as a distinctive model of constitutional interpretation which is assonant, but not identical, to other progressive/purposive forms of interpretation. This is becoming more and more relevant in the comparative 'market of ideas': it was adopted as an inspiration firstly by other classic *transnational judicial conversations'* participants, but it is today also used, with theoretical attention and precision, in the activity of a jurisdiction of a consolidated democracy like the Spanish *Tribunal constitucional*. The distinctive nature of the *Living Tree doctrine* in comparison with other models of constitutional interpretation is the basis of its comparative influence.

* Postdoctoral researcher at Alma Mater Studiorum – Università di Bologna. Leonardo.Pierdominici@eui.eu. Thanks are due to Giuseppe Martinico, Giacomo Delle Donne and the anonymous reviewers for their precious comments on an early draft. Errors are mine.

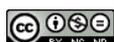
¹ The interview is available at the website <https://www.memri.org/tv/us-supreme-court-justice-ruth-bader-ginsburg-egyptians-look-constitutions-south-africa-or-canada>.



- ⁱⁱ See as a prototypical example the case HCJ 4676/94 *Meatreal Ltd v. Knesset* [1996] IsrSC. 50(5) 15. [30].
- ⁱⁱⁱ *Edwards v Canada (Attorney General)* [1930] AC 124 at 124, 1929 UKPC 86.
- ^{iv} See for instance the cases *Mounted Police Ass'n Ont. v. AG of Canada*, 2015, SCC 1, (2015) 1 S.C.R. 3; *Figueroa v. AG for Canada*, 2003 SCC 37 (2003) 1 S.C.R. 912; *H.M. R. v. Big M Drug Mart Ltd.* (1985) 1 S.C.R. 295.
- ^v See among the others *Reference re Same-sex marriage*, 2004 SCC 79 (2004) 3 S.C.R. 698, in particular at paragraphs 22-30.
- ^{vi} See for a judicial assertion on this *Reference re Same-sex marriage*, 2004 SCC 79 (2004) 3 S.C.R. 698
- ^{vii} *Reference re Same-sex marriage*, 2004 SCC 79 (2004) 3 S.C.R. 698.
- ^{viii} *Reference re Employment Insurance Act*, 2005 SCC 56, (2005) 2 S.C.R. 669.
- ^{ix} *Canadian W. Bank v. Alberta*, 2007 SCC 22 (2007) 2 S.C.R. 3.
- ^x Even though sometimes put into question: see Karazivan 2017.
- ^{xi} See on the use of metaphors in the legal realms the special issue of the journal *Pólemos - Journal of Law, Literature and Culture* VI 2012.
- ^{xii} *Trop v. Dulles*, 356 U.S. 86 (1958).
- ^{xiii} See in this respect *Corte costituzionale sentenze n. 11/1956 and 98/1979*.
- ^{xiv} Of course the reference is to *Versteinerungstheorie* in Austrian constitutional doctrine: see on this Douin 1977 at 49-52, Gamper 2005 at 15-16, Taylor 2006 at 98-103, Grimm 2011 at 24 in particular.
- ^{xv} *S v Makwanyane and Another (CCT3/94)* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).
- ^{xvi} *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.
- ^{xvii} *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7.
- ^{xviii} With the foundational and well-known case CA 6821/93, 1908/94, 3363/94 *United Hamizrahi Bank v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.
- ^{xix} HCJ 4804/94 *Station Film Ltd v. Film and Plays Review Board* [1997] IsrSC 50(5) 661.
- ^{xx} Par. 9: 'Para avanzar en el razonamiento es preciso dar un paso más en la interpretación del precepto. Se hace necesario partir de un presupuesto inicial, basado en la idea, expuesta como hemos visto por el Abogado del Estado en sus alegaciones, de que la Constitución es un 'árbol vivo', —en expresión de la sentencia Privy Council, *Edwards c. Attorney General for Canada* de 1930 retomada por la Corte Suprema de Canadá en la sentencia de 9 de diciembre de 2004 sobre el matrimonio entre personas del mismo sexo— que, a través de una interpretación evolutiva, se acomoda a las realidades de la vida moderna como medio para asegurar su propia relevancia y legitimidad, y no sólo porque se trate de un texto cuyos grandes principios son de aplicación a supuestos que sus redactores no imaginaron, sino también porque los poderes públicos, y particularmente el legislador, van actualizando esos principios paulatinamente y porque el Tribunal Constitucional, cuando controla el ajuste constitucional de esas actualizaciones, dota a las normas de un contenido que permita leer el texto constitucional a la luz de los problemas contemporáneos, y de las exigencias de la sociedad actual a que debe dar respuesta la norma fundamental del ordenamiento jurídico a riesgo, en caso contrario, de convertirse en letra muerta. Esa lectura evolutiva de la Constitución, que se proyecta en especial a la categoría de la garantía institucional, nos lleva a desarrollar la noción de cultura jurídica, que hace pensar en el Derecho como un fenómeno social vinculado a la realidad en que se desarrolla y que ya ha sido evocada en nuestra jurisprudencia previa (SSTC 17/1985, de 9 de febrero, FJ 4; 89/1993, de 12 de marzo, FJ 3; 341/1993, de 18 de noviembre, FJ 3; 29/1995, de 6 de febrero, FJ 3; y 298/2000, de 11 de diciembre, FJ 11) . Pues bien, la cultura jurídica no se construye sólo desde la interpretación literal, sistemática u originalista de los textos jurídicos, sino que también contribuyen a su configuración la observación de la realidad social jurídicamente relevante, sin que esto signifique otorgar fuerza normativa directa a lo fáctico, las opiniones de la doctrina jurídica y de los órganos consultivos previstos en el propio ordenamiento, el Derecho comparado que se da en un entorno socio-cultural próximo y, en materia de la construcción de la cultura jurídica de los derechos, la actividad internacional de los Estados manifestada en los tratados internacionales, en la jurisprudencia de los órganos internacionales que los interpretan, y en las opiniones y dictámenes elaboradas por los órganos competentes del sistema de Naciones Unidas, así como por otros organismos internacionales de reconocida posición.'

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ISSN: 2036-5438

**Constitutional Judges and Secession.
Lessons from Canada ... twenty years later**

by

Irene Spigno*

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





Abstract

In constitutional theory, the *referendum* is an instrument that allows for the expression of the popular will in government decisions and through which people are asked to vote directly on an issue or policy. Over the last decades, the referendum has been the instrument used by minority groups to claim their independence supported by popular will. This paper examines trends in constitutional jurisprudence on the issue of independence referendums. The birth of this constitutional trend can be found in the 1998 decision by the Supreme Court of Canada in the *Reference Re Secession of Quebec*. The principles developed therein have been further explored in two recent cases, issued by the Italian Constitutional, and by the Spanish Constitutional Tribunal in the latest decision of the *Catalonia saga* (Judgment no. 114/2017).

Keywords

referendum, secession, constitution, constitutional judges, Canada



1. Introduction

In constitutional theory, the *referendum* (from the Latin expression *ad referendum*, meaning “convocation to referee”) is an instrument of direct democracy that allows the expression of the popular will in government decisions and through which people are asked to vote directly on an issue or policy (Morel 2012: 502). Thanks to the influence exercised by Rousseau’s ideas, and mainly the idea that the only valid form of legislation was popular legislation, it is possible to find the first constitutional traces of the *referendum* in the 1793 French Constitution (which remained inactive) and in the Swiss constitutional order (federal and cantonal) in which, since 1848, the referendum found extensive and well-structured prediction (Salerno 1988: 202). While no explicit reference to referendums or popular consultation was provided in the 1787 US Constitution, referendums started to be used by American states from the end of XVIII century, thanks to the influence exercised by the *Progressive Movement* and by the idea of the need to extend the use of the popular will (Salerno 1988: 203).

Although the referendum has been a subject of interest in legal science since its first conceptualisation, this interest has increased in the XX century, following the greater use of referendum, both internationally¹ and constitutionally (as evidenced in the composition of many European Constitutions, such as the 1919 Weimer Constitution; Salerno 1988: 204).

Referendums can take an extensive variety of forms: we can distinguish between *mandatory* or *compulsory* referendums and *optional* or *facultative*, depending if the request of the referendum is a compulsory part, or not, of a regulated process as, for example, a legislative process; we can distinguish by the actors who propose it, between referendums initiated by institutional actors such as the executive, the legislative branch, or a parliamentary minority, and popular initiatives. With regard to the formal objective, it is possible to differentiate between *abrogative*, *suspensive* or *deliberative* referendums when the vote is on existing legislation, and *prepositive* referendums if it refers to new legislation. We can classify referendums by the reference to the legal consequences of the vote, distinguishing between *consultative* or *advisory* referendums or *binding* ones. The referendum can deal with a wide category of legislative acts (ordinary legislation, constitutional reforms or international treaties), and it can concern a



range of subjects: institutional, international, territorial, moral, economic etc. (Morel 2012: 508).

The recent comparative experience, of the last 30 years, shows us an increasing trend in using the referendum as a tool to support minority groups' demands for independence. Apart from those cases in which the independence request came from oppressed people as the expression of their right to self-determination, there has been an increasing use of the referendum by minority groups living in consolidated democratic states. Usually they are groups with a specific historical and cultural heritage, distinct from the majority, which already enjoy regional and/or federal political autonomy status: their demand is directed to obtaining the sovereignty that they consider belongs to them, through secession from the State they are part of.

For Qvortrup (2014: 1-4), since the Second World War there have been slightly more than fifty referendums on independence. The conditions under which these took place were very different: for example, the referendum in French Guinea that was held in 1958 was part of the decolonisation process that took place in the second half of the XX century. It was held as part of a wider referendum across the French Union to adopt the new French Constitution. As the consequence of rejecting the adoption of the French Constitution, Guinea gained independence. Referendums held in 1991 in Latvia, Estonia and Lithuania to gain independence were part of the restructuring of Europe after the dissolution of the Soviet Union. The constitutional referendum held in Iceland in 1944 asked voters whether the Union with Denmark should be abolished and a new constitution approved. But the list is longer.

Very few referendums had been held in each decade before 1990, while in the last 30 years there has been an explosion of plebiscites (Qvortrup 2014: 1-4). Referendums held before 1990 are strongly linked to an international consolidation of the right to self-determination of peoples, and the decolonisation process, while referendums held since the end of the Eighties finds their explication, from a geo-political point of view, in the fall of the Berlin Wall and the dissolution of the Soviet Union that redesigned the features of Europe.

However, referendums held since the middle of the Nineties have had different characteristics: they have been held in democratic countries, and they have all resulted in the rejection of the proposed change, as shown by referendums in Quebec in 1980 and 1995, in



St. Kitts and Nevis in 1998^{II} and in Scotland in 2014. The only case in which a referendum on independence in a democratic country was successful is Montenegro in 2006.

From a political point of view, the outcome of a referendum on independence is related to multiple elements. However, to be constitutionally legitimate, secession requires that certain essential elements be respected. Since most contemporary constitutions are silent on this point, with very few exceptions,^{III} constitutional judges have been responsible for determining which elements should be respected to allow a *constitutional secession*. More specifically, this article will deal with two main aspects: the constitutional nature of a referendum on independence or secession, and its possible legal effects.

In this regard, in the following pages we will first see the theoretical configuration of secession, and the transition from a *de facto* institution to a subjective legal situation which, in some cases, clearly provides for its qualification as a right (paragraph II). The analysis of the reference of the Supreme Court of Canada on the intent of the secession of Quebec will follow (III): even if the decision issued by the Supreme Court of Canada dates back to 1998, the constitutional argumentation developed therein still represents an important and topical lesson for more recent cases of independence intent, as in the cases of the Veneto Region in Italy and Catalonia in Spain. Thus, the Italian Constitutional Court Judgment no. 118/2015, and the latest decision of the Spanish Constitutional Tribunal in the Catalonia saga (Decision no. 114/2017), will be analysed (respectively in paragraphs IV and V). This choice is mainly due because both constitutional judges have faced the same problems in dealing with an internal entity with intents on secession, and have both chosen analogous solutions, inspired by similar constitutional principles to those developed by the Supreme Court of Canada's 1998 decision.

Last, some final considerations on the emergence of a constitutional tendency among constitutional judges, on the use of referendums for independence, will be developed in paragraph V.

2. Secession, Constitution and Referendum

Secession, as the “formal withdrawal from a central authority by a member unity” (Wood 1981: 110) is an event through which new states are created. Part of constitutional theory considers secession as an *extra ordinem* fact, generally ignored by traditional international



doctrine and international law^{IV} and *demonized* by constitutional law. Constitutional legal scholarship has underlined how the idea of secession clashes with State and sovereignty conceptions elaborated in the XIX and XX centuries, in that supposed constitutional rights to secession are “manifestly absurd for the nature of the Constitution itself”.^V In 1869 the US Supreme Court, in the case *Texas vs. White*,^{VI} stated that “When [...] Texas became one of the United States, she entered into *an indissoluble relation*. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.”^{VII} Secession has become considered as a taboo, and has almost become forbidden by constitutional law that has given prevalence and priority to the principle of unity of the State.

According to the *compact theory*, however, secession is an inherent right related to the belief that – with specific reference to Southern States of the US – the union between states is made on a volunteer basis. Moreover, secession has been justified by the *inherent-power argument*, according to which States have the power to reassert their previous status of sovereignty and- as Calhoun argued (1992)– due to the absence of federal power (Neff 2015: 407-401).

The principle of unity started to lose part of its power when, in 1921, the Aland Islands asked for independence from Finland: in that case, the League of Nations stated that secession can never be unilateral;^{VIII} the only case in which secession can be unilateral is when it represents a remedy to an injustice. From that moment onwards, secession started to be considered as a *remedial right*.^{IX} The right of self-determination has been recognised since the Second World War, and it has provided the conditions under which secession can be legitimate under international law. According to art. 1 of the 1966 International Covenant on Civil and Political Rights “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Due to its wide formulation, this disposition also seemed to include the right to secede, but only for oppressed peoples (Ruggiu 2016: 75). As a matter of fact, contemporary international doctrine considers secession as an extreme remedy to



situations in which a State has committed a gross violation on the right to free self-determination of a people, or other fundamental human rights of minorities, or other groups which are under its sovereignty. Secession as a remedial right is constituted when a State exercises a form of abusive sovereignty that, from an international point of view, would justify the “rebellion against tyranny and oppression” indicated in the Preamble of the 1948 Universal Declaration of Human Rights as a legitimate reaction. Here, secession is strongly related to the right of free self-determination of peoples in its *external* perspective: in this case, the right to self-determination is denied by the State, whose claim rests on the principle of State integrity and unity. However, rather than authorising the right to secession, the trend is to ask the State to stop committing the violation and to reestablish the *status quo ante*. Even if the trend is toward the prevalence of the principle of state integrity over secession,^x as established in paragraph 7 of the United Nation General Assembly Resolution n. 2625 (XXV), the State’s right to have its integrity respected is strictly conditional on the respect the State gives to *internal* self-determination, giving representation to the whole people, including minority groups (Murswiek 1993: 38).

These had been the guiding principles during the decolonisation process; however, since the end of this process in the 1990s, secession claims have started to gain a new profile. First of all, they come from minority groups with historical, cultural and linguistic specificities. Secondly, these groups are part of consolidated democratic States within which they already have specific political autonomy: the aim of their independence claims is to regain lost sovereignty. Thirdly, they do not seek to use the referendum as an instrument to participate in government or policy making decision, but rather they use the popular consultation instrument to give space to a minority will.

At the moment, very few Constitutions explicitly recognize a right to secession (the Constitutions of Ethiopia,^{XI} Liechtenstein^{XII} and Saint Kitts and Nevis^{XIII} do so), while the Constitutions of Chad,^{XIV} Djibouti,^{XV} Mauritania,^{XVI} Senegal^{XVII} and Ukraine^{XVIII} all make specific reference to the need to proceed to a referendum in a secession process. This data reflects the predominant trend according to which Constitutions generally reject the possibility of local entities seceding and gaining independence, preferring the protection of the principle of State unity, as analysed in the following pages.



3. The Quebec intent of secession: the decision of the Supreme Court of Canada in the *Reference Re Secession of Quebec* [1998]^{XIX}

Tensions between Quebec and Canada's central government have far-reaching origins, dating back to the foundation of the Federation. As a majority French-speaking province, Quebec has consistently pushed for the recognition of its 'distinct society', separate from that of the other Anglo-Saxon provinces, periodically threatening unilateral secession from the rest of the Canadian territory.

The position of the Canadian government has been to leverage mono-national sentiments, which was considered the foundation of the 1867 British North America Act (BNA) (Groppi 2006: 29-31), resulting from the compromise between the colonies, including those that were not part of the Federation at an early stage. This compromise was considered as the *pactum societatis*, whose rationale is to be found not in territorial collectivities, but rather in the consensus given by individual citizens to the Federation.

The aim of the BNA was ambiguous: on one side, the English-speaking founding fathers intended to create a great British North American nation; while, on the other side, French-speaking delegates wanted to protect their cultural diversity. Finally, the BNA represented the birth of a political nationality based on the coexistence of different *families* (Russell 2004: 32 ff.). From that moment, Quebec was characterized by a strong social and political conservatism and a defensive nationalism.

Change began with the *Quiet Revolution*, that characterised Quebec from the early 1960s. The province went through a period of economic, political and cultural development, with the government of Jean Lesage, leader of the Liberal Party, and the support of the small bourgeoisie which cleaved to ideas of a social state and thus sanctioned the end of a traditional pattern of clerical immobilism (Clift 2014: 18 ff.).

This was followed by a growing involvement of the province in the fields of labour, economics and education, with the consequent expansion of the bureaucratic provincial apparatus. This was also the time when a nationalist sentiment was revitalised, which changed the attitude of the French-speaking community that then began to defend their own interests. The Quebec government called for more powers, but at that time the federal union was never questioned.



Quebec refused to sign the 1971 Victoria Charter as it conceived of the idea of the Constitution as a *pactum societatis*, and not as a confederal pact (Behiels 2005: 23 ff.); moreover, it provided for the principle of regional equality of Canadian provinces, which implied a failure to recognise Quebec's primacy with reference to social policy (Tosi 2006: 127). From the second half of the 1970s the first independent movements began to form. In 1976, the *Parti Québécois* – founded in 1968 and whose main purpose was to obtain sovereignty for the province – gained a majority in Quebec's parliament (Pinard-Hamilton 1978) and launched a referendum to gain a mandate to negotiate with the rest of the country a new agreement recognising political sovereignty in Quebec, while maintaining an economic association and a monetary union between the two new sovereign entities. The referendum took place on May 20, 1980: almost 86% of the population voted but the referendum question was rejected by nearly 60% of voters, receiving little more than 40% of the consensus. The negative outcome of the referendum was in part determined by the *No campaign* carried out by the Federal Government, based on the promise that in the event of a negative outcome of the referendum, a process of renewal of the constitution would have begun.

In spite of the negative outcome of the referendum, the *Parti Québécois* won the next year's provincial assembly elections and re-established itself in government as an interpreter of the interests and will of the Quebec people, and hence the only official interlocutor with the central government.

In 1982, the Constitution Act was approved and the Canadian Constitution was repatriated: for Quebec, the repatriation of the Constitution was an unlawful act, due to its unwillingness to adhere to the new constitutional pact. As a consequence, the province has utilised the guarantee instruments introduced with the reform much more frequently than the other provinces (including the notwithstanding clause provided in Section 33 of the Canadian Charter of Rights and Freedoms). Given the dissent, in 1986 the new Liberal Quebec government of Robert Bourassa laid down five essential conditions for consenting to the Canada Act of 1982 (Groppi 2006: 36 ff.).

In 1987, a political agreement was signed at Meech Lake, which included the extension of all requests made by Quebec's government to all provinces, apart from the recognition of the distinct nature of the Quebec community. The reform project was adopted by Quebec and gained the consent of six other provinces, but some political facts created a stalemate. The change of government in New Brunswick, Terra Nova and Manitoba called for few



points to be modified, but collided with Quebec's refusal to make changes thus leading the Meech Lake agreement to fail (Breton 1992).

In 1990, the Quebec Government established a parliamentary Commission (Commission Bélanger Campeau) in order to examine possible solutions for the constitutional political future of Quebec (Nemni 1993). The final report of the committee became the starting point for new negotiations between Quebec and the Federal Government: a series of intergovernmental conferences were convened and at the end of the meeting held in Charlottetown at the end of August 1992, the parties found a compromise on a new constitutional review text. The main idea of the text elaborated in Charlottetown was to reprise the Meech Lake solutions, to include the recognition of a veto power for Quebec, and of a special distinction in terms of French language and culture.

When the *Parti Québécois* returned to power, the new Prime Minister, Jacques Parizeau, fulfilling the promises of the electoral campaign, launched a new popular consultation on the sovereignty of the Province. The government submitted to the Provincial National Assembly a draft law on the Quebec's future (the Act Respecting the Future of Quebec). After just over a month, the people were called to the polls to express their vote on Quebec's accession to the condition of sovereignty. While in 1980 the people were to decide on whether to give a mandate for negotiating an agreement with the Federal Government recognizing the sovereignty of Quebec, the 1995 referendum on sovereignty was no longer about delegation to intergovernmental negotiations; rather it was directed to know the Quebec people's will on accession to sovereignty. Negotiations after the popular consultation were to be limited to a proposal for a new form of political-economic association between the two sovereignty entities (Canada and Quebec). Despite increasing popular support for the independence solution, the result of the referendum was once again negative. The referendum, in which almost 94% of citizens participated, was rejected with 50.6% of negative votes. After the negative result of the referendum, the central government sought to reduce preferences for independence, and the Federal Parliament approved a resolution recognizing the distinct nature of Quebec society.

In 1996, the Federal Government, using the reference instrument, asked the Supreme Court to issue a reference on the legitimacy, in domestic as well as international law, of a possible unilateral secession of Quebec from the rest of Canada. In particular, the reference was based on three questions: the first requested the Court to determine whether the



National Assembly or the Government of Quebec could, in accordance with the Constitution of Canada, unilaterally proceed to the secession of the Province from the rest of the country. The second question questioned the judges on the provision in international law of such a right, and whether there is a right of self-determination that would give the Province the right to unilateral secession. In the third question the Federal Government asked the Court to determine which of the two regimes, the national or international, would have precedence in Canada in the event of a conflict between the two in relation to the right to unilateral secession of the province.

The decision issued by the Supreme Court is relevant, not only for the arguments developed with specific reference to the questions referred by the Government, that have been deeply analysed by several authors (*ex plurimis* Gaudreault-DesBiens 1999) and because it “combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity” [*Reference re Manitoba Language Rights*, (1985) 1 S.C.R. 721 (Manitoba Language Rights Reference), at p. 728], but also with specific reference to the topic this article is dealing with: the legal nature of a referendum on independence or secession and its possible legal effects.

The analysis is conducted on the Court’s taking as reference the fundamental principles of the Canadian Constitution: federalism, democracy, constitutionalism and the principle of legality and respect for minorities, an understanding of which is necessary for both the interpretation of the written constitution, but also an understanding of the historical context and previous jurisprudential interpretations made in constitutional matters. In the light of some fundamental historical stages in Canadian history – such as the conferences of Charlottetown and Quebec in 1864, the 1867 BNAA, the attempt of secession of Nova Scotia amongst others (see further *Reference Re Secession of Quebec*, cit., para. 33-48), the Supreme Court underlined how the federal principle is the key to all the needs expressed by the various political and cultural realities that have characterised and continue to characterise the whole Canadian legal system. The 1867 BNAA had given birth to a nation: federalism was the mechanism by which diversity could be linked to unity. Canadian constitutional history has demonstrated the ability of institutions to change and adapt to changing political and social needs of the country, always ensuring full compliance with the principle of legality and respect for democratic institutions and minority requests. Thus, the basis of Canadian federalism is the recognition of the diversity of the constituent units of the Confederation,



and the right of provincial governments to foster the development of their communities within their spheres of jurisdiction. This is a context in which, notwithstanding the possibility of cultural and linguistic minorities in Quebec pursuing their collective interests, the Court emphasizes the will, present throughout the whole history of the country, of all Provinces to protect not only their autonomy of government on local subjects, but also their respective cultural traditions (*Reference Re Secession of Quebec*, cit., para. 55-60).

Against this backdrop, the Court stated that the referendum, even though it has no direct legal effect and is therefore legally unfit for a unilateral secession, is in any case the expression of a democratic will, and in the case of the referendum in Quebec the will of a part of the Quebec people. Consequently, a referendum that brings a clear expression to the Quebec people should be given a considerable weight: it is the application of the principle of the *clarity of the majority*, meaning that the results of the referendum must not be ambiguous both in relation to the question submitted to the vote, and as to the level of support achieved (*Reference Re Secession of Quebec*, cit., para. 86).

Consequently, if there is a clear indication by a province of the will to pursue secession, the principle of federalism, coupled with the democratic one, binds each and every one of the parties of the Confederation to negotiate constitutional changes that are functional to the implementation of this will. The Constitution of Canada is the product of the sovereignty of the Canadian people, and that power makes it possible to make any constitutional change deemed appropriate within the Canadian territory (*Reference Re Secession of Quebec*, cit., para. 87), thus rejecting the extreme hypothesis that the other Provinces and the Federal Government would have to passively accept the unilateral will of Quebec. A unilateral declaration of independence carried out at the margins of law and constitutionality, and possibly accompanied by a declaration of unconstitutionality of the Court, might well only be successful in the case of an entity which had effective control over the territory, and from the subsequent recognition of the international community.

Consequently, the judges of the Supreme Court excluded that *external* and/or *internal* self-determination might be established in the case of the intent of secession of Quebec: the only constitutional right granted to Quebec to satisfy their will to independence would have been to initiate the legal proceedings provided for in the Constitution for its revision. After the Supreme Court decision, the Clarity Act was approved, which set out the rules to be observed in negotiations between the federal government and a province that wants to secede.^{XX}



Even if some scholars have been critical towards the Supreme Court decision for the poverty of theory in it (Choudry and Howse 2000), it represents an important step in the construction of a judicial constitutional tendency of progressive constitutional openness to secession with respect to the 186 US Supreme Court case in *Texas vs. White*. The principles elaborated therein have been adopted and further elaborated by other constitutional judges as shown in the following sections.

4. The *Canadian lesson* on the Italian Constitutional Court: Judgment no. 118/2015

In Italy it is also the case that there are territorial entities that aspire to greater political autonomy and, in some cases, to independence. According to Art. 116, para. 1 of the 1948 Italian Constitution “Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law.” The special status accorded to these five Regions by the Constituent Assembly is related to the historical and cultural legacy that characterises them, as well as their geographical position. Indeed, Friuli-Venezia Giulia, Trentino-Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste are Regions located on the Italian borders with Austria and Slovenia, Austria and Switzerland and Switzerland and France respectively; as for Sardinia and Sicily, both are islands.

However, at the beginning of the 1990s, new regional movements for autonomy began to appear, progressively acquiring an important position in the political arena: the cases of the Lombardia and Veneto Regions. In particular, in 1991-1992 the Veneto Region, whose regional council was formed by a majority comprising left-wing parties [*Democrazia Cristiana* (Christian Democracy), *Partito Socialista* (Socialist Party), *Partito Socialdemocratico* (Social Democratic Party), and *Partito Repubblicano* (Republican Party)] approved the proposal presented by the *Gruppo Socialista del Veneto* (Socialist Group of Veneto) to launch a popular consultation asking whether the people of the region would have wanted to include Veneto among regions with special statutes.^{xxi} The *Partito Democratico della Sinistra* (Left-wing Democratic Party), the *Federazione dei Verdi* (Federation of the Greens), two Venetian autonomous movements *Liga Veneta* (Venetian League) and the *Unione del popolo veneto* (Venetian People Union), as well as the national hierarchy of the *Partito socialista italiano*



(Italian socialist Party-PSI), opposed this proposal. The President of the Council (at that time, Giulio Andreotti), challenged the regional law, which was annulled by the Constitutional Court with Judgments no. 470/1992. The Constitutional judge stated that ‘as long as [the regional consultative referendum] has no binding effect it cannot exercise its influence, direction and orientation, not only on the power of initiative of the Regional Council, but also in relation to the subsequent stages of the state legislative process, up to affect discretionary choices entrusted to the exclusive competence of central state organs: with the consequent violation of that limit already indicated by this Court for regional consultative referendum that refers to the need to avoid “the risk of adversely affecting the constitutional and political order of the state”’ (Judgment no. 470/1992, *Considerato in diritto* no. 4).

A referendum on autonomy was again proposed in 1998, but once again the central Government (presided over by Romano Prodi) challenged the Regional Law on an “Advisory referendum on the submission of a constitutional law proposal for granting the Veneto Region special forms and conditions of autonomy” and the Constitutional Court annulled it with Judgment no. 496/2000 with similar reasons to those laid down in the 1992 ruling.

A third attempt was made by the Veneto Regional Council in 2001-2002, with the approval of a regional law on “Advisory Referendum on the submission of a constitutional law proposal for the transfer to the Veneto Region of functions state government in the field of health, professional training and education, local police.”^{xxii} Once again, the central Government (under Giuliano Amato), challenged the law at the Constitutional Court, but this was subsequently withdrawn by the new Silvio Berlusconi government.

A fourth attempt was made in 2014, with the approval of Regional Laws no. 15 on the “Advisory Referendum on the Autonomy of the Veneto” and no. 16 on the “Consultative Referendum on the Independence of Veneto”: the first launched a consultative referendum on the autonomy of the Region, while the second launched a referendum on independence for the Region.

In particular, Law no. 15 envisaged a *negotiation* between the President of the Regional Council and the Central Government for ‘defining the contents of an advisory referendum aimed at knowing the will of the voters of Veneto to obtain further forms of autonomy in the Veneto Region’ (Art. 1). If negotiations had not reached an outcome within one hundred



and twenty days from the approval of the law, the President of the Regional Government would have been authorized to launch an advisory referendum to know the will of the voters of Veneto (Art. 2, para. 1), on five questions:

1) Do you want that further forms and condition of autonomy will be attributed to the Veneto Region?

2) Do you want a percentage of not less than 80 per cent of the taxes paid annually by Venetian citizens to the Central Administration to be used in the regional territory in terms of goods and services?

3) Do you want the Region to keep at least 80 percent of the taxes levied on regional territory?

4) Do you want the revenue from the funding sources of the Region not to be subject to destination constraints?

5) Do you want the Veneto Region to become a special status Region?

In the case that the referendum would have reached the *quorum* for its validity and that the majority of the votes would have been validly expressed, the President of the Regional Council would have proposed to the Regional Council itself a negotiating program to be conducted with the State and submitted a state bill containing paths and contents for the recognition of further and specific forms of autonomy for the Veneto Region (Art. 2, para. 2).

Law no.16 gave powers to the President of the Regional Council to launch an advisory referendum to know the will of the Veneto voters on the following question: do you want Veneto to become an independent and sovereign Republic? (Art. 1, para. 1). The President of the Regional Government and the Regional Council were entrusted with safeguarding the right of the Veneto people to self-determination (Art. 3) in every competent national and international arena.

Both laws have been challenged by the Central Government before the Constitutional Court: Law no. 15 for violating Arts. 3, 5, 116, 117, 119 and 138 of the Constitution as well as Arts. 26 and 27 of the Statute of the Veneto^{xxiii} and Law no. 16 for the violation of Arts. 5, 81, 114, 138 and 139 of the Constitution.

With Judgment no. 118/2015, the Court declared the unconstitutionality of the questions indicated in numbers 2, 3, 4 and 5 of Art. 2 of Law no. 15,^{xxiv} while Law no. 16 was declared unconstitutional *in toto*.



According to the Court, the referendum is a link between the people and government institutions: it is not a form of spontaneous exercise of collective freedom of expression. Rather, it fulfills a function: to initiate, influence or counter public decision-making processes, mostly regulatory, even in cases where there is no immediate legal effect on the sources of law. These characteristics mean that a referendum can be launched by a Region on issues of interest of the regional community. But it also means that regional referendums can cover areas beyond the boundaries of regional subjects and territory, up to the point of interlinking with the national dimension.^{xxv} At the same time, this does not mean that Regions can take initiatives - even of popular consultation - free in form, or beyond the limits set by constitutional provisions. The Constitution and Regional Statutes (as indicated in Art. 123 of the Constitution) establish the regional referendum discipline framework within which each Region can move and define its own political autonomy:^{xxvi} autonomy that must be carried out in harmony with constitutional principles and dispositions.^{xxvii}

Respect for constitutional principles and dispositions implies that even though each Region has the freedom and autonomy to establish the forms, ways and criteria of popular participation in the democratic control processes of its acts,^{xxviii} once these choices have been taken and consecrated in the Regional Statute, they apply to the subsequent regional activity, even legislative, given the fundamental character of the Regional Statute and its relationship with the regional laws drawn up by the Constitution in terms of both hierarchy and competence.^{xxix}

In Veneto, regional referendums are regulated in Arts. 26 (abrogative referendum) and 27 (consultative referendum) of the Statute.^{xxx} the normative framework sets out that regional referendums on tax and budget laws, and implementing measures, are excluded as well as referendums on laws and regional acts whose contents constitute fulfillment of constitutional, international and European obligations. This limit has been part of the constant Constitutional Court case law, according to which regional referendums, including those of a consultative nature, cannot involve constitutional-level choices.^{xxxi} According to the Italian constitutional judge, the referendum set out in Law no. 16 deals with fundamental constitutional choices that are obviously precluded to regional referendums according to the constitutional and statutory framework, and its jurisprudential interpretation. Moreover, the proposed referendum would have led to institutional overtures radically incompatible with fundamental principles of unity and indivisibility of the Republic. Indeed, according to Art.



5 of the Italian Constitution ‘The Republic, one and indivisible, recognizes and promotes local autonomies; implements in those services that depend on the State the fullest measure of administrative decentralization; and accords the principles and methods of its legislation to the requirements of autonomy and decentralization’.

The unity of the Republic is one of those essential elements of the constitutional order that cannot be put under constitutional revision.^{xxxii} Even if the republican order is also based on principles that include social and institutional pluralism and territorial autonomy, as well as an openness to supranational integration and international order, these principles must be developed within the framework of the unity of the State. According to the consolidated constitutional jurisprudence, pluralism and autonomy do not allow Regions to qualify themselves in terms of sovereignty or allow their governing institutions to be assimilated into those with national representation.^{xxxiii} More importantly, the same principles cannot be exploited towards a fragmentation of the system, and cannot be invoked to justify initiatives aimed at asking voters, even for consultative purposes, on prospects for secession in view of the establishment of a new sovereign subject. A referendum initiative that, like the one in question, contradicts the unity of the Republic could never be translated into a legitimate exercise of power by regional institutions and thereby should be considered as an *extra ordinem* fact.^{xxxiv}

Following the Constitutional Court Judgment no. 118/2015, the President of Veneto issued a decree launching the referendum for October 22, 2017. The date is no mere coincidence: it is the 151th anniversary of the plebiscite of Veneto – held on 21 and 22 October 1866 – which sanctioned the unification of the Venetian and Mantua provinces with the Kingdom of Italy. The referendum received a popular participation of 57.20% and received 98.10% of positive votes. Negotiations with the central Government will follow.

5. The *Canadian lesson* on the Spanish Constitutional Tribunal: Judgment no. 114/2017

An organised Catalan nationalist political movement has existed since the end of the XIX century, initially claiming simple autonomy for the region, later adopting a more radical independent position (Claret and Santirso 2014). However, its juridical and political structures find its origin in the Carolingian Empire (Gonzalez 2016: 119).



A first attempt to proclaim the Independent Catalan Republic took place in the 1920s but it was repressed by the Primo de Rivera right-wing regime (Scotoni 2001-2002: 400). When the monarchy fell in 1931, even though there was a significant weakening of central power, manifestations of autonomist expression were almost silent and a convergence with the central power was observed (Oleart 2014: 8). During the Civil War, the Catalans supported the republican forces, fearing another totalitarian regime; their defeat was heavy with severe economic and social harm. The *Catalan question* was considered as the major catalyst of the war (Gonzalez 2016: 121). After Franco's dictatorship, Catalonia implemented a strong policy of cooperation with the government. The Spanish Parliament approved a Statute of Autonomy for Catalonia in 1979, re-established the *Generalitat* as the government of Catalonia, Catalan as the official language of the region, and reinstated the Catalan flag (Gonzalez 2006: 122). Thus, for more than thirty years, Catalan independence has not been a problematic issue. In the early 2000s, some independent parties began to rise, growing more and more, to the point of reaching a majority in the regional parliament in 2015.

In March 2006, the Spanish Parliament adopted a new version of the Catalan Statute, which strengthened the autonomy of the Autonomous Community, and which in its Preamble defined Catalonia as a nation within the State. The new statute also established the right and duty of Catalan citizens to understand and speak the two official languages, Catalan and Castilian. In July of that same year, the Popular Party of Mariano Rajoy (at that time in the opposition) filed one of seven challenges against the new Catalan Statute in the Constitutional Tribunal, defining the text – in particular the definition of Catalonia as a Nation - as a threat to the unity of Spain.

The Constitutional Tribunal decision arrived four years later, in 2010 (Judgment no. 31/2010, of June 28), annulling part of the Catalan Statute, stating that reference to Catalonia as a nation has no legal value and that the Constitution recognizes nothing but the Spanish nation. It also denied the use of the Catalan language as the first language in Catalan administrations and the media.^{xxxv} The decision of the Court triggered the reaction of the Catalans and a month later the first popular demonstrations began.

On November 9, 2014, Catalonia organized a symbolic consultation, which was not recognized by the government of Madrid, and was found unconstitutional the Constitutional Court.^{xxxvi} At the referendum, the favorable vote for independence reached over 80%, but participation was modest; turnout was only 36% of the voting population. On September



27, 2015, regional elections took place. These had been perceived of as a plebiscite for or against independence. Separatist parties (from both the right and left wing) obtained 47.8% of the popular vote, and for the first time formed a majority in the Catalan parliament. The new *separatist* Parliament approved a series of normative acts, whose aim was to build the road to independence: Resolution 1/XI on “The beginning of the political process in Catalonia as a result of the election results of September 27, 2015” and its Annex, approved on November 9, 2015; Resolution 263/XI, by which the report and the conclusions of the Study Commission of the Constituent Process was ratified (declared unconstitutional and void by the Constitutional Tribunal with Judgment no. 259/2015, of December 2 and Decision no. 24/2017, of February 14).

However, all the decisions issued by the Constitutional Tribunal in this respect were ineffective.

On September 6 and 8, 2017 the Catalan Parliament approved two Laws proposed on August 31, 2017 by *Junts pel Sí* and the *Candidatura d’Unitat Popular* (CUP). Law no. 19/2017, on the “Self-Determination Referendum”, launched a new referendum on self-determination, and Law no. 20/2017, on “Law of legal and foundational transience of the Republic”, provided for the founding of the [Catalan] Republic, conditional on the results of the referendum to be held on October 1, 2017. The Laws were approved, in wide violation of the Catalan Parliamentary Regulation; the order of the day was altered to urgently include the proposals; and all the guarantees of the opposition to present amendments were eliminated. The proposed laws were prevented from being submitted to the Council of Statutory Guarantees, and they were approved in a day, without the chance of a proper parliamentary debate.

Both Laws have been challenged to the Constitutional Tribunal for the serious problems they pose from a constitutional and legal point of view, as well as for the respect of the democratic rule of law.^{xxxvii} Both Laws have been suspended by the Constitutional Tribunal, which has declared Law no. 19/2017 unconstitutional with Judgment no. 114/2017, issued on October 17, 2017. First of all, Law no. 19 has been promulgated with an atypical formula that has no precedents: the reference of the promulgation by the President of the *Generalitat* on behalf of the King (as provided for by Article 65 of the Catalan Statute) as the Ordinary State Representative in Catalonia (Article 67.6a), is omitted and the only reference is that it is known to all citizens that the Law has been approved by the Catalan Parliament. Similar



objections can be made regarding the Preamble of the Law: it refers to some of the Catalan Parliament's resolutions adopted in application to the right of self-determination. These Resolutions had already been declared unconstitutional by the Constitutional Tribunal: for example, Resolution 5/X, which adopted the "Declaration of sovereignty and the right to decide of the people of Catalonia" (declared unconstitutional and null by the Constitutional Tribunal Judgment no. 42/2014, of March 25); Resolution 306/XI, on the "General Political Orientation of the Government" (declared null, also in what now matters, by the Constitutional Tribunal Decision no. 24/2017, of February 14). Linking in this way with previous actions of the institutions of the *Generalitat*, the regional legislature sought to finalise its secession process from the Spanish State, which had given rise, in successive phases, to many decisions of unconstitutionality by the Constitutional Tribunal in respect of the so-called "constituent process" in Catalonia.^{xxxviii}

In the first instance, the contents of the challenged law are *abnormal* as a sovereignty of the Catalan people was proclaimed (Art. 2), differentiated from Spanish sovereignty; for according to Art. 1, para. 2 of the Spanish Constitution, sovereignty belongs to Spanish people. Moreover, the Catalan Parliament was identified as the *representative* of that sovereignty (Art. 3, para. 1), and Law no. 19/2017 is provided with legal supremacy on any other rule that could contradict it (as provided in Art. 3, para. 2, in the second additional provision and in the first final provision). This supremacy is configured as *unconditioned* and it that would affect the Spanish Constitution and the same Catalan Statute of Autonomy. The foundational basis of Law no. 19/2017 does not reside in the Constitution and in the Statute of Autonomy either: rather, they reside in the right to self-determination of people (Art. 3, para. 3), considered as "fundamental and inalienable for the people of Catalonia" (Art. 3, para. 2); the right to self-determination of people is claimed to be part of the current legal system (Art. 3, para. 3), being recognized as "the first human right" (Preamble of Law no. 19/2017) based on international treaties and Arts. 96 and 10, para. 2 of the Spanish Constitution.

Similarly to the Italian Constitutional Court's Judgment no. 118/1995, the Spanish Constitutional Tribunal has also dealt with the topic of which matters can be submitted to a regional referendum - even if only consultative - and the legal consequences of that.

In the Spanish constitutional order, the State has exclusive competence on referendums. This competence extends, in accordance with the constant jurisprudence of the



Constitutional Tribunal, not only to the authorization for such consultations (as provided by Art. 149, para. 1, no.32 of the Spanish Constitution), but also to their establishment and regulation. In the Spanish legal system, the referendum is considered to be the channel for the direct participation of citizens in public affairs. It is a participation with a political nature that is the subject of a fundamental right (Art. 23, para. 1 of the Spanish Constitution) whose development and regulation corresponds only to an Organic Law (Art. 81, para. 1 of the Spanish Constitution) and, more specifically, to that provided for in Art. 92, para. 3 of the Constitution for the regulation of the “conditions and procedure of the different modalities of referendum provided for in the Constitution”. In accordance with constitutional norms, only the State is competent to regulate the launch of a referendum, “whatever the modality or territorial scope on which it is projected” [Constitutional Tribunal Judgment no. 31/2015, of February 25 (*Fundamento Jurídico* 6.A)]. Autonomous Communities are conferred only with a competence of additional intervention [Constitutional Tribunal Judgment no. 51/2017, of May 10 (*Fundamento Jurídico* 6.a)].

However, there are some material limits to regional referendums. Among others, fundamental issues that were resolved in the constituent process, such as the definition of identity and the unity of title of sovereignty, are removed from the decisional capacity of constituted powers [Constitutional Tribunal Judgment no. 51/2017, of May 10 (*Fundamento Jurídico* 5 c) and d)] and should be submitted to the constitutional review process [Constitutional Tribunal Judgment no. 90/2017, of July 5 (*Fundamento Jurídico* 6, also citing previous decisions of the Court)]. Thus, an Autonomous Community cannot launch a referendum that goes beyond the framework of its own competences, or which affects fundamental issues resolved by the constituent process, and that are removed from the decision-making capacity of the constituted powers [Constitutional Tribunal Judgment no. 103/2008, of September 11 (*Fundamento Jurídico* 4) and Constitutional Tribunal Judgment no. 138/2015, of June 11 (*Fundamento Jurídico* 3)].

In the specific case of Law no. 19/2017, Catalonia’s government had called for a referendum without prior State authorization, and launched a referendum neither provided for in the Constitution nor in Organic Law no. 2/1980. Moreover, its explicit aim was to violate the essential principles of the Spanish constitutional order: national sovereignty, that resides with the Spanish people; the very unit of the Nation, constituted in a social and democratic State of law; and the supremacy of the Constitution itself, to which all public



powers are subject and also, therefore, the Parliament of Catalonia (Arts 1, para. 2, 2, 1, para. 1 and 9, para. 1 of the Spanish Constitution).

In addition, the Court emphasised, similarly to the affirmation of the Supreme Court of Canada, that “the Constitution is not the result of a pact between historical territorial instances that preserve rights prior to the Constitution and superior to it, but a norm of the constituent power that is imposed with binding force in its scope”^{XXXIX}. The premise of the sovereignty of the people of Catalonia marked the referendum of binding self-determination, that Law no. 19/2017 regulated and convoked, as unconstitutional for being irreconcilable with the unit of the Spanish Nation on which the Constitution is based (Art. 2 of the Spanish Constitution). According to the Tribunal, if such a consultation were to have been held in the conditions intended, that unit would have been legally aggrieved; for even if the vote had not implied the independence of Catalonia, that unit of the Nation, and that of the State in which it is constituted would have been canceled irremissibly. The principle of unity means that all Spaniards, as free citizens and equal in rights, are the only ones that, hypothetically, could be called upon to decide on the permanence and destiny of the State (Art. 168 of the Spanish Constitution);^{XI} they are the only holders of the constituent power, and a decision that could affect the whole nation, such as the secession of an Autonomous Community, cannot be granted to only a fraction of the Spanish people, as Law 19/2017 purported. The whole Constitution (also, therefore, its Art. 2) is not a *perpetua lex*:^{XLI} it is, without exception, susceptible of reconsideration and revision in law.^{XLII}

Finally, in much the same way that the Supreme Court of Canada had, in 1998, excluded the existence of a right to *external* and/or *internal* self-determination of the Quebec people, the Spanish constitutional judge stated that none of the “peoples of Spain” (as indicated in the Preamble of the Spanish Constitution), had the “right to self-determination”, considered by Law no. 19/2017, as the right to promote and consummate its unilateral secession from the State in which Spain is constituted. All the evidence shows that such a right is not recognized in the Constitution.^{XLIII} The inclusion of the right of self-determination, as interpreted by Catalonia with Law no. 19/2017, would mean that the act of sovereignty of the State in contracting international treaties, obliging Spain to recognize such rights under such conditions, would have entailed the paradoxical renunciation of that same sovereignty. These hypothetical commitments would have declared unconstitutional under the unconditional supremacy of the Constitution.^{XLIV}



6. Final Considerations

Part of Constitutional law considers secession as an *extra ordinem* fact. For a long time, it has considered it as an unconstitutional fact, even though some secession and independence was gained through the use of force. Over time there has been a progressive development of Constitutional approaches, where those aiming for secession have started to use a constitutional instrument: the referendum. This evolution has been possible thanks to the development in international law of the idea of secession as remedial right, part of the right to free self-determination of oppressed peoples. Thanks to the right of self-determination, the decolonization process found its justification and international legitimation and many oppressed peoples were allowed to gain independence.

The closed nature of constitutional law to the question of self-determination finds its justification in the protection of the principle of constitutional unity. In the XIX century, the unity of the State was considered as an almost absolute value; Constitutional law has progressively started to admit the possibility of secession; but only under certain conditions. The Canadian Supreme Court in the decision *Reference Re Secession of Quebec* has indicated which these conditions are, establishing a solid constitutional framework that has generated a constitutional tendency, progressively confirmed by other judges (in the cases of the Italian Constitutional Court and the Spanish Constitutional Tribunal). This tendency is characterized for three main elements. First of all, there is a constitutional tendency in considering the Constitution as a *pactum societatis* between all the individuals. In consequence any change to the constitution considered as a *pactum societatis* must be agreed between all citizens, including the possible secession of part of the territory that is inadmissible, such as a unilateral secession or a secession based only on the will of people territorially involved in the secession.

Secondly, there is a common constitutional trend toward the idea that the referendum is an instrument to allow people to take part in government or public policy decisions. It can also be an instrument capable of expressing a minority will, but this will cannot produce binding legal effects on the majority. If the minority will is *clear* – where *clear* means, as stated by the Supreme Court of Canada, that the results of the referendum must not be ambiguous in relation to the question submitted to the vote, as well as to the level of support achieved



- it can be considered as a starting point of a constitutional process to renew the *pactum societatis*.

Lastly, there is a constitutional consensus toward the configuration of the right to self-determination of people as a non-absolute right. Rather, it is conceived of as a fundamental right for people in a state of oppression but outside of these circumstances, the principle of State unity prevails over it^{XIV}.

* Inter-American Academy of Human Rights.

^I The reference is to popular consultations made under the vigilance of the League of Nations in contended territories: see Butler-Ranney (1978).

^{II} An independence referendum was held in Nevis on 10 August 1998 in order to secede from the Federation of Saint Kitts and Nevis. Although it was approved by almost 62% of voters, it was not valid because it needed a two-thirds majority to succeed.

^{III} See *infra*, paragraph II.

^{IV} According to a neutralistic approach, mainly sustained by traditional international doctrine, secession is considered as a *de facto* phenomenon, generally not explicitly authorized or prohibited by law (Quadri 1968: 423 ff.; Arangio-Ruiz 1971: 132 ff.).

^V According to Barbera “[...] a constitutional right to secede is manifestly absurd for the very nature of the Constitution [...]. The Constitution, any Constitution, being a pact to guarantee the political unity of a state, excludes secession by its very nature. The political pact underlying the Constitution applies to that particular people, to that specific territory. You can change everything you want, always remaining in the constitutional legality [...] but you cannot create two political communities, mutilate the territory without violating the Constitution” (Miglio and Barbera 1997: 177 f.). See also Bluntschli, who considers secession as a hypothesis of State extinction (1881: 253 ff.) and Jellinek, who underlines the ontological incompatibility of the hypothesis of a variation of the political organization with the very idea of the state assumed as a sovereign entity representative of a virtually perpetual socio-political reality (1949: 296 ss.).

^{VI} *Texas vs. White*, 74 U.S. 700 (1869)

^{VII} *Texas vs. White*, cit., 726. Emphasis added.

^{VIII} See Report of the Commission of Rapporteurs, League of Nations Council, Doc. B7 21/68/106, 1921.

^{IX} The basis of secession as a remedial right can be traced back to jusnaturalism and late middle age contractualism (Althusius 1614) as a legitimate instrument against the tyrannical government (Margiotta 2005: 31 ss.; Tosi 2006: 12-22). But it has been with Locke theorization that this idea has had a further and more complete development (Locke 1982: 227 ff.). See also Mancini 2012.

^X As demonstrated by the praxis developed in the Nineties in different States as Bosnia-Herzegovina, Georgia, Moldova, Azerbaijan, Kosovo, Chechenia and outside Europe in Tibet, Sudan, Comoro Island and Sri Lanka.

^{XI} Art. 39, para. 1 of the 1994 Constitution of Ethiopia: “Every nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession”.

^{XII} Art. 4, para. 2 of the 1921 Constitution of Liechtenstein (modified in 2003): “Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed”.

^{XIII} Art. 113, para. 1 of the 1983 Constitution of Saint Kitts and Nevis, according to which “1. The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis”.

^{XIV} Art. 219 of the 1996 Constitution of Chad (modified in 2005): “No cession, no exchange, no addition of territory, is valid without the consent of the People expressed by way of referendum”.

^{XV} Art. 62 of the 1992 Constitution of Djibouti (modified in 2010): “No cession, no acquisition of territory is valid without the consent of the people who decide by means of referendum”.

^{XVI} Art. 78 of the 1991 Constitution of Mauritania (modified in 2012): “[...] No cession, no exchange, no addition of territory is valid without the consent of the people who pronounce themselves by way of referendum. [...]”.



- XVII Art. 96 of the 2001 Constitution of Senegal: “[...] No cession, [or] no addition of territory is valid without the consent of the population interested. [...]”.
- XXVIII Art. 73 of the 1996 Constitution of Ukraine (modified in 2014): “Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum”.
- XIX *Reference re Secession of Quebec*, [1998] 25 S.C.R. 217.
- XX See Romero Caro 2017 (in this Special Issue).
- XXI Legislative resolution adopted by the Veneto Regional Council on March 5, 1992, on “Advisory Referendum on the Submission of a State Bill for Amending Provisions on the Regime of the Regions”.
- XXII Regional Law no. 12/2002, on “Consultative referendum on the implementation of a Constitutional Law proposal for the transfer to the Veneto Region of State functions on health, professional training and education, local police”.
- XXIII Statute of Autonomy of the Veneto Region approved with Regional Law no. 1/2012.
- XXIV The Constitutional Court declared the unconstitutionality of the questions provided in Art. 2, no. 2, 3, 4 and 5 for violating Arts. 26 and 27 of the Statute of the Veneto Region and of Art. 123 of the Italian Constitution, because they were related to tax matters. The Court underlined that these provisions violated the constitutional principles in the field of coordination of public finances since they affect the bonds of solidarity between the regional population and the rest of the Republic. In addition, the possibility that the Veneto Region was included among the regions with special statute affects fundamental constitutional choices that cannot be subject to regional referendums.
- XXV Constitutional Court Judgments no. 496/2000; no. 470/1992; and no. 256/1989.
- XXVI See also Judgment no. 80/2012.
- XXVII *Ex plurimis* see Judgments no. 81 and 64/2015.
- XXVIII It implies the possibility of introducing new types of referendums also in line with those laid down in the Constitution (Judgment no. 372/2004).
- XXIX Constitutional Court Judgment no. 188/ 2011.
- XXX See *supra* nota n. XXII.
- XXXI Constitutional Court Judgments no. 365/2007; no. 496/2000; no. 470/1992.
- XXXII In this sense see Italian Constitutional Court Judgment no. 1146/1988.
- XXXIII Italian Constitutional Court Judgments no. 365/2007; no. 306 and no. 106/2002.
- XXXIV On the Italian Constitutional Court Judgment no. 118/2015 see Conte 2015 and Tega 2015.
- XXXV On the Spanish Constitutional Tribunal Judgment on the Catalan Statute see Ibrido 2011.
- XXXVI See Spanish Constitutional Tribunal Judgments no. 31/2015 and 32/2015, both of February 25.
- XXXVII Both laws and Decrees no. 139/2017, of September 6, of the Generalitat of Catalonia, convening the Self-Determination Referendum of Catalonia and no. 140/2017, of September 7, on complementary rules for holding the referendum on self-determination, have been suspended by the Constitutional Tribunal, after being challenged by the Government under the provisions of Art. 161, para. 2 of the Spanish Constitution.
- XXXVIII Among the most recent see Spanish Constitutional Tribunal Judgment no. 90/2017, of July 5 (*Fundamento Jurídico* 3.d).
- XXXIX Constitutional Tribunal Judgment no. 76/1988, of April 26 (*Fundamento Jurídico* 3), and in the same terms Constitutional Tribunal Judgments no. 42/2014, of March 25 (*Fundamento Jurídico* 3), in which the Spanish Constitutional Tribunal makes an explicit reference to the Canadian Supreme Court Reference on the Quebec intent of secession; 259/2015, of December 2, *Fundamento Jurídico* 4.b); and 90/2017, of July 5 (*Fundamento Jurídico* 6).
- XI Spanish Constitutional Tribunal Judgment no. 103/2008, of September 11 (*Fundamento Jurídico* 2), according to which only citizens, acting necessarily at the end of the reform process, can have the supreme power, that is, the power to modify without limits the Constitution itself.
- XLI Every one of the constitutional provisions are susceptible of modification, but for this it is necessary the respect of the framework of the procedures of reform of the Constitution, since the respect to these procedures is, always and in any case, inexcusable [Spanish Constitutional Tribunal Judgment no. 138/2015, of June 11 (*Fundamento Jurídico* 4), and jurisprudence there cited].
- XLII The Spanish Constitution admits and regulates its total revision [Art. 168 of the Spanish Constitution and Spanish Constitutional Tribunal Judgment no. 48/2003, of March 12 (*Fundamento Jurídico* 7)].
- XLIII Spanish Constitutional Tribunal Judgment 42/2014, of March 25 (*Fundamento Jurídico* 3.b) and Spanish Constitutional Tribunal Decision no. 122/2015, of July 7 (*Fundamento Jurídico* 5).
- XLIV See Art. 95 of the Spanish Constitution and Art. 27, para. 2, let. c) of the Organic Law of the Constitutional Tribunal; Spanish Constitutional Tribunal Judgments no. 100/2012, of May 8 (*Fundamento Jurídico* 7); no. 26/2014, of February 13 (*Fundamento Jurídico* 3); and no. 215/2014, of December 18 (*Fundamento Jurídico* 3.a).



XLIV See also Fasone 2017.

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Judgment no. 42/2014, of March 25.

Judgment no. 215/2014, of December 18.

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Judgment no. 90/2017, of July 5.
Judgment no. 114/2017, of October 17.

US Supreme Court

Texas vs. White, 74 U.S. 700 (1869)



ISSN: 2036-5438

**The Spanish vision of Canada's Clarity Act:
from idealization to myth**

by

Francisco Javier Romero Caro*

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





Abstract

Since it was passed, the Clarity Act has been at the core of any secessionist debate in Canada and abroad. Although contested at home, the Clarity Act has earned worldwide prestige as *the* democratic standard that must be observed when a secessionist debate arises. In the last fifteen years Spain has experienced successive debates about the need to establish a mechanism of popular consultation to address secessionist claims in the Basque Country and Catalonia. Most political actors in favour of such consultations have expressed their will to import the Canadian Clarity Act as a tool to settle disputes on how to conduct a referendum. However, this deification of the Canadian example is, for the most part, based on a misreading of the Secession Reference, only taking into account certain passages while ignoring others. The emphasis tends to be made on the quantitative clear majority test, disregarding other factors. Hence, the aim of this paper is to study the causes of this deification of the Clarity Act in Spain, and its influence on the treatment of secessionist claims that the country is currently experiencing.

Keywords

secession, referendum, Clarity Act, Canada, Quebec, Spain, Catalonia



1. Introduction

Constitutional interpretation is not an easy task, and particularly so when courts have to deal with what Dworkin refers to as hard cases.^I In these situations, when the choice of norm to apply is not clear, or when there are legal vacuums, resorting to foreign experiences can shed some light on the issue and help legal operators to solve the case.

Facing a secessionist challenge that puts into question the unity of the state is, without any doubt, one of the hardest cases on which a Court might have to decide. Most Constitutions are silent on the matter, while some include clauses that declare the indissoluble character of the nation and the indivisibility of the territory.^{II} Therefore, the lack of positive legal materials to inform Court's decisions poses a big challenge that might be solved by referring to the practical wisdom of foreign judgments (Choudhry 2006: 4).

Although Choudhry focuses his approach on judges and tribunals, the migration of constitutional ideas also has an impact in the political arena. This migration might not just be between courts, but also from one Parliament to another. Secession is a complex matter that in its own intrinsic nature combines both the legal and the political (Mancini 2012: 483-487),^{III} hence, any answer to this problem has to include both elements.

Since the restoration of democracy in 1978, Spain has experienced several secessionist claims, with those coming from the Basque Country and Catalonia having a higher degree of intensity. The Spanish constitutional framework does not contemplate the possibility of holding a referendum to address such claims. This possibility has been rejected by the Constitutional Court according to article 2 of the Spanish Constitution, which affirms that sovereignty resides with the Spanish people and, as a consequence, not with the Autonomous Communities.^{IV}

Regardless of this theoretical consideration about the indivisibility of sovereignty, some political actors have turned their attention to the Canadian experience in order to find a legal framework to address these secessionist claims. After the narrow victory of the 'NO' camp in the 1995 referendum, the Canadian federal government decided that it was time to clarify the ground rules governing secession. Following the Reference Re Secession of Quebec,^V the Clarity Act was passed in 2000 with the aim of resolving some of the uncertainties created by the Supreme Court Reference.



Although contested by Quebec's sovereigntists, and also by some domestic and foreign scholars,^{VI} the Clarity Act has earned prestige worldwide as *the* democratic standard that must be observed when a secessionist debate arises, and Spain is no exception. In the last fifteen years, Spain has gone through several debates on the need to establish a mechanism of popular consultation, to address secessionist claims in the Basque Country and Catalonia. Most political actors in favor of these consultations have expressed their will to adopt the Canadian Clarity Act as a tool for settling disputes over how to conduct a referendum.^{VII}

If a bill such as the Clarity Act were to be implemented in Spain, would it help clarify the rules governing secession, reducing current tensions, or on the contrary would it make secession more likely? The Canadian example is a good lens through which to look, but it remains to be seen whether the consequences might be the same as on the other side of the Atlantic.

2. The Clarity Act in the Canadian constitutional system: a matter of dispute

In 1995 the unity of the Canadian federation was in question. The referendum on sovereignty was the epilogue of a period of tensions –a “constitutional odyssey” in Russell's words– between Quebec and the federal government that started in 1982 with the patriation of the Constitution without the consent of Quebec's National Assembly and continued with the failure of the constitutional rounds of Lake Meech (1987) and Charlottetown (1992).^{VIII} The ‘NO’ camp won by a margin of less than 55,000 votes (about 1.1% of the electorate), with the highest turnout to date in the history of the province of 93.52%.

This near-death experience led the federal government to refer the matter of the unilateral secession of Quebec to the Supreme Court. After years of constitutional disillusionment, the Supreme Court was called to settle the issue and decide if Quebec had a right to secede under domestic or international law.^{IX} In its reference the Supreme Court enlarged on the Constitution, which was described as a living tree,^X by identifying a series of unwritten rules that include, “the global system of rules and principles which govern the exercise of constitutional authority in every part of the Canadian state”.^{XI} The Court



highlighted four fundamental principles: federalism, democracy, constitutionalism and the rule of law and respect for minorities. These principles work in symbiosis, meaning that none of them can trump or exclude the others.^{XII}

The operation of these overlapping principles allowed the Court to conclude that Quebec had no right to unilaterally secede from Canada under domestic or international law.^{XIII} Nevertheless, the interaction of the same principles generated a duty to negotiate in good faith in the event of a clear expression of will of the people of Quebec that can only be derived from a clear majority on a clear question as a result of a qualitative evaluation.^{XIV} As Tierney (2004: 263) notes, the Court's conception of the term "unilateral" was very narrow, being understood as secession without prior negotiations. This consideration, together with the principles of federalism and democracy, resulted in the creation of an obligation to negotiate in good faith the practicalities of secession, as the rest of Canada could not refuse to enter these negotiations after a clear expression of the desire to pursue secession from the population of a province.^{XV}

With the intention of giving legal entrenchment to the Secession Reference, the federal government introduced the Clarity Act.^{XVI} According to Stéphane Dion, the Crown Minister responsible for the act, the bill was needed because the government of Quebec had refused to commit itself to the Court's opinion (Dion 2000: 21). In Dion's view, the interpretation of the Secession Reference made by the Parti Québécois (PQ) was incomplete. It merely focused on the obligation to negotiate, disregarding the notions of a clear majority and a clear question. The preamble of the bill stated that its purpose was to clarify the circumstances under which the government of Canada would enter into negotiations after a provincial referendum on secession. For that reason, the Clarity Act set the rules that must be observed before the federal government enters into any kind of negotiations with a province that wants to secede. According to section 1, the House of Commons has 30 days after the official release of the question to determine whether it is clear. In this process, the Commons would have to consider if the question would result in a clear expression of the will of the people of the province on whether the province should cease to be part of Canada. It must be noted that the Supreme Court did not greatly elaborate on what it understood as a clear question. It merely stated that it should be free of ambiguity and that it was a matter for the political actors to determine.^{XVII}



In addition, the federal government also limited the options that could be presented to the electorate, by establishing two types of questions that would not satisfy the clear expression of will requirement of the Act.^{xviii} This provision had the intention of preventing the federal government from entering into negotiations following questions such as those used in the 1980 and 1995 referendums (Haljan 2014: 367-368). It was also influenced by opinion poll data suggesting that there was an important degree of confusion among the electorate about what a victory of the ‘YES’ camp would actually have meant (Keating 2001: 98-101). In this regard, Murkens (2002: 52) questioned if this provision reflected the opinion of the Supreme Court, for the Reference contained no mention of a prohibition of asking about future arrangements with the rest of Canada.^{xix} But, as this issue was for the political actors to determine, nothing prevented the federal government from defining the clarity of a question according to these parameters.

In respect of the majority needed in any referendum, the Clarity Act established that the House of Commons should take into account the size of the majority of valid votes cast in favour of the secessionist option, the percentage of eligible voters voting in the referendum and any other matters or circumstances it considered relevant. The Clarity Act did not establish any threshold or minimum level of support required to consider that the result constituted a clear expression of the will to secede. The Court left the issue of the clarity of the majority for the political actors to determine, but it made two important remarks that need to be highlighted. The first one is that the clear majority has to come from a qualitative evaluation;^{xx} the second was that democracy, and the Canadian constitutional system, are more than simple majority rule.^{xxi} From these two premises it can be inferred that a simple majority could not be considered to constitute a clear majority, and that other factors such as the total number of voters or the territorial distribution of votes also need to be taken into account.

As mentioned above, there have been competing interpretations of the opinion of the Court in the Secession Reference between federal and provincial governments (Dumberry 2015: 370-379). In response to the Clarity Act –which made it almost impossible to achieve secession under Canadian law (Pelletier 2001: 526-527)– the National Assembly of Quebec enacted Bill 99, containing Quebec’s interpretation of the Secession Reference.^{xxii} It conferred the inalienable right to freely decide the political regime and legal status of Quebec on the Quebec people, with no external condition having effect on a referendum



unless determined by Quebec institutions. Bill 99 also stated in section 4 that the winning option would be the one that obtained 50% + 1 of the votes cast. Despite this, Monahan (2000: 4-5) recalls that there seemed to be a feeling among Quebecers that a clear majority was needed to be able to proceed with secession.

As we can see, some provisions of Bill 99 directly conflict with the regulation made by the federal government in the Clarity Act. Although this controversy was referred to the courts years ago, thus far no ruling has been issued.^{XXIII} To date, a third referendum is not on the agenda, as the PQ has committed itself not to hold one if they return to power as the *winning conditions* are far from being a reality.^{XXIV}

3. The Spanish vision of the Clarity Act

3.1. The process of idealization

The Canadian example has become a common recourse in the Spanish political arena in the last ten to fifteen years. The 5,686 kilometers that separate Ottawa from Madrid, together with the different cultural, political and constitutional realities of both countries, have not been an impediment for the Canadian model to become configured as a leading exemplar in respect of secessionist claims. Interest in the Canadian model came firstly from academia, where scholars mainly focused on two particular features of the Canadian constitutional system: the role of multiculturalism,^{XXV} and the Quebec question, being the latter the element that has had the biggest impact on the Spanish political landscape.^{XXVI}

Interest in the Canadian experience switched to the political arena following the 1995 referendum. The referendum and the subsequent reference issued by the Supreme Court were presented as examples of a true democratic culture. For the political forces pushing for a higher degree of national recognition, or even secession, those events proved the democratic nature of secessionist aspirations in a modern state. If Canada, one of the most advanced and democratic countries in the world, was divisible in allowing Quebec to gain independence in the event of a favorable result in a referendum, any country that wanted to be called democratic would have to do the same. This axiom translates into the proposition that to be democratic, a country has to allow any subunit to secede in the event of a favorable referendum on the subject.^{XXVII}



In Spain, admiration for the Clarity Act is widespread among the left of center and nationalist political parties as a standard that must be met in order to classify a constitutional system as democratic. The mantra of a “clear majority on a clear question” has been repeated for years without further explanation of what it really means or how would it be implemented in Spain. For its supporters, no true democrat could be opposed to the Clarity Act, as this instrument is the only viable tool to know the true will of the people on the question of secession. Hence, this Act results in a test of maturity for any system that defines itself as democratic.

This simplistic approach contains a reductionism of the Secession Reference to the obligation to negotiate, following the example of Quebec’s sovereigntists. The Spanish nationalist forces have identified those notions of the Canadian experience that are most favorable for their cause, presenting them as the “Canadian parameter”. The first one implies that it is possible and legitimate for a territorial subunit to conduct a referendum on secession. In Spain, referendums can only be called with the approval of the President, following article 92 of the Spanish Constitution. This legal difference between the two constitutional systems, together with the absence of a constitutional clause concerning the unity of the Canadian state, have been underestimated by some of the advocates of the Canadian experience. The second notion that has been highlighted by some of the advocates of this model is the duty to negotiate discussed above.

As López Basguren (2005: 12-14) remarks, these forces have consciously ignored important parts of the Canadian reality, creating their own vision and presenting it as if it were the Canadian model. This political discourse has benefited from the inaction of other political actors as, surprisingly, political parties opposing secession did not challenge this interpretation of the Canadian experience until some years ago. These parties left the monopoly of the “Canadian parameter” to the nationalist forces, which took advantage of this to create their own Canadian narrative.

As has been said above, the level of admiration for the Clarity Act varies across the political spectrum. In general terms, it is higher among parties that consider themselves to be to the left of center. These political formations have tried to find a balance between the principles of democracy and legality that could result in the recognition of the possibility of holding a referendum on secession within the current constitutional framework. Parties from the center to the right usually prioritize the principle of legality, stating that there



cannot be democracy without respect for the rule of law and the constitutional order. Among nationalist parties the interest in the Clarity Act is also high, but with a different perspective. These formations, especially those in Catalonia, tend to emphasize the value of democracy, as the centerpiece of their political discourse. They have created the term “*derecho a decidir*” (right to decide) that basically hides within it a right to self-determination (López Basaguren 2016: 166-171). In their view, the democratic principle must prevail over others, as there is no bigger power than the will of the people expressed in a referendum. This conception entails a notion of hierarchy among constitutional principles, democracy being a value superior to the others, an aspect that was expressly rejected in the Canadian Supreme Court Reference.^{xxviii}

In the first group, we find the traditional position of the PSC (*Partit dels Socialistes de Catalunya*), the sister party of the Socialists (PSOE) in the Autonomous Community of Catalonia. For this formation, the Clarity Act is a federalist tool that can be used to address secessionist claims. The PSC defends a federal reform of the Spanish Constitution, a Clarity Act being an alternative in the event of that reform failing (Pascual 2016a). For the leader of the PSC, Miquel Iceta, the Canadian Clarity Act lacks clarity, as it does not specify which question and majority must be considered as clear (Pascual 2016b). In his view, a Clarity Act has the virtue of encouraging agreements between the parties in conflict making secession less likely due to the requirement of a reinforced majority on a clear question.

Although these postulates have been defended for years by the PSC, they have been abandoned in the last months as they created major tensions with the PSOE.^{xxix} The importation of the Clarity Act would mean the acceptance of the possibility of holding a referendum on secession, an aspect that is rejected by the majority of the PSOE.^{xxx} However, for some socialist MPs like Odón Elorza, the enactment of a Spanish Clarity Act would make possible the combination of the principles of democracy and the rule of law (Elorza and Escudero 2015). In his proposal, Elorza structures the process in three tiers. To begin with, the Parliament of the Autonomous Community that wished to secede would have to approve a resolution in favor of a referendum by a reinforced majority. Secondly, the law would envisage that the central Government is obliged to call a non-binding referendum on the issue, establishing the clarity of the question and the thresholds that would be needed to consider the result as clear. If these majorities were accomplished, the result would trigger good faith negotiations between the parties, in order to proceed



with the separation via an amendment of the Spanish Constitution (Elorza and Escudero 2015).

In this proposal, we can clearly see the influence of the Canadian example, with some important variations. In the Canadian case, the question and the result are valued *a posteriori*. In Canada, the provincial government sets the wording of the question and the Commons have 30 days to determine its clarity before the referendum, while in this case the wording of the question would be decided by the national government, as the competent body to call the referendum. The number of votes that would constitute a clear majority would also be established before the referendum, in contrast with the Canadian case where it is a matter that has to be decided by the House of Commons after the vote.

Center right parties such as the People's Party (PP) and Ciudadanos are totally opposed to secession and to the possibility of holding a referendum, an aspect that they consider as a breach of the constitutional order (Tudela Aranda 2016: 479). For these organizations a Clarity Act is not a viable instrument to reduce secessionist tensions because it would legitimate secessionist aspirations and could result in the dynamic of a *neverendum*.^{xxxI}

The nationalist parties represented in the Spanish Parliament tend to be favorable towards a Clarity Act, or at least, to their own interpretation of it. The Basque Nationalist Party (PNV) has expressed its position in favor of the act, as it would allow the democratic expression of the people through a referendum^{xxxII}. The PNV also notes that the notion of clarity should be developed and included in the law, in order to reduce the possibility of a conflict over the interpretation of the results of an eventual referendum. The Catalan sovereigntists, particularly PDECat (formerly CiU), used to take great interest in the Canadian case, frequently drawing parallels between Quebec and Catalonia. Their interest in the Clarity Act was high in the past, but has fallen in the last couple of years since they started to push for unilateral secession. As has been mentioned, their focus was on the democratic principle, from which they derived a right to self-determination. In their offers to the national government, in order to agree on the terms of a referendum, the Catalan parties –grouped in a collation called Junts Pel Sí (Together for Yes)– centered their agenda in the negotiation process after the vote, disregarding the notions of clarity. A good example of this was the unofficial referendum that they called in 2014 that will be discussed further below.



The postulates of the new left-wing party, Podemos, are difficult to classify in the typology of these groups. Although the party has a strong leftist ideology, it has formed alliances in the Basque Country, Galicia and Catalonia with other formations with a strong nationalist component. As a result, its position regarding secession tends to differ from one territory to another. Their national leader, Pablo Iglesias, has stated that they support the *derecho a decidir*, in line with other nationalist political parties, but without any breach of constitutional legality.^{xxxiii} During the Basque electoral campaign in 2016, Podemos proposed a Basque Clarity Act to regulate any future referendum that redefined the status of the Basque Country. This bill would include provisions regarding the wording of the question and the size of the majority needed with the objective of reducing uncertainty and increasing the transparency of the process (Gorospe 2016). The legal instrument proposed by Podemos only concerned the Basque Parliament, without any further explanation as to how the result would be implemented, or if it would trigger any negotiations with the national government. This proposal seemed to be an effort to attract nationalist voters during the campaign as, so far, this political formation has not introduced any bill related to the issue and it seems that they do not plan to do so in the near future.

3.2. Getting it wrong: reality versus myth^{xxxiv}

As we can see, the deifying of the Canadian example is, for the most part, based on a misreading of the Secession Reference, only taking into account certain passages while disregarding others. The emphasis tends to be placed on the quantitative clear majority test, discussing what percentage should be established as the threshold needed to trigger negotiations to allow secession. The Canadian Supreme Court referred to this test not just as a quantitative matter, but also as a qualitative evaluation. This last consideration is almost absent in the Spanish literature or in the political discourse, as if it never existed.

The question that thus arises is the following: why is qualitative analysis absent for the much praised “Canadian parameter” in the Spanish debate? In my view, the answer lies in the fact that this analysis could become a counter argument for those in favor of secession. To take qualitative elements into consideration, we have to take a closer look to aspects such as the distribution of support of the secessionist cause across the territory, the presence of minority groups or the degree of turnout in the event of a referendum. These three aspects tend to perform a role that does not play in favour of the secessionist



movement. Taking the vote for nationalist parties as an indicator of support for the secessionist cause, we find that there is a substantial difference in popular support for this option between certain parts of the territory (e.g. Álava and its capital, Vitoria, in the Basque Country or the cities of Badalona and Tarragona in Catalonia).^{xxxv} The presence of minority communities, like the linguistic minority in the Val d' Aran in northwest Catalonia, cannot be disregarded, as their interests need to be preserved.^{xxxvi} Turnout is also an important element, as part of the population could express their rejection of the secessionist option by abstaining, if they consider the consultation to be illegal or illegitimate.^{xxxvii} In the event of a referendum on secession, qualitative aspects like these could have a decisive role in considering whether the result is clear or not.

Another point that is often misunderstood is the obligation to negotiate. In Spain, this duty tends to be characterized, particularly by those in favor of the *derecho a decidir*, as an obligation for the rest of the state to allow the subunit to secede. Hence, for these actors, the negotiation should be about the details of secession and not about secession itself, an aspect that they take for granted. This interpretation clearly contradicts the opinion of the Supreme Court in the Secession Reference. For the Court, the conduct of the parties in the negotiation process should be governed by the same principles that gave rise to the duty to negotiate.^{xxxviii} Those principles imply a rejection of the proposition that there is a legal obligation to accede to secession, as this would mean that the subunit would dictate the terms of the proposed secession, thereby nullifying the process of negotiation.^{xxxix} At the same time, the federal government could neither refuse to enter into negotiations, nor conduct them in such a way that would suppose a complete denial of Quebec's rights, as this would give some legitimacy to the demands for a unilateral process. Therefore, the Supreme Court created a duty to negotiate in good faith, excluding the extreme positions of both parties, although this duty might indeed result in the secession of the territorial subunit.

In Spain, there seems to be a high degree of confusion between the obligation related to the means, the negotiation process as created by the Supreme Court, and an obligation related to the objective, which is the one desired by Quebec's sovereigntists. The negotiation process is not about the logistics of secession, as is commonly understood in Spain, but about the whole issue of secession. The content of the agreement that would result from these negotiations, or even the failure to reach one, is an issue for both parties



to determine without either ruling out the possibility of secession, or taking it for granted. The confusion existing in Spain about the duty to negotiate could have its roots in the fact that the Canadian model has long been defended by nationalist parties that were the first to present the “Canadian parameter” as a solution to their secessionist claims. As they were the pioneers in recurring to the Canadian experience in the political arena, their interpretation has become dominant.

It is also interesting to note that the misreading of the Secession Reference, and the misinterpretation of the Canadian experience, is not limited to politics. The Spanish Constitutional Court, in its STC 42/2014 judgement, briefly cited the opinion of the Canadian Supreme Court on the issue of Quebec’s secession in support of its own rejection of the possibility that an Autonomous Community could unilaterally call a referendum of self-determination (Fossas Espadaler 2014: 287-288). This prohibition, together with the conclusion that a region cannot secede unilaterally, was inferred from the principle of sovereignty.^{XI} The recourse of the Spanish Constitutional Court to the Canadian experience is confusing, because sovereignty is not among the principles used by the Canadian Supreme Court and, as a consequence, the comparison is not accurate (Ferrerres Comella 2014: 581). Furthermore, Canada’s Supreme Court did not question the legality of the first step –the referendum– but the legality of the final act of purported unilateral secession.^{XII} The Canadian Supreme Court declared that unilateral secession could not be the result of a unilateral referendum, but did not rule on the constitutionality of the referendum itself. Hence, it is not possible to draw parallels with the Canadian experience on the referendum issue, because this aspect was not controversial in Canada as provincial competence to call the referendum was taken for granted.^{XIII}

All things considered, it seems clear that Spain’s Constitutional Court misconstrued the Canadian reality, and referred wrongly to it as a comparative argument to justify the unconstitutionality of the Catalan Declaration of Sovereignty and the subsequent referendum (Fossas Espadaler 2014: 284; Solozábal Echevarría 2015: 46). By doing so, the Constitutional Court made the same incomplete interpretation that politicians often do, a mistake that should be avoided by the maximum interpreter of the Constitution.

Returning to the Clarity Act and its impact on secessionist processes, it should be recalled that the biggest virtue of the act is that it establishes a set of rules to address a referendum on secession. These rules should have an impact on the body that wants to



hold the referendum, as it would need to respect them in order to be able to enter into negotiations in the event of a victory of the secessionist option. This reasoning should lead us to think that those political parties that have tried to call a referendum on the issue in Spain would have abided by them, in order to increase their legitimacy and gain support for their cause. However, their defense of the virtues embodied in the Clarity Act has been limited to theoretical considerations, but not to their political action. So far, there have been two attempts to hold referendums on issues like secession, sovereignty or redefining the political status of an Autonomous Community.

3.2.1. Ibarretxe's plan and the status of the Basque Country

The first case was the project of a new Statute of Autonomy for the Basque Country passed by the Basque Parliament in 2004. This project, commonly known as *Plan Ibarretxe* after the political leader of the Autonomous Community at the time, was presented as a legal document inspired by the Canadian model. The Basque Government often mentioned the Canadian experience during its defence of the plan, and the Preamble of the proposed Statute of Autonomy included “the compromise of not exercising unilaterally the right to self-determination” and “the obligation to negotiate with the Spanish State”.^{XLIII} These two formulations were clearly borrowed from the opinion of the Canadian Supreme Court in the Secession Reference, but they were manipulated in order to meet the political needs of the political parties supporting the new legal framework.

Article 13 of the proposed statute regulated the possibility of holding a referendum on a new political relationship between the Basque Country and the rest of Spain.^{XLIV} According to the provision, an absolute majority of the total of valid votes would be considered as a clear expression of will. In practice, that meant that the plebiscite could be won with just 50% + 1 vote. In a consultation with two options to choose, yes or no, the absolute majority is equal to the majority of votes as the winning option is always going to have a support over 50%. Therefore, this article established the simple majority rule as the winning formula. This formula fails to respect any notions of clarity based on the Canadian model, as it could in no way be considered a clear majority. Again, the qualitative parameter of the majority test was absent, making it evident that this element is absent from the “Canadian parameter” as used in Spain.



Furthermore, the same article added that in the event of such support being achieved, a negotiation process should be started in order to materialise the will of the people. That legal provision implied that negotiations must lead to a change in the political status of the Basque Country, as a sort of automatic process with no other options or issues to be discussed. This conception of the negotiation process was also very different from the one envisaged by the Canadian Supreme Court. The Court characterised the negotiations as difficult, highlighting that their result was uncertain and for the political actors to determine. The almost automatic result envisaged by the Basque Parliament was closer to the position of the Parti Québécois, which also thought that the only possible outcome of negotiations was for the secession of Quebec.

Although the whole process was inspired by the Canadian experience, the provisions of the proposed Statute of Autonomy related to the referendum were based on a biased reading of the Secession Reference. The articles regarding the formula for victory, and the subsequent negotiations, were incompatible with notions of clarity that inspired the Clarity Act. Also, the reference to the “Canadian parameter” seemed to be a mere marketing strategy in order to give a comparative legal basis to the project of reform. In any case, the project failed in early 2005 when the Spanish Parliament rejected it with an overwhelming majority of 313 to 29, with two MPs abstaining.

Three years later the Basque Government again recurred to the Canadian experience to find a legal basis for a new formulation of the *derecho a decidir*, but the plan failed after the Constitutional Court, in STC 103/208, rejected this formula (Ridao 2014: 103-105).^{XLV}

3.2.2. Catalonia and the 9N consultation

Recourse to the Canadian process as a factor of legitimacy has also been a feature in Catalonia. In this region, the political struggle tends to be about the possibility of holding a referendum on secession. In this context, the “Canadian parameter” is presented as a model of democracy. For those who share this view, the 1980 and 1995 referendums in Quebec are examples of the true democratic nature of the Canadian constitutional system, as it allowed the consultation of the Quebec electorate on the issue of sovereignty. Following this reasoning, the rejection by the central government of the possibility of holding a referendum shows a lack of democratic culture that legitimizes the recourse to unilateralism.



In 2014, the Catalan government called for a referendum on the political future of Catalonia. As it was declared unlawful by the Spanish Constitutional Court, the Catalan government –with the aid of thousands of volunteers– conducted a participatory process designed to be like a referendum. This participatory process took place on November 9 2014 and consisted of a double question in which the second part was subordinated to the answer given in the first one. Those questions were originally designed for the referendum that was suspended by the Constitutional Court, but were carried over into the participatory process. These were:

a) *Do you want Catalonia to become a State? (Yes or No)*

If the answer is in the affirmative:

b) *Do you want this State to be independent? (Yes or No)*^{XLVI}

As we can see, the questions were anything but clear. The first concerned the possibility of Catalonia becoming a State. There was no mention of what was understood by the term State. It could be inferred from the second question that answering yes to the first one did not imply voting for secession as this issue was reserved for the following question. Therefore, if that State was not independent, what would be meant by voting yes to the first question and no to the second? This could include a wide range of possibilities that were not specified in the ballot, and could not be determined alone by the people of Catalonia, as a federal reform of the Spanish Constitution, or the establishment of confederation or an associated state.^{XLVII} The ambiguity of the question and its lack of clarity also had consequences in the process of interpreting the results (Castellá Andreu 2014: 232). There were three possible ways of filling the ballot (no, yes/yes and yes/no) plus the option of just answering one question and leaving the other blank. The issue of secession was contained in the second question, but the results had to be interpreted in relation to the first question, adding complexity to the process of evaluating the existence of a clear majority. Also, as there was no official census, no turnout figure could be calculated, an aspect that rendered it impossible to take into account the qualitative aspects of the result.^{XLVIII}



The participatory process conducted in Catalonia in 2014 perfectly illustrates the biased and partial interpretation that tends to be made of the Canadian experience in Spain. Some parts of the “Canadian parameter” were used as a tool to increase the legitimacy of demands for a referendum, while others, notably those related to the Clarity Act, were ignored, as they were not convenient for the secessionist cause. The participatory process did not meet any of the notions of clarity established by the Canadian Supreme Court and, hence, would not have satisfied the requirements of the Clarity Act.

4. Migration and its limits: lessons from the Canadian experience

The two examples discussed above are illustrations of how, in Spain, the Canadian reality has been distorted in order to serve the interests of certain political parties. The Canadian experience is a compact that contains several elements that cannot be separated from each other. The selective use of some of those elements, while ignoring the others, has been common in Spain for some time.

The Canadian experience offers plenty of lessons that could be useful to address the secessionist claims that Spain is currently experiencing, but they need to be put in context within the constitutional reality. In my view, becoming obsessed with importing foreign ideas to solve domestic problems is a mistake. Canada is a good comparative case to study how other countries have reacted to secessionist tensions in their own territory, but the Canadian model cannot be separated from the Canadian constitutional framework. The foundations of some of the elements of the Canadian experience that have been frequently quoted by the Basque and Catalan nationalists reside in the constitutional structure of the Canadian system, which is very different from the one present in Spain.

First of all, Canada is a federal entity while Spain, although it presents some federal elements, is a decentralized state where the subunits are not sovereign bodies.^{XLIX} One of the myths that are often cited by those in favor of the *derecho a decidir* is that the Canadian government agreed to the referendums in Quebec. If we take a closer look at the Canadian Constitution we will see that the power to conduct referendums is absent.¹ Canada follows the British model with a Westminster system of government, and the figure of referendums is considered alien to the British tradition, as these systems are based on the doctrine of



parliamentary sovereignty (Dicey 1915: 78). In contrast, as was said above, referendums are regulated by the Spanish Constitution and must be called by the central Government.

A second feature is that Canada lacks a constitutional clause declaring the territorial integrity of the state. The absence of this constitutional provision allowed the Supreme Court to declare that Canada is divisible under certain circumstances.^{LI} These circumstances are those regulated by the Clarity Act, notably the existence of a clear majority on a clear question regarding the secession of a province from the rest of Canada. As Stéphane Dion has stated in several of his conferences in Spain, a mechanism of the type established in the Clarity Act is incompatible with the existence of a constitutional clause declaring the indissoluble unity of the Spanish nation.^{LII}

Regarding secession, the Canada-Quebec dynamic is an anomaly, a democratic exception, which cannot be considered as a general trend.^{LIII} The anomaly of the Canadian case does not, however, mean that it is not a valuable experience. The Canadian model was useful in Canada in a particular political context. Although there is no clear evidence that the Clarity Act has contributed to settling the issue of Quebec's independence, it was a turning point on the issue of secession. For the first time, the Canadian federal government acknowledged the possibility of entering into negotiations regarding the secession of a province, but it conditioned them to the existence of a clear majority on a clear question. The establishment of these conditions also had an influence on the secessionist camp, as the legitimacy of their cause was subordinated to the achievement of these conditions. Otherwise, the process would be considered as unlawful and the international recognition of the state would be compromised due to the unilateral nature of the process of secession.

The Canadian model is useful as a comparative example, but it has to be taken as a compact in order to be able to learn from the experience. Focusing on just one aspect, or making biased interpretations as some politicians do in Spain, is a mistake. Contrary to the general perception in Spain, the Canadian experience has more to offer to the federalist cause than to those pushing for secession. It underlines some of the weaknesses of the secessionist strategy, especially when it is confronted with a clear legal framework to respond to a secessionist challenge.

In 1980 and 1995 the federal government was on the defensive, always having to react to the movements of the secessionists. After the traumatic experience of the 1995 referendum the federal government went on the offensive and settled the terms of the



quarrel with the Clarity Act. In Canada, but also in Spain, the secessionist parties are the champions of ambiguity, and attempt to take advantage of such situations to pursue their ends, disregarding any legal notion, with the defense of the democratic principle as their justification (Tornos Mas 2014: 47-48). Thanks to the Clarity Act, the secessionist movement can no longer claim that their democratic rights are violated or that their will is not respected. The disappearance of ambiguity and its replacement with the notion of clarity is one of the biggest lessons of the Canadian experience. The notion of clarity, and the subsequent duty to negotiate in good faith, have deactivated the unilateral path to secession, and the recourse to ambiguous questions aimed at influencing the electorate, together with the defense of the simple majority rule as a model of democracy. These instruments, defended by the Parti Québécois in 1980 and 1995, are no longer accepted. Since the Clarity Act, secessionists must abide by the procedure established in that act; otherwise the federal government will refuse to enter into negotiations on secession (Dion 2014: 34-36).

5. Concluding remarks

Once the impact of the Clarity Act on the Spanish political system has been assessed, a debate about the effect of such an act in Spain arises. What would be the consequences of the implementation of a Clarity Act in Spain? Would they favor the unity of the state or, by contrast, would they help the secessionist cause?

Trying to measure the impact of the transplant of the Clarity Act into the Spanish constitutional system is no easy task. The choice of the metaphor of the transplant instead of that of migration is no casual coincidence.^{LIV} Implementing an act such as the Canadian Clarity Act in the Spanish legal system is a very invasive operation with a high risk of rejection. Although its values are useful, the nature of the Clarity Act is very different from the legal foundations of the Spanish constitutional system.

Transplanting the Clarity Act would imply important concessions by the central government. First, it would mean that holding a referendum on secession is possible, a scenario that has been denied by all governments to date. To overcome this difficulty, we could imagine a political compromise between the central government, and its counterpart in the Autonomous Community, to hold a referendum in order to know the will of the



people regarding the issue of secession. The transfer of the competence to conduct referendums to the autonomic government has also been suggested as an alternative.^{LV} Secondly, it would also imply that article 2 of the Spanish Constitution relating to the indivisibility of the state should be amended, or at least reinterpreted, in order to make Spain divisible.^{LVI}

As these two considerations seem highly unlikely in the current political context, the impact of a Clarity Act should be limited to the values that the Canadian experience contains, but not to the act itself. Notions of clarity could be useful in the context of a non-binding referendum authorized by the central government to know if the people of an Autonomous Community want to cease to form part of Spain. Applying this concept to the wording of the question would assure that the result represents the true will of the people, and that it has not been influenced by a biased setting of the question as in 2014 in Catalonia.

As has been said above, the concept of a clear majority is the one that has had the greatest impact upon the Spanish political landscape. An ambiguous formulation like the one in the Clarity Act is unlikely in Spain, as most actors have expressed their preference for a complete regulation of the issue. An illustration of this, although it was not an enlarged majority, is the aforementioned provision of the project of Statute of the Basque Country regarding a referendum on its political relationship with Spain.

Setting the minimum required percentage in favour before a referendum could help to evaluate if its result is clear or not, as there would be clear rules to decide what would constitute a clear majority. But this presetting of a clear majority entails the risk of subordinating the whole process to this issue, thereby conditioning the final result. As much as the wording of the question can influence the electorate, the presetting of a majority threshold can do so as well. If the achievement of that enlarged majority seems unlikely some voters could be tempted to vote for that option in the hope that it would translate into a higher degree of autonomy. Also, this factor could exacerbate secessionist tensions with the intention of mobilizing the electorate in order to achieve the required level of support. As a consequence, this could make secession more likely.

The duty to negotiate is also an important value that should be taken into account. Negotiations are an essential element of politics, and any effort to address a threat of secession must involve such a process. Contrary to the conceptualisation that those in



favour of secession tend to make, this duty does not comprise an obligation to negotiate the details of secession, but an obligation to negotiate the whole issue that might, or might not, lead to secession. If we take it in broader terms, this value enshrines an obligation to address the problem of secession, an obligation to recognise that there is a part of the population that is discontent with the political arrangement currently in place, and that desires a change. This negotiation could result in the amendment of the Constitution in order to accommodate certain national or regional sensibilities. In this sense, the duty to negotiate could be seen as a test of the maturity of any democratic system, which has to adapt to address certain challenges even if those put into question the constitutional framework in place. This conception of the duty to negotiate is useful, even for those political forces that are opposed to secession, and that often do not pay much attention to the Canadian model. As said before, the Canadian experience contains more lessons against the secessionist cause than in favor, but they have been silenced due to the lack of interest of these political actors.

All things considered, it would be good for Spain to develop its own framework to respond to secessionist challenges, instead of copying the Canadian experience. Even though transplanting the Clarity Act does not seem a good choice, its inherent notions are a good starting point, but they need to be adapted to the constitutional architecture of the Spain. Enacting a legal framework to address secessionist claims will help to reduce tensions between both levels of government, delegitimising the recourse to a unilateral path to secession. It will also enhance cooperation between governments, as the political agenda would not be focused only on secession.

The aforementioned values of the Canadian experience have helped to decrease the uncertainties and ambiguities of the process and could be useful in the drafting of a Spanish model. Furthermore, by articulating its own legal framework Spain could implement elements such as a *cooling down* clause that are not present in the Canadian experience.^{LVII} This clause would prevent the *neverendum* dynamic that was mentioned before. Other elements like the requirement of a higher quorum than for ordinary constitutional amendment or sub-territorial ratification could also be considered.^{LVIII}

Nevertheless, an exclusive focus on the issue of referendums is a mistake, as there are other factors that need to be assessed. The lessons of the Canadian experience are useful with regard to the matter of referendums and the legitimacy of unilateral secession, but



there is a bigger picture. If Spanish institutions want to redirect the situation and reduce support for sovereignty in Catalonia, they must address other issues such as the distribution of competences, the distribution of finances, and an acknowledgment of national sensibilities in the Constitution. Secession is a hard case, and there are no easy ways to resolve it. Bold actions and a comprehensive legal framework are good tools to begin with but their utility is doubtful if there is no political will to find a compromise.

* PhD Candidate, University of the Basque Country (Spain). LLM in Constitutional Law at the Centro de Estudios Políticos y Constitucionales, Madrid (Spain) after graduating in Law and Business Management at the University Carlos III of Madrid. His main research interests are Canadian federalism and the politics of secession. He is the author of ‘Senado y sistema federal en Canadá: ¿imposibilidad de una reforma deseable?’ (*Revista de Estudios Políticos*, 2016). Email: franciscojavier.romero@ehu.eus. This paper was presented at the *Symposium on The Constitution of Canada: History, Evolution, Influence and Reform*, Scuola Superiore Sant’Anna, Pisa, 24 May 2017. The author would like to thank the conveners for their work and hospitality in Pisa.

^I Vid. Dworkin (1975) & (1978): 81. For Dworkin, hard cases are those that are not easy to solve for the judge because they cannot be resolved by the use of an unequivocal legal rule, set out by the appropriate body prior to the event. In these cases, principles play a crucial role in order to help the judge to settle the case. The issue of secession constitutes a hard case as there is no rule, unequivocal or not, to decide the case. Because of this, the Canadian Supreme Court resorted to the implicit principles that underlie the Constitution to establish a mechanism to address the secessionist demands of part of the Quebec population.

^{II} The indivisible character of the state is present in the constitutions of France (articles 1 and 89), Italy (article 5), Brazil (article 1), Mexico (article 2) or Norway (article 1). Even a state born out of secession like Kosovo defines itself as indivisible according to article 1.1 of its constitution. In this sense, we can also recall a passage of the United States Supreme Court in *Texas v White* US 700, 725 (1869) affirming that “the Constitution [...] looks to an indestructible union, composed of indestructible states”.

^{III} As Mancini (2012: 481) notes, secession is at once the most revolutionary and the most institutionally conservative of political constructs. This duality reflects the complexity of this phenomenon as it could constitute a great challenge to state sovereignty, but it also can be an incentive to reinforce the latter in order to avoid the dismemberment of the state.

^{IV} The Spanish Constitutional Court ruled in the STC 42/2014 that “*la Constitución atribuye con carácter exclusivo la titularidad de la soberanía nacional al pueblo español*” [The Constitution exclusively attributes the ownership of national sovereignty to the Spanish people], rejecting the consideration of the Catalanian people as sovereign as it constitutes only a fraction of the Spanish people.

^V Reference Re Secession of Quebec [1998] 2 SCR 217, hereafter *Secession Reference*.

^{VI} The *Parti Québécois* and the *Bloc Québécois* have openly criticized the act since its passing. In 2013 the BQ filed a motion to repeal it, but it was rejected by 283 to 5 in the House of Commons. Scholars like Pérez Tremps (2004: 53-55), Taillon (2014: 13-59), Rocher and Verrelli (2003: 220-232) and Haljan (2014: 379-380) have also stressed the ambiguities of the Clarity Act.

^{VII} Several political parties have expressed their support to the idea of importing the Clarity Act. This is the case, among others, of the PNV (Congreso de los Diputados 2014: 40), the PSC (2016a: 9) or JxSí, the collusion between CiU and ERC, (Hernández and Tomàs 2016).

^{VIII} Russell characterizes as a constitutional odyssey the quest to bring the Constitution home from the United Kingdom –patriation– and the subsequent efforts to integrate Quebec back in the constitutional consensus after it was left out in 1982. For an overview of this period vid. Russell (2004: 107-227), Oliver (2005: 160-184) and Stein (1997: 307-338).

^{IX} The questions raised were: 1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? 2) Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? 3) In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Quebec to effect the secession of Quebec from



Canada unilaterally, which would take precedence in Canada?

^x *Secession Reference*, para 52. This doctrine was created by the Judicial Committee of the Privy Council in *Edwards v. Attorney-General for Canada*, [1930]A.C. 124 (P.C.), p. 136 and has been revisited by the Supreme Court in cases such as *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, paras. 22-26 or *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, para 23.

^{xi} *Secession Reference* para 32.

^{xii} *Secession Reference* para 49.

^{xiii} The Court concluded that Quebec was outside of the scope of the situations where international law grants a right to external self-determination, as it was not a colony, its people were not oppressed and were not denied a meaningful access to government to pursue their political, economic, social and cultural development (*Secession Reference* para 138). For a detailed analysis see Woehrling (1999: 405-436).

^{xiv} *Secession Reference* para 87.

^{xv} *Secession Reference* para 88.

^{xvi} “An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession” Reference S.C. 2000, c. 26.

^{xvii} *Secession Reference* paras 87-92.

^{xviii} Following section 1(4) of the Clarity Act these are: (a) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or (b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.

^{xix} Although the *Secession Reference* does not contain a prohibition of asking about future arrangements, the notion of a clear expression of will seems to be in conflict with subordinating the answer to a future event that could or could not happen.

^{xx} *Secession Reference* para 87.

^{xxi} *Secession Reference* paras 73-76.

^{xxii} “An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State”, (2000, chapter 46).

^{xxiii} The judicial process started in 2001 when Keith Henderson, the leader of the Equality Party, impugned six articles of the Bill 99. Due to administrative problems the process was delayed for several years. In 2013 the government of Quebec and the federal government intervened to express their respective positions on the matter. Again, for administrative reasons, the ruling has been delayed and it should be rendered in 2018.

^{xxiv} This policy was initiated by Lucien Bouchard when he became PM of Quebec in 1996, who affirmed that he would not call another referendum until the winning conditions –*conditions gagnantes*– were met, in other words, until the support for sovereignty was high enough to guarantee a victory of the secessionist option (*Globe and Mail*: 1999). The recently elected leader of the PQ, Jean-François Lisée, has also committed himself to this idea (*Radio Canada*: 2016).

^{xxv} Related to this topic vid. Relaño Pastor (1999: 63-86), Oliveras i Jané (2001: 243-279) and Ruiz Vieytez (2006: 9-29).

^{xxvi} As an example of this interest, vid. Bilbao Ubillos (1999): 83-118, Pérez Tremps (2004) and López Basaguren (2013): 53-92.

^{xxvii} The former president of the Generalitat of Catalonia, Artur Mas, recalled this axiom by affirming that “Canada has much more respect for Quebec than Spain for Catalonia” Vallespin (2011).

^{xxviii} *Secession Reference* p. 221.

^{xxix} The reference to the Canadian model and the Clarity Act was erased from the PSC political manifesto in their XIII Congress held in Barcelona the 4th and 5th of November 2016. Vid. PSC (2016b: 12-13).

^{xxx} PSOE (2017): 38.

^{xxxi} The Canadian writer Josh Freed coined the term *neverendum* in relation with the repeated referendums in Quebec. He recalls the idea that once the first referendum has been held, subsequent referendums will be called until the victory of the secessionist option.

^{xxxii} Europa Press (2014) – Bilbao, 11th April 2014.

^{xxxiii} Europa Press (2017) – Madrid, 1st March 2017.

^{xxxiv} The expression “Getting it wrong” is taken from Paul Romney’s book: *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation*. In that book, Romney explains how Canadians once regarded the



Confederation as a compact of peoples, the English and the French, but with the passing of time that conception evolved into a centralist myth of the origins of Confederation.

XXXV In the Catalan elections of 2015, the secessionist coalition JxSí obtained 39.59% of the vote. This figure fell to 24.55% and 29.39% in the cities of Badalona and Tarragona, respectively. In the Basque elections of 2016 the PNV obtained 37.65% of the vote, while in the capital, Vitoria, it obtained only 25%. In the province of Álava the vote for the winning party was 29%.

XXXVI Around 30% of the population of this valley in the Pyrenees Mountains has Aranese, an Occitan language, as their mother tongue.

XXXVII As it was the case in the unilateral, and thus illegal, referendum on secession held on October 1st 2017 by the Catalan Government despite it was suspended by the Constitutional Court.

XXXVIII *Secession Reference* para 90.

XXXIX *Secession Reference* para 91.

XL STC 42/2014 – Fundamento jurídico 3.

XLI *Secession Reference* par 86.

XLII Vid. note 49 below.

XLIII The original text, in Spanish, was “*el compromiso de no ejercer unilateralmente el derecho de autodeterminación y el reconocimiento explícito de la obligación de abrir un proceso de negociación y pacto con el Estado*”.

XLIV The Basque government envisaged the Basque Country as a free state associated to Spain, in similar fashion to the sovereignty-association proposed by the Parti Québécois in 1980, and the new economic and political partnership in 1995.

XLV This plan was articulated through Law 9/2008, which contained provisions for a non-binding referendum to ask for a mandate to negotiate with the terrorist group ETA, and to conduct negotiations to design a new legal framework for the *derecho a decidir*. The preamble of the law made explicit references to the Secession Reference as a factor of legitimacy. As the referendum had an impact on sovereignty it was rejected by the Constitutional Court as it was a matter for the whole Spanish nation to decide on, not just a fraction of it.

XLVI As the questions were originally designed for the referendum, they were included in the Decree 129/2014 of the Generalitat of Catalonia that was enacted under the provisions of the Law 10/2014. The Constitutional Court suspended both norms after they were challenged by the Central Government. Following the ruling of the Constitutional Court the Catalan Government decided to carry on the participatory process with the same questions designed for the referendum.

XLVII It should be noted that any change in the Spanish Constitutional framework regarding the territorial organization of the state must obtain the approval of the Spanish people in a referendum.

XLVIII The census was elaborated on a case-by-case basis with data of the electors that voted. Some organizations opposed to the secession process claimed that there cases of fraud due to this issue.

XLIX The federal nature of Canada was contested by Wheare (1963: 19-20), who described the Canadian constitution as quasi-federal, although he conceded that it was predominantly federal in practice. This statement is based on a literal reading of the Constitution, in particular those provisions regarding the power of disallowance and the federal appointment of lieutenant governors which conferred powers to the federal government that could undermine the authority of the provinces. However, this idea was rejected by the Supreme Court in the Secession Reference (para 55) highlighting the undisputed federal nature of Canada given the fact that these powers has been abandoned. This idea is shared by Hogg (2007: 5-19) and Monahan (2013: 84-85). In relation to Spain, it has been described by Watts (2009: 55) and Moreno (2007: 95-97) as “*a federation in disguise*” because of the federalizing nature of the internal logic of the *Estado de las Autonomías*.

^L Quebec enacted its Referendum Act, chapter 64.1, in 1978 under the provincial residual clause regarding matters of merely local or private nature in the province of section 92.16 C. 1867.

^{LI} *Secession Reference* para 84.

^{LII} Conference at the Barcelona Bar on April 11th 2013 entitled “Secession and Democracy”.

^{LIII} In fact, in addition to the Canadian case, just two constitutions in the world, Ethiopia (article 39.1) and Saint Kitts and Nevis (article 115), contain provisions regulating the right to secession.

^{LIV} In relation with the metaphor, vid. Ewald (1995): 489-51, Nelken and Feest (2001) and Pegoraro (2013): 33-80.

^{LV} The Government of Catalonia requested the transfer of this competence in 2014 through proposition 125/000013, but it was rejected by the Spanish Parliament. It must be noted that in its ruling 103/2008 the Constitutional Court considered that holding a referendum on secession is against the Constitution as the sovereignty belongs to the nation. Any consultation in that sense needs a previous reform of the Constitution



in order to be compatible with it.

^{LVI} As Aláez Corral (2015): 151-157 recalls, there are not any material limits on the Spanish Constitution and, therefore, its complete amendment is possible. For that reason, this article should not be considered as an impediment to include a secession clause in the Spanish Constitution.

^{LVII} A *cooling down* –*enfriamiento* in the Spanish doctrine– clause refers to the entrenchment of a clause that bans the holding of a new referendum on secession for a period of time after one has been held with the aim of preventing a dynamic of continuous referendums on the issue. This clause settles the debate for a period, allowing the electorate to reflect on the issue without the passions of the political debate.

^{LVIII} See *Haida Nation v. British Columbia* (Minister of Forest), 2004 SCC 73. This territorial counting of the votes could be a tool to address the issue of different degrees of support for secession among the territory of a given Autonomous Community. The requirement of an enlarged majority would not just apply to the final result, but also to the result in each province that integrates the Autonomous Community that wants to secede. These elements have a qualitative nature in line with the reasoning of the Canadian Supreme Court. This instrument could also be used to protect minorities that are not concentrated in a sub-unit, like those resulting from immigration. In this sense, *vid.* Saénz Royo (2016: 145-148).

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ISSN: 2036-5438

Franchises Lost and Gained: Post-Coloniality and the Development of Women's Rights in Canada

by

Charlotte Helen Skeet*

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





Abstract

The Canadian constitution is to some extent characterised by its focus on equality, and in particular gender equality. This development of women's rights in Canada and the greater engagement of women as political actors is often presented as a steady linear process, moving forwards from post-enlightenment modernity. This article seeks to disturb this 'discourse of the continuous,' by using an analysis of the pre-confederation history of suffrage in Canada to both refute a simplistic linear view of women's rights development and to argue for recognition of the Indigenous contribution to the history of women's rights in Canada.

The gain of franchise and suffrage movements in Canada in the late nineteenth and early twentieth century are, rightly, the focus of considerable study (Pauker 2015). This article takes an alternative perspective. Instead, it examines the exercise of earlier franchises in pre-confederation Canada. In particular it analyses why franchise was exercised more widely in Lower Canada and relates this to the context of the removal of franchises from women prior to confederation.

Keywords

women's rights, pre-Confederation, franchise, indigenous women, constitutions



1. Introduction

Canada has an international reputation as a standard setter in relation to women's rights (CEDAW 2003: Para 16) and the Canadian constitution is to some extent characterised by its focus on equality, and in particular gender equality (FAFIA and NWAC 2015: 9).¹ The development of women's rights in Canada and the greater engagement of women as political actors is often presented as a steady linear process, moving forwards from post-enlightenment modernity. In this view rights acquisition and political engagement are linked to 'Western' ideas of progress, and closely associated with 'Western' models of development (Fraser 1999; Friedman 1995). This presents a view of history that Foucault terms a '... discourse of the continuous...' (Foucault 1982:12). This perspective on history has been criticised by postmodern scholars and particularly by feminists. (Foucault 1982; Scott 1988). Amongst other things feminist critique notes that it can place women's rights and non-western cultures in an oppositional relationship leading to the paternalistic treatment of indigenous women^{II} (Green 2007). In addition an alignment of women's rights with the experience of middle class white women's emancipation crafts an understanding of gender discrimination and shapes the context of women's rights in a way which fails to take into account the significance of class and race, and other cleavages (hooks 2000; Crenshaw 1989). This can be seen in Canada itself where general views of women's rights fail to recognise the very serious problems of rights 'enjoyment' for Indigenous women. For example Indigenous women are over represented as victims of violence in Canada and underrepresented in political positions (Palmater 2016). These disparities in the enjoyment of rights have been presented as an anomaly and, because they did not fit a picture of the steady development of women's rights in Canada, were blamed on the dysfunctionality of indigenous communities themselves rather than any failing within the Canadian state (Palmater 2016). This article seeks to disturb this discourse of the continuous,' (Foucault 1982: 12) by using an analysis of the history of suffrage in Canada to both refute a view of women's rights as developing through simplistic linear progression and by arguing for recognition of the Indigenous contribution to the history of women's rights in Canada.



The gain of franchise and the development of suffrage movements in Canada in the late nineteenth and early twentieth century are, rightly, the focus of considerable study (Pauker 2015). This article takes an alternative perspective. Instead, it examines the exercise of earlier franchises in pre-confederation Canada. In particular it analyses why franchise was exercised more widely in Lower Canada and relates this to the context of the removal of franchises from women prior to confederation. Existing literature both references and provides some discussion of the phenomenon of women's early franchise in Canada (Bradbury 2012; Garner 1969; Cleverdon 1950; Campbell 1989). This article draws on the existing secondary literature and uses contemporary primary sources to provide context for both the exercise of and the exclusion from franchise in the pre-confederation period. Distinctively, this article refutes the orthodox explanation given by *The History of the Vote in Canada* (Elections Canada 1997) and by John Courtney (Courtney 2004), that the higher incidences of voting by women in Lower Canada were due to the absence of the Common Law. Alternatively it is suggested that any difference is due among other factors, to the role of women, and particularly indigenous women, in the development of Lower Canada. The context of women's explicit exclusion from franchise in pre-confederation Canada is also analysed through this new perspective. The article argues for the significance of this legal history to current theory and debate on the political and legal contexts of development of women's rights, particularly in the context of indigenous women's rights in Canada.

The next section (2) sets out the recorded incidences of women's voting in pre-confederation Canada and challenges the orthodox reasons given for the higher incidence of voting in Lower Canada. Section 3 provides out an alternative explanation for the difference in political culture while section 4 analyses the removal of these early franchises from women. The section goes on to link these legal changes to change in the context of the imperial project and the nature of colonialism. Section 5 concludes by arguing that this 'lost' history has a contemporary resonance on understandings of women's rights in contemporary Canada.



2. Pre-Confederation Canada

2.1. Charting Franchise Exercise

The history of women's suffrage in Canada, might appear to support a view of rights acquisition as a linear development. For example *Edwards v. A.G. Canada* ([1930] A.C. 124), the Persons Case, is presented as one of those defining constitutional moments along the way of a steady progression of women's rights. Yet within the 'Persons Case' itself we can also read illustrations of the historical complexity of women's fluctuating positions in society and the more diverse origins of respect for women's equal worth. *Edwards v. A.G. Canada* ([1930] A.C. 124), held that women in Canada had a constitutional right to stand for Senate. Lord Sankey rejected an originalist interpretation and instead found that the Canadian Constitution was a 'living tree' (*Edwards v. A.G. Canada* [1930] A.C. 124: 136) capable of growth and reinterpretation in line with changing social circumstances.ⁱⁱⁱ The reasoning in this case seems to fit the understanding of rights acquisition as linear. Yet in *obiter* statements Lord Sankey found that women had exercised franchise without explicit grant, noting that 'In Quebec, just as in England, there can be found cases of exceptional women in exceptional instances.' (*Edwards v AG Canada* [1930] AC 124). In fact the evidence shows that these instances were numerous and frequent.

Women in Lower Canada voted under the Constitutional Act 1791 Georg.II Cap. XXXI (Shortt and Doughty 1918: 694). A *Plan For a House of Assembly* attached to a petition presented by Anglophones in 1784 called for the British to set up an elected assembly in Lower Canada in which 'None but males shall either Vote or represent.' (Shortt and Doughty 1918: 510). The petitioners desire to limit the vote to men might be viewed as suggestive that women at the time were politically active and would otherwise have expected to vote. Nevertheless when the assemblies for Lower and Upper Canada were established and voting qualifications were set out in the Constitutional Act 1791 in section XX there was no reference to sex as a qualification. The vote was given to 'persons,' provided they had the requisite property qualification, age and citizenship as set out in section XXII.

One of the earliest direct records of women voting in Canada is of Mrs Papineau and her female friends accompanying her son to the Polls in 1809, and announcing proudly that she would be voting for her son (Cleverdon 1950: 214). This was recorded in the press at



the time. Further evidence exists through petitions regarding elections. In 1820, the provincial parliament of Lower Canada upheld a petition challenging the validity of 22 married women's votes (Garner 1969: 157). Interestingly it was not the gender of the voters per se that was found to invalidate the votes. It was the married status of the women, together with the fact that their husbands had already exercised votes based on the same property, which rendered their votes void (Garner 1969: 157). Therefore the reasoning suggests that where the property qualification was fulfilled women's votes were acceptable. Cleverdon also notes that at this time and through the 1820s voting by women a Three Rivers was 'commonplace.' (Cleverdon 1950: 215).

Further petitions presented in 1828 provide a record of women voting and reveal a lack of any "strong antipathy" towards women's votes in this period (Cleverdon 1950: 215). One petition from 'divers electors' concerned the refusal of the returning officer to take a widow's vote at an election in Quebec Upper Town. The petition asked the Assembly to invalidate the election of the candidate Mr. Andrew Stuart for this reason (Cleverdon 1950: 215). Supporting this petition, an assembly member, seconded by another, opined that, if the widow's vote had been denied, then the election was surely invalid (Cleverdon 1950: 215). A second petition, presented to the House of Assembly of Lower Canada at the same time argued in the opposite way (Doughty and Story 1935:519). Amongst other electoral irregularities the petition suggested that the "votes of women, married, unmarried and in a state of widowhood were illegally received." (Doughty and Story 1935: 521). Both petitions were laid aside until the next session, when the assembly decided to take no action in relation to either (Cleverdon 1950: 215). There was no duty to keep polling records but some were kept and noted both the sex and the ethnicity of voters. So that in 1825, 27 First Nations women from Ka were recorded as voting in an election in Huntingdon County, Lower Canada (Bradbury 2012: 263).

The highest numbers of recorded votes came in the years prior to the first legislative attempt to exclude women from the franchise. In elections in 1832 records show that 71 women came forward to vote over 4 days in an April by-election in an Montreal East, 61 of the votes were accepted (Parliamentary Report, Lower Canada 1833: 26th January 185). Later that month in the by-election of Montreal West that went on for 23 days 225 women approached the hustings. Of these 216 women came forward to vote, 199 women had their votes accepted for the election and 17 were refused. (Parliamentary Report, Lower Canada



1833: 26th January 187; 23rd February 94). These records were preserved through the report of a parliamentary inquiry into the election which was significant since the Riot Act was read (Jackson 2009). Garner states that there were no recorded instances of women voting in Lower Canada after 1834 (Garner 1969: 158), but Bradbury notes that further recorded instances exist until 1844 (Bradbury 2012: 261).

Some records also exist for Upper Canada, most notably after Upper and Lower Canada had been combined as the United Province of Canada in 1841. In an 1844 election in the County of Halton, 7 women's votes were accepted. James Durand of Dundas a Reform Party Candidate put in a petition to the Assembly in relation to the election. One of the 12 complaints he listed was that the Returning Officer and several of the Deputy Returning Officers '...allowed divers women, in all to the number of 7 on the aggregate Poll, to vote for Mr James Webster' his rival (Assembly 1844 2 December 8 Victoria). The whole election was won by only 8 votes overall so these 7 were key votes. The investigation into this election went on until 1846 and Mr Durand brought 6 women as witnesses to one of the hearings. Ultimately the select committee found that none of the evidence was sufficient to invalidate the election and the costs had to be paid by Durand (Journal of the Assembly 6 May 1846: 214-215).

In other parts of pre-confederation Canada some recorded instances of women voting exist but are much less frequent, and these were more often successfully contested at the time. Jennings believes the earliest women's votes recorded were six women's votes at Winston County Nova Scotia in 1793 (Jennings 2015). Garner also cites two further examples, which suggest that women's right to vote was recognised in Nova Scotia even if it was not deemed to be customary (Garner 1969: 156). In the first cited instance a candidate sought to challenge his opponent's use of female votes again on the basis of their property qualification rather than sex. He dropped his challenge when told that any investigation would centre on the property qualification of the candidates, not those of the voters (Garner 1969: 156). The second instance occurred at a general election in Annapolis County, when the Tories rounded up 26 eligible women supporters to vote. They were defeated when the Reform Party got wind of this and found 40 similarly qualified women of their own (Garner 1969: 156). It was suggested, by Garner writing in 1969, that in New Brunswick women did not try to exercise the vote at all. He could find no examples (Garner 1969: 156). Later research by Gail Campbell and Elections Canada cites one



instance where a vote was accepted (Campbell 1989; Elections Canada 1997), and Kim Klein discovered evidence of dozens of women attempting to vote in controverted elections (Klein 1996: 72). The votes were accepted by the clerks even though “instructions that guided the conduct of New Brunswick’s earliest elections stipulated that voters must be male.” (Klein 1996: 71) It was only afterwards when these were challenged and were not allowed to stand. The fact remains that they were cast (Klein 1996:74) and the clerks accepted them on the basis that all the women were feme sole and had the requisite property qualification (Klein 1996: 73). This difference in formal rules and the acceptance of women’s votes by people on the ground is not uncommon. Where discretion was given to ordinary people it was often exercised in relation to customary understandings of the law and in a manner which might be at variance with the tenor of elite debates (Klinghoffer and Ellis 1992; Markoff 2003). This can be illustrated in the acceptance of votes by polling clerks and lower officials, even in cases where higher authorities later overturned them.

2.2. Lower Canada a Distinctive Position?

Across pre-confederation Canada, there are many more reported instances of women voting than the “... exceptional women and exceptional instances” noted by Lord Sankey in *Edwards v Att. General* ([1930] AC 124 at 132). Does Lower Canada stand out as an exceptional area?

Existing research findings vary, and new materials are still being brought to light, but currently held records give more frequent instances for women voting in Lower Canada than elsewhere in pre-Confederation Canada. This marked difference between the ‘recorded incidences’ of women voting in Lower Canada as compared to Upper Canada, New Brunswick, Nova Scotia and Prince Edward Island seem beyond doubt. This is not just because of preserved records but also because Lower Canada was recognised as distinctive by contemporary sources at the time.

For example in Lower Canada itself the issue of women’s voting was openly discussed. Joseph Papineau made a great show of accompanying his mother to the polls in 1809 and openly encouraging women to come forward and vote (Elections Canada 1997). It might also be inferred, that a different culture of political behaviour for women existed in Lower Canada, from the fact that the press in other provinces commented often unfavourably on women’s political behaviour there. In 1820 in the New Brunswick popular press the



involvement and acceptability of women 's political activity was noted and it was suggested that if Lower Canada was not careful it would develop into a “Petticoat Polity” (Klein 1996: 71). This suggests then that this very visible political activity of women in Lower Canada was not the norm throughout pre-confederation Canada.

What, then, explains the difference between the frequency and acceptability of voting by women in Lower Canada compared to other Provinces? The *History of the Vote in Canada* and John Courtney suggest that this difference in voting patterns is linked to the operation of French civil law in Lower Canada; in comparison with the Common Law operating in the other provinces (Elections Canada 1997; Courtney 2004). There are, however, two problems with this explanation. First, it is not clear that, before the case of *Chorlton v. Lings* (1868-69) L.R. 4 P.C. 374), that the Common Law did exclude women *per se* from voting. Second there is no evidence that French Civil Law produced better results anywhere else. The former will be argued further in section 2.3 and 2.4 and the latter at 2.5.

2.3. Did the Common Law Exclude?

In *Chorlton v. Lings* Chief Justice Bovil in 1868 in the Court of Common Pleas held that the law was, and always had been clear that women were subject to a legal incapacity and could not vote (*Chorlton v. Lings* (1868-69) L.R. 4 P.C. 374). He noted references to aristocratic women voting on occasion but suggested, that these women might have been acting as returning officers. In conclusion Bovil considered that even if these women were voting in their own right, “these instances” were “of comparatively little weight, as opposed to uninterrupted usage to the contrary for several centuries.” (*Chorlton v. Lings* (1868-69) L.R. 4 P.C. 374: 383). I argue though that the Common law was far from crystallised in the earlier historical periods which Bovil referred to (Brooks and Sharpe 1976), instead he ‘reasoned backwards’ (Atiyah 1986) and applied the mid-nineteenth century developing notions of who and what women were, to earlier periods of time in order to justify denying women the vote.

This next section looks first at the context of women as political and legal actors under the Common Law and then at evidence of franchise itself. Modern historians have produced much good direct evidence of the involvement of both aristocratic or propertied women (Stretton 1998; Prest 1991; Bailey 2002; Froide 2005; Bradbury 2012; Pearlston 2009, 2011; Harris 1990) and ordinary women^{IV} as political and legal actors through the



medieval and modern periods (Power and Postan 1997; Clark 2005, 573; Pollard 1920: 153). This is not in itself evidence of franchise exercise but it was an absence of evidence of legal and political activity which in the past made many historians think franchise exercise was unlikely, although Pollard is unusual in stating he is open regarding its 'extent' (Pollard 1920: 153).

Women's petitions in the seventeenth century show the extent of women's participation in the political life at that time, and their sense of entitlement to be involved (Harris 1990; Thomas 1958). For example in 1641, "Gentlewomen, tradesmens' wives, and many others of the female sex" forced the House of Commons to accept their petition by attending in ever greater numbers and saying, as they stood at the doorway of the Commons, that "it was as good to die here as at home." (Cobbett 1807: cols 1072-1076). In 1649 another women's petition, this time arguing for the release of Levellers imprisoned without trial in the Tower of London, was met with the response that women should not "meddle in things they could not understand." (Brailsford and Hill 1976: 317). In response, ten thousand women signed a second petition and a thousand women marched it to Parliament. This second petition complained about the treatment of the first petition, stated women's right to share in the freedoms of the Commonwealth, and asserted their equal interest with men in the "beliefs and security contained in the Petition of Right and the other good laws of the land." (Brailsford and Hill 1976: 317). When women's right to petition was challenged in 1829 a House of Commons Speaker's Ruling confirmed that women, whether single or married, were competent political actors in relation to petitions (Pickering 2001: 382).

The well-kept records of Protestation Oaths in the seventeenth century also give a good sense of both the acceptability and the expectation for women to be political actors. The requirement to swear an Oath of Allegiance to the Parliament and the protestant religion were required to be sworn in 1641 (House of Commons Journal vol. 2 30 July 1641) and set out in gender-neutral language (Mendelson and Crawford 1998: 398). Mendelson and Crawford note that in some places, like West Sussex, women were excluded altogether, in others only single or widowed women were included; while elsewhere all women were listed (Mendelson and Crawford 1998: 149), sometimes these including the names even of those who refused to swear (Froide 2005: 149). The later "George Oaths," (Oath Act 1715 1 George 1 c.13; and Oath Act 1723 9 George I c.24)



required people of requisite civic status to swear allegiance to the King. Again there were great regional variations, but in some places up to a third of the signatories were women (Froide 2005:149).

Direct evidence of franchise itself needs to be placed in the context of the changing nature of franchise. Until the sixteenth century, attendance at the infrequently convened parliaments was seen as “an unpleasant incident of feudal service” (Pollard 1920: 153). The privilege of not attending, or of sending proxies, was sought after: the question was not “a matter of who is anxious to serve but of who is obliged to attend.” (Pollard 1920: 153).^V As it became desirable to have a representative in Parliament, the variety of franchises available at the local level proliferated. This general complexity in itself complicated the question of whether any particular ‘person’ let alone female persons held franchise (Pollard 1920: 156; Seymour and Frary 1918: I: 70; Anderson 2010: 430).^{VI}

The extent of the franchise was also sometimes actively misrepresented for political reasons (Hirst 1975: 29). Coke (Coke 1669), for example, was cited in *Chorlton v Lings* as authority for women’s exclusion from the franchise at common law (*Chorlton v. Lings* (1868-69) L.R. 4 P.C). Yet, it is suggested that he misrepresented the position in relation to women (Stopes 1894: 101). Coke was present when the Privileges Committee decided cases which confirmed that women were entitled to exercise the vote, and he was criticised for amending interpretations of law to suit his own political ends (Hirst 1975: 29). Coke’s contemporaries, William Hakewill and D’Ewes, stated that women, when *femes soles*, were under no legal incapacity (Hirst 1975: 18–19).^{VII}

Women were recorded as participating in the “cry,” where the crowd roared its choice, and the “view,” where hands were raised at both the election at Westminster, and in Worcestershire, in the elections for the Long Parliament of 1621. These informal methods seem to have allowed lower class women, without property or status, to vote (Hirst 1975: 19).

Even in the period after the Restoration of the Monarchy in 1660, when it is suggested that to some extent women’s public activity was “closed down” (Mendelson and Crawford 1998: 428), the legal right of qualified women to vote was still recognised. For example women at a Richmond election in 1678, were prevented from exercising the vote in person but they were conceded their right to deputise male proxies (Mendelson and Crawford



1998: 347). The use of proxies through discreet temporary transfers of Burgage rights^{VIII} became accepted practice for qualified women in the Eighteenth century Burgage-tenure constituencies (Hirst 1975: 18).

Two later case reports of an election for a Sexton^{IX} in 1738 (*Olive v Ingram* 93 E.R. 1067; *Olive v Ingram* (1738) 2 Str. 1114) also provide evidence of the eighteenth century understanding of the extent of women's franchise under the Common Law. Both a male candidate and female candidate stood for Sexton, each received votes from women electors and the female candidate, Sarah Bly, was elected. The male loser disputed the result and the King's Bench was asked whether the Common Law allowed women to stand for election as Sextons, and also whether it allowed them to vote for the appointment of a Sextons. The case was heard on three different occasions before the Court accepted that women could both vote and stand. If you only read the English Report of the case you might think that this was the first time that women had participated in such elections, but an alternative report written up by Strange, the Solicitor General who acted in the case, casts a different light. He stated that he did not feel it proper to argue against women standing as Sextons since there are many "cases where offices of greater consequence had been held by women and there being many women Sextons now in London." (*Olive v Ingram* (1738) 2 Str. 1114: 1115).

The case was politically sensitive. Lee, the Chief Justice, had initially indicated that the case was of wide significance, and he cited the cases of *Holt v. Lisle* or *Coats v. Lisle*, and *Katherine v. Surrey*^X as authority for the right of women to vote in parliamentary elections when they were *femes soles*. By the final hearing, however, the Court was very careful to state that its decision should not be taken as authority for parliamentary franchise. Despite this statement, though, both Lee C.J. and Page J. gave *obiter* comment to the effect that they believed that women's parliamentary votes were also good votes (*Olive v Ingram* 93 E.R. 1067: 1068).

2.4. Common Law: In Colonial Contexts

Final support, for the proposition that the Common Law provided no absolute bar to women's franchise before the mid-nineteenth century, comes from the colonial experience itself, and particularly from the experience of colonies established prior to the nineteenth century. English Common Law was often cited as authority for the right of propertied



women to vote in Canada. For example the Petition to the House of Assembly Lower Canada in 4th December 1828 in favour of women's votes, argued that "property and not persons is the basis of representation in the English Government" and, that "the same principle is carried into our own constitution." (Doughty and Story 1935: 519).

Similarly in the colonies which later became the United States of America, it was understood that, if women were to be excluded from franchise, then this must be done explicitly through state or federal constitutional mechanisms (Keyssar 2000). Ratcliffe notes that in accordance with traditional British terms, voting was on the basis of property and non-dependent women who were responsible for family property could vote (Ratcliffe 2013: 220). It was only after the American revolution that most states disenfranchised women by setting maleness as a voting qualification (Ratcliffe 2013: 229). A debate on women's franchise prior to the 1776 constitution in New Jersey referred to the "time honoured right of *femes soles* to represent their own property", and did not exclude them (Klinghoffer and Elkins 1992: 193). In 1790 the Assembly passed a Bill setting out franchise qualifications which explicitly referred to voters as both 'he' and 'she.' (Turner 1915: 167) Women's franchise remained in New Jersey until 1807 (Ratcliffe 2013: 244).

2.5. Was French Civil Law More Conducive to Women's Franchise Exercise?

The other reason given more frequent exercise of Franchise in Lower Canada is the existence of French Civil Law (Elections Canada 1997: 24). Once again I argue that this does not seem to be a likely reason. Although community property systems under the *coutumes* were said to favour women, there is no evidence that French Civil Law was usually any more supportive of women's formal political participation than was the English Common Law (Hanley 1998). Women voted in the eighteenth century revolutionary period in France, but this was short lived, and their deliberate exclusion from subsequent franchises was heavily criticised by French women at the time (Proctor 1990; Kingdom 1990). In no other colony with French legal *coutumes* was a difference in political behaviour apparent. For example Corsica had a tradition from 'time immemorial' of women voting in local elections in the shepherd's villages whose remoteness made them like 'little republics.' (Gregory 1985: 19) This tradition was continued in the Paoli constitution from 1755- 1769, but when France took over in 1769 women's rights to vote were removed (Nardo 2014: 7).



3. Lower Canada a Distinctive Culture?

3.1. Alternative Reasons for Higher Exercise of Franchise

Section 2 identified Lower Canada as distinctive in terms of the frequency and acceptability for women exercising franchise. The section also refuted arguments which suggested that this was either because of the absence of the English Common Law or the presence of French Civil law. Rather than looking for explanations in the European heritage of its law this section argues that differences in Lower Canada are more likely to be related to specific local factors, and to its distinctive cultural development. In Lower Canada it is argued that the settlers adopted some ‘traits from the aboriginal world’ to create a distinctive culture that was “resistant to hierarchy” and “driven by egalitarianism” (Elections Canada 1997: 19). In ‘two generations they became a distinct society readily distinguishable from sojourners.’ (Elections Canada 1997: 19). This paper argues there are three factors, including the contribution of First Nations culture to early Canadian society, which are significant in creating these differences in manifestation of women’s political autonomy. This section will look at these factors in turn.

3.2. Role of Women in Establishing New France

First women played an unusual influential and significant role in developing the colony of New France. They administered hospitals and schools and religious communities and were viewed with great respect (Noel 1991). General Murray’s report for the British Government on the state of the government in Quebec in 1762 made a number of observations on the contribution of women to the colony (Murray 1918). Murray noted the many ‘communities of women’ and the institutions for teaching girls to read and write. He found these communities of ‘Women’ to be ‘... much esteemed and respected by the people’ (Murray 1918). A later report from Finlay to Sir Evan Nepean the first Permanent Under Secretary of State for the Home Department, noted that while the educational standard overall were poor, the females had ‘... a great advantage over the males in point of education’, since the sisters had taught girls to read and write as well as sew and knit (Finlay 1918). He saw this lack of education in males as a potential issue for the success of any future elections and local assembly (Finlay 1918), but of course it placed women in a good position to participate.



3.3. Distance of Lower Canada from Changing Conceptions of Gender

Second as a factor was the relative distance of Lower Canada from the development of “modernity” in Europe. The European settlement of New France began at time when “ideas about women’s role were surprising flexible in western Europe” (Noel 1991: 30). Subsequent contact with Europe was minimal, so that the changes in European society were not transferred to, and paralleled in, Lower Canada. Settlers became “Canadianised” and differentiated themselves from the French *Sojourners* who came to the colony and did not adopt settler life (Noel 1991: 30). Further, Lower Canada never received the same flow of emigrants as the other Canadian provinces or European colonies. For example the province was not flooded with refugees following the American war of Independence. One of the results of this was that the liberalism that swept Europe with its notion of “separate gendered spheres” was late in coming to Lower Canada (Choquette 1997: 298). Markoff notes that women in other ‘frontier settlements’, most distant from the centre and its social control, also evidenced stronger political activity (Markoff 2003). In Lower Canada, colonial life, carried on at a distance from the political centre, and in circumstances which demanded greater mutuality than in other places, created challenges to contemporary European norms about the nature of relations between men and women. Eighteenth century, European *sojourners* found women in New France to be well educated, and to play a role unequalled in any other “country or colony” in relation to the leadership, “financing, immigration, and defences that played a major role in the colony’s survival” (Noel 1991: 29). Women were noted for exercising their “initiative ... in business and commerce,” and it was noted in eighteenth century in Quebec that women-only assemblies elected midwives, and may also have had other functions (Noel 1991: 29).

3.4. Influence of First Nations Culture

Thirdly, the different nature of Lower Canada was not due only to its remoteness from the colonial centres, first of France and then England, and the distinctive authority and efforts of the women who were founders, but also to its closeness to an alternative to European culture.

Good contact with indigenous communities was initially essential to the success of the colony, and of the trading companies, when European settlement commenced in the



sixteenth century.^{XI} Sylvia Van Kirk in her monograph *Many Tender Ties*, argues that the knowledge and craft skills of indigenous women, and their ability to mediate between two different worlds, became crucial to both the survival of the settlers and the success of the fur trade (Van Kirk 1983). Although much of Van Kirk's work relates to developments in Western Canada, the fur trade was administered from Montreal and Quebec and Van Kirk records the bringing in to society in Lower Canada, traders wives and children of indigenous Canadian origin. The French government also encouraged marriages with dowries and land grants, hoping that it could assimilate the indigenous populations and make them 'French' (Martin 2007). Intermarriage between European settlers and indigenous people thus became usual, and was encouraged at a local level by Champlain, one of the founders of New France (Fischer 2008). This acceptability of interrelationships between the two communities was compounded by the fact that there were few French women in Quebec in the early seventeenth century only five were counted in Quebec in 1632 increasing to 65 in 1636 as a result of an influx of immigration (Fischer 2008: 467). The French government later provided dowries for the *Filles de Roi* – the women sent in the late seventeenth century to boost French immigration (Noel 1991), but comparatively few women travelled out to Lower Canada until the nineteenth century (Choquette 1997). First Nations women were also more numerous than men in the area where New France was established, diseases, like smallpox, brought by Europeans, had a greater impact in taking the lives of men than women (Devens 1992: 27). Many First Nations groups viewed interrelationships as a way of fostering good relations with other communities (Martin 2007), and relationships were often based on affection rather than mere practicalities (Backhouse 1991: Chapt 1). In Lower Canada a distinct Métis (mixed) community developed, and still exists. Instead of French assimilation of indigenous people the French and other European settlers became 'Canadianised' (Elections Canada 1997: 19). It is argued that this is significant because indigenous culture and the relative autonomy of indigenous women provided an alternative model for all women's lives in the colony.

There are many different accounts of women's life in indigenous societies. Contemporary ethnographic accounts by the Jesuit missionaries, and many colonial historians, were critical of the egalitarian nature of the indigenous societies, and particularly of the economic role of women (Devens 1992: 25). These accounts must be understood through the barrier to comprehension created by the white patriarchal system of the



observers (Williams 1989: 1023). So that many of these accounts portrayed the lives and economic activity of indigenous women as “drudgery.”^{xii} Yet other contemporary sources provide keys to a much more positive interpretation. Champlain one of the founders’ of New France noted women’s sexual freedom and autonomy yet rationalised this according to his own mores. He reasoned that a woman by taking ‘many lovers’, and ‘keeping company with whoever she likes’ was ‘... engaging in a form of courtship and marriage...’ selecting a ‘partner who pleases her most’ to ‘live together to the end of their lives’ (Fischer 2008: 145). Baillargeon also suggests that the autonomy and independence of Indigenous women was ‘...manifest in the free exercise of their sexuality.’(Baillargeon 2014:4) Divorce was eminently acceptable. Devens cites a seventeenth century governor observing that ‘... when a woman wishes to put away her husband she has only to tell him to leave the house and he goes without another word.’ (Devens 1992: 26).

Reviewing and evaluating many of the contemporary sources, Leacock suggests that, while life was hard, women were full political participants in their communities and lived more autonomous lives than their European counterparts (Leacock 1980). Egalitarianism was based on mutuality and gendered checks and balances (Williams 1989). Women worked hard, but they ultimately “retained control over the products of their labour.” (Leacock 1980: 25) In many groups while ‘Chiefs,’ such as they existed,^{xiii} were male, they were chosen by the women and could be removed by women if necessary.^{xiv} A 1842 law ‘text book’ written by Doucet sets out the laws of the Huron and Iroquois ‘Indians,’ arguing that they were very similar to the Lycians – an ‘empire of women’ (Doucet 1847: 15). He suggested real authority lay with Huron and Iroquois women (Doucet 1847: 10), who often fought and provided a strong resistance to the attempts of missionaries to assert ‘masculine authority’ and ‘French social organisation’ in New France (Devens 1992: 25). In some groups Matrons selected the new chief after consultation (Doucet 1847: 15) and women both choose and were sometimes appointed as representatives to act under ‘Chiefs.’ (Doucet 1847: 16) Doucet noted that ‘Women are always the first to deliberate.’ (Doucet 1847: 16).

The Clio Collective suggest that European women ‘considered their own position to be more enviable’ than that of the indigenous women they lived so close to because they believed the onerous work done by those women ‘outweighed their influence in the Councils and family clans.’(Clio Collective et al 1990). Yet there was positive contemporary



recognition and evidence of indigenous influence on the political expectations of women within New France. Frances Brooke, for example, an English *sojourner* who came to New France in 1763 as the wife of a chaplain, noted the indigenous approach to women's political activity with approval. She wrote the novel *The History of Emily Montague* while living in the Quebec garrison, and published it on her return to England in 1769 (Brooke 1995). Boutelle notes that the novel argued for women's rights, at one point Brooke's principal male character draws unfavourable comparisons between the position of women in Huron society and that of their sisters in Europe, saying that the "sex we have so unjustly excluded from power in Europe have a great share in Huron government; the chief is chose by the Matrons.... We [men] are the savages who so impolitely deprive you of the common rights of citizenship." (Boutelle 1986: 56).

Across the American-Canadian border, there is much clearer evidence that First Nations Haudenosaunee women directly inspired and influenced early American feminists. In 1848 the first American women's rights convention, composed of three hundred women and men took place in Seneca Falls, New York. Speeches demanded that women should have a 'restoration' of the right to vote, and should receive equal rights under the constitution (Stanton 1993). Elizabeth Cady Stanton, Matilda Gage and Lucretia Mott, who were a driving force in the convention and subsequent movement for women's suffrage in the US, studied Haudenosaunee life and used it as an illustration of a society in which women already possessed the political freedoms which they themselves sought (Wagner 2001, 2004).^{xv} Later the National Woman Suffrage association drew parallels with the oppression of "Indian tribes" by the USA government, and of man's treatment of woman (Wagner 2001: 93). Huadenaunsee men also argued for all men and women in the United States to be given the vote, as they were in their nation (Wagner 2001: 92).^{xvi}

This section has provided an alternative explanation for the higher incidence of women's exercise of franchise in Lower Canada. It has argued that rather than looking to the European legal heritage of the colony we should look to local reasons for the seemingly greater political autonomy of women, and in particular recognise the influence of indigenous culture.



4. Nineteenth Century Exclusions

4.1. 1832 Reform Act in Britain

The exclusion of women from franchise did not occur simultaneously in either Britain or the different parts of British North America and the changes to the British franchise did not seem to have been the influence for all of the changes to franchise in pre-confederation Canada. Yet the process of introducing gender qualifications for new voting categories in Britain and excluding women from franchises in pre-confederation Canada coincided with fears about unrest and the security of empire in both Britain and North America, assertions of rights to self-rule and were also reflected in the changing ideologies around gender relations and notions of difference that developed in the course of the nineteenth century.

In relation to Britain the first formal reference to sex only came in with Representation of the People (England and Wales) Act 1832 (2 & 3 William IV c. 45). Although women's votes were not directly debated it is noted in *Hansard* that the second reading of the final Bill presented to the House of Lords attracted unusual attention from propertied women coming to spectate (7 Parl. De, (3rd ser.) (1831) 1307).^{xvii}

The 1832 Act, limited the new categories, which greatly extended the franchise, to male voters. Also where there were newly created Boroughs, it was stipulated that voting applied only to 'male persons.'^{xviii} The Act recognised the continued existence of the 40-Shilling shire franchise, and stated that this applied to any "person,"^{xix} rather than any 'male' person. Moreover, it further stipulated that any "persons" previously entitled to vote in a borough still in existence did not lose that right because of the Act.^{xx} Following in the footsteps of the 1832 Reform Act, the Municipal Corporations Act 1835,^{xxi} gave a statutory franchise for 178 boroughs, which stipulated that ratepayers must be "male persons" in order to qualify. The Reform Act did differentiate between 'persons' who were entitled to vote under the old categories and 'male persons' who were the only people entitled to vote under the new categories. The new categories gave a greatly reduced property qualification and extended class of people able to vote. Any exercise of the old franchises by propertied women was minor at that time, but the prospect of including women in these wider franchises would have been a very different matter. The association made between political action by women without real property and anarchy was longstanding (Mendelson and Crawford 1998: 388; Proctor 1990).



4.2. Exclusions in Pre-Confederation Canada

While that there was no attempt to impose a uniform electoral qualification on 'colonies' after the 1832 Act, Orders in Council for pre-confederation Canada reflected the differentiation of different types of qualification in Britain and stipulated that for new franchises or newly established electoral districts the voting qualification must be male (Quebec Gazette Friday 8th June 4340 vol. 69).

In the pre-confederation British North American provinces exclusions occurred at differing times. In Lower Canada an attempt to exclude came in 1834 and then was successful in the United Province of Canada in 1849. In other provinces formal exclusions started in 1836, when Prince Edward Island extended some categories of the franchise but limited these new categories to male voters (Laws of Prince Edward Island, An Act to Consolidate and Amend the Election Laws Cap. XXIV.); before this all Protestants could vote. In New Brunswick formal exclusion came in 1848 (Klein 1996: 75).^{xxii} In Nova Scotia in 1843 a new Act further incorporating the town of Halifax set two different voting qualifications 'male persons over 21' and 'any inhabitant householder' with a property interest of 'twenty pounds or upwards' (Garner 1969; 32) then a requirement that all voters be male was brought in in 1851 (Garner 1969: 154). British Columbia, established in 1856, did not restrict the franchise on the basis of gender, but in 1870 prior to confederation with Canada it was forced by London to restrict the vote to male voters over the age of twenty-one who could read and write English, aboriginal peoples and US immigrants were also excluded (Garner 196:128- 9).

It has been suggested that Canadian exclusions were a reaction to the Seneca Falls conference in America because of fears that this conference, calling for women's rights, might generate similar demand from Canadian women (Markoff 2003, 89). Yet Seneca Falls is insufficient as an explanation for Lower Canada, where women's voting had been both a social reality and widely accepted, and where deliberate and conscious exclusion took place prior to Seneca Falls. In Lower Canada the first attempt to exclude women came in Controverted Election Act 1834 C28 s. 27. This is significant not just for its timing but also because unlike other exclusions which were achieved by just stipulating that voters be male,



this explicitly excluded women by stating that they were not qualified. Section XXVII of the Act stated

“Be it declared and further enacted by the authority aforesaid that from and after the passing of this Act, no female shall vote at any election for any county, City or Borough of this Province”

For unconnected reasons the imperial government overturned the 1834 Act.

The new Legislative Assembly of the Province of Canada’s Electoral Act of 1849, which standardised electoral regulations in Upper and Lower Canada, followed the trend begun by the overturned Act of 1834 by using the same explicit language to consciously exclude women (The Province of Canada Act 1849, 12 Victoria c. 27). Section XLVI of the Act stated:

“And it be declared and enacted, that no woman is or shall be entitled to vote at any such election whether for any county, riding, city or town.”

It was said to be motivated by that controversial County of Halton election in 1844 (see 2.1) in which 7 women voted against Durand (Elections Canada 1997, 28). The reformers never forgot this defeat and led the change in the law. Some conservatives like Sir Allan McNabb made a strong point of voting against the change (Martin and Wilson 2013).

4.3. Distinctive Nature of Exclusions in Lower and Upper Canada

The Acts in other areas of pre-confederation Canada modelled the British Reform Act of 1832 in creating a male qualification, but the 1834 Act in Lower Canada was drafted very differently and explicitly stipulates women’s exclusion from all elections. The 1849 Act in United Canada mirrored that 1834 approach so why these differences in tone in first Lower Canada and then the United Province of Canada? One factor is surely that it suggests further evidence that women were exercising the vote there. It also could be interpreted as a clear assertion that though referred to as a ‘petticoat polity’ previously, politics in the province were from then on to be a purely masculine preserve.

Radical Patriote leaders like Papineau and Viger were initially very much in support of women voting (Garner 1969: 158; Elections Canada 1997: 22), though the traditionalist



Patriotes were not. Despite his initial support Papineau is often given sole blame for this attempt in 1834 to remove the vote from women. It is claimed it was a part of his political agenda (Bradbury 2012: 227; Garner 1969: 158; Greer and Radforth 1992: 7).^{xxiii} It is true that the Controverted Elections Bill which introduced the qualification was Papineau's Bill but the amendment which removed the vote from women was put forward by John Neilson who had parted company with the Patriotes in 1830. It seems from the debate on the Bill that this amendment rather than being supported by Papineau was just something he 'went along with' in order to get his Bill through. In the debate Papineau initially said he was capitulating to his rival, Mr Neilson, on what he referred to as this "trifling point," because there were more serious issues on which he wished to engage (*Quebec Gazette* 1834: Vol. 71, nineteenth January). Later when challenged in his change of approach Papineau claimed that he was concerned only to protect women from the increasingly violent eruptions at election (Garner 1969: 158). Papineau said that it was ridiculous to suggest that he had ever said that women who voted at elections were 'guilty of indecency (impudicite)' rather he had said that the scenes of women being dragged to the polls were indecent (*Quebec Gazette* Vol. 71, nineteenth January 1834).

The election in question became infamous for its violence yet James Jackson contends that the election was not inherently violent and that there had been no need to read the Riot Act at this election; rather it was political move to close the polls because the Loyalist candidate was losing (Jackson 2009). Evidence to support this also comes from the voting record. Mr Goedlike noted that at the time Mr Culliver called the Special Constables his own wife went to vote for Bagg. He concluded that Mr Culliver must be extremely partial to the Loyalist candidate if he was prepared to send his own wife to vote for him when there was such danger (Parliamentary Report, Lower Canada 1833: 41). The implication being that Mr Culliver knew there was no danger to her at all and he actually had no reason to call the Special Constables.

Evidence to the hearing on this election also suggests that women were not 'dragged' or pressed to attend the polls. One woman whose vote was sought explained that she had not admitted visitors to her house in this period 'to avoid troublesome people.' She was laughing while she said this suggesting the quest for her vote was not intimidating. (Parliamentary Report, Lower Canada 1833: 53)



A further reason for the Patriotes failure to continue to support women's votes may have been a belief that the Loyalists benefitted more from women's votes. In the 1832 West Montreal election, Loyalists only made marginally more use of women's votes than Patriotes, 104 to 95 (Parliamentary Report, Lower Canada 1833: 41). Yet evidence given to the enquiry suggests that it was 'believed' if not actually the case that married women's votes increasingly favoured parties other than the Patriotes. In the Parliamentary Report on the election, it was noted (p16) that that were differences in the practice of marriage contracts which affected property holding among women in Lower Canada. Mr Larocque giving evidence to the hearing said he was not sure whether women, in similar circumstances to those who voted for the Loyalist Mr Bagg, had been refused an opportunity to vote for the Patriote Mr Tracey but he noted that

'... it was so evident to all, that in admitting such persons to vote it was favouring Mr Bagg's Party since it is very seldom that marriage contracts are made among the Canadians, which contain clauses for a division (separation) of goods between man and his wife. On the contrary, that often occurs among the English and Scotch Traders, who were all, with the exception of a very few Partisans, disposed in favour of Mr Bagg.' (Parliamentary Report, Lower Canada 1833: 16)^{XXIV}

Significantly the exclusions can also be tied in to wider ideological changes and the claim both of the fitness of the Patriotes to rule in Lower Canada, and of the wider claims to independent rule of first the Province of Canada and then a Confederated Canada.

Exclusions based on gender were also paralleled by exclusions based on race (Elections Canada 1997).^{XXV} The linking of exclusions based on sex and race if contextualised within the changing ideology of empire also reveal a rationale for Patriote support for limiting the franchise to white male electors. Masculinist rhetoric grew in eighteenth-century Europe and was coupled with a discourse supporting the idea of separate spheres for men and women (Levine 2004: 9; Shoemaker 1998). Choquette has suggested that we can see in the passage of the first Lower Canada exclusion in 1834 an indication that liberalism, with its insistence in separate spheres for men and women, had finally made the transition from Europe to Quebec (Choquette 1997: 298).

The treatment of women within a society was also used as an indicator of its masculinism and fitness to rule. It was "assumed that a critical function of society was to



care for and protect women, an idea which logically assumed that women would be defined by men and compared against male behaviours.” (Levine 2004: 6) Thus, as Levine has noted, in this period:

“The British found equally faulty societies ... where they saw women, as they understood it, caged and isolated and those ... where women displayed what the British regarded as excessive independence. The behaviour, demeanour, and the position of women thus became a fulcrum by which the British measured and judged those they colonised. Women became an index and a measure less of themselves than of men and of societies.” (Levine 2004: 7)

Contemporary criticisms of indigenous women’s position perpetuated the myth of European woman as a symbol for civilisation, and portrayed the independence of women as a sign of the inferiority of indigenous society (Leacock 1980; Devens 1992; Turpel 1993). Gender evidenced though either masculinism or effeminacy was used, not only to distinguish the different spheres of activity for men and women, but also to delineate and distinguish whole races and nations. Societies might be deemed “female” as a consequence of the colour, religion, or nationality of their people. Non-white, non-British, non-Protestant societies were deemed “effeminate,” by the British who used this designation as a reason to refuse their claims for self-rule. The direct and explicit exclusion of women from the franchise, first in 1834 at a time of growing unrest in Lower Canada, and then again in 1849, fits into this wider picture and also explains the Patriote support for exclusion.

In 1834 Patriotes were arguing for greater independence for Lower Canada and were resisting unification with Upper Canada. They needed to establish Lower Canada as a community with power to control their own affairs rather than as men subject to a ‘petticoat polity’ and only fit to be ruled. The explicit colour and race distinctions added to franchise qualifications also emphasised this distance from those peoples ‘colonised’ or ‘ruled’. As Upper Canada was flooded with Loyalists it became symbolised as English and “male,” while in comparison the distinctive Canadian culture of Lower Canada was aligned as “effeminate”^{XXVI} because of its association with France, Ireland (King 2007) and indigenous interests. In this time of heightened tensions any association by the Patriotes



with women's franchise would only increase their designation as effeminate and any incidence of women voting strengthen the designation of Lower Canada as "female." The distancing of French–Canadian politicians like Papineau from women's rights to vote prior to the Lower Canada rebellions, suggests an attempt to assert the masculinism of French–Canada in the context of the application of these distinctions, and the threat of Unification and control by an English majority.

Lord Durham's Report discussed the inferiority of the non-English peoples in Lower Canada and suggested that governance problems were due to '...races not classes...' (Durham 1973: 23) He recommended subjecting Lower Canada to '... the vigorous rule of an English majority...' (Durham, 1973:150) This was acted on and the controversial process of unification of Upper and Lower Canada in itself brought an end Lower Canada's claims for independence, by asserting the dominance of the culture of English dominated Upper Canada.^{xxvii}

De La Cour, Morgan and Valverde argue that while the consolidation of masculine power this period in the 1830's and 1840's was crucial to the formation of the Canadian state. Women in this period were not just excluded from politics but also experienced other exclusions. Exclusion '... from medicine, reproductive decisions through the criminalising of abortion, and others went hand in hand with a complex fragmentation of women as a group along racial, class and moral/ sexual lines.'(de la Cour et al 1992:184) They argue that the state became so successful in constituting ' itself and most of the public sphere as masculine,' that it became unlikely '... anyone would even ask where the mothers of the confederation were, ...'(de la Cour et al 1992:184).

This situation is a parallel of the situation in the former colonies in the US post-independence. Delaware and New Jersey were the only two colonies not to exclude women immediately after the revolution. When New Jersey did remove women's franchise in 1807, the limitation to 'free white male citizens' was justified as necessary to clarify that 'aliens' 'negros' 'slaves' and 'married women' could not be included (Turner 1915: 184). Ratcliffe notes that as the USA became more 'democratic' in one sense in that it increased the numbers of men who could vote, but it also became more ' racist and sexist as women and backs were stripped of rights.'(Ratcliffe 2013: 247)

These same arguments around unfitness for rule were exercised in the later nineteenth century and early twentieth century in debates around women's suffrage in Britain. It was



said that if women gained the vote the British would be perceived as weakened and it would lead to rebellion in the 'empire' (Curzon 1908: Reasons 8, 9, and 15). A majority of women in suffrage movements in Britain and Canada adopted this view themselves. In Britain early feminist movements utilised the same rhetoric of 'the advancement of women' that other imperial projects had used to justify the codification of law and interference in the lives of their colonial subjects and indigenous peoples (Midgely 2001). For example suffragists suggested that a failure to recognise women's suffrage was incompatible with 'civilisation' (Midgely 2001: 4). Drawing on stereotypes of Other women, in 'Turkish harems' and in polygamous relationships, feminist tracts were '... imbued with analogy' (Midgely 2001: 4) between the position of European women and those 'subjugated' non-European women. Improvements in women's status, and the grant of female suffrage were '... presented ... as the culmination of a European social progress from savagery to civilisation.' (Midgely 2001: 6). In Canada the suffrage movement also held up '... idealised white women, in effect colonial ladies ...' as worthy of franchise (Strong-Boag 2002: 80). Women's suffrage was argued as '... part of a larger scheme of civilisation progress for white societies' (Brydon and Schagerl 2005:194).

In pre-confederation Canada once women's voting rights were lost they were slow to be regained. Although women as a group in Quebec gained a right to vote in federal elections in 1919 they did not regain a provincial right to vote until 1944. Until its amendment in 1951 women of 'Indian status' were excluded from voting or standing in Band Elections by the Indian Act 1876 which imposed unequal status on relations between men and women designated as of 'Indian status' (Voyageur 2008). Until 1960 the Indian Act also stated that no 'Indian' (sic) person male or female, could vote in federal elections unless they renounced their 'Indian' status.

5. Conclusion

This article has examined an alternative history of women's suffrage, its exercise, and then the exclusion of franchise in the first half of the nineteenth century as Canada moved to self-rule and confederation. It concludes that the orthodox claims that Common Law 'convention' prevented women from voting cannot be justified either by reference to the position in Britain or the British colonies including Lower Canada. Instead I have argued



that it was the 19th century adjudication in the UK and British North America which imposed a less favourable understanding of women's position under the Common Law than had originally been the case. Until *Chorlton v Lings* exclusion of women from the franchise was only achieved in Britain and British North America, as it had earlier in the US through statutory bar.

If it was not the case that the absence of Common Law convention led to higher levels of voting in Lower Canada what did? This article has argued that we see in this different behaviour a recognition of the higher status of women in Lower Canada. In part because of the significant contribution of the few European women who founded New France, and their commitment to women's education. Also because the distance from first the French then British colonial centres meant that the ideological changes in the political centre which marginalised middle class women (Choquette 1997; Markoff 2003) might not have been adopted, or might have been slower to manifest themselves, than they were within areas of Canada that had received a big influx of people from the US. Finally and most importantly because more egalitarian Indigenous culture had a stronger influence in the settlement of Lower Canada, women's political activity found greater acceptance and was reflected in higher levels of voting by women.

These different cultural norms eventually gave way to the marginalisation of women which had occurred to some extent in Britain and in the USA, tied in part also to the desire to assert a particular masculinity. For in the nineteenth century British North America was a society moving away from being colonists subject to colonial rule and looking to gain independent control as self-governing colonisers. In this period clear lines were drawn to forge a difference between those 'nations' which were seen as less masculine, sometimes precisely because of women's egalitarian position. This historical process then led to a worsening of women's political status in the nineteenth century.

It is important to recognise this history of exclusion: first, because it is important in the current period to recognise that women's empowerment is not always coexistent with modernity; and second, to recognise the contribution of Indigenous culture in creating expectations in relation to women's equality in Canada. Finally it is important because, as I discussed in the introduction, a flawed discourse about the location and source of women's rights still has a resonance in Canada today.



In the 19th century the response of the Canadian government to rapes of indigenous women was to blame those women as resistant to modernity and progress, and behaving in an ‘abandoned and wanton’ manner (Carter 2016: 347). This has been echoed in the 20th and 21st century as a response to the current problems experienced by Indigenous women. Levels of violence experienced by Indigenous women are 3.5 higher than those experienced by Canadian women classified as ‘non-aboriginal women.’ (CEDAW 2016: Para 3) In contrast to violence against women classified as ‘non-aboriginal’ violence is much more likely to come from strangers rather than intimates and to come from outside Indigenous communities and ethnic groups. (Palmer 2015) Despite this the contrast in the enjoyment of rights by middle class ‘white’ Canadian women and Indigenous Canadian women is presented as a failure of assimilation and as the ‘persistence of the pre-modern’ in Indigenous societies (FAFIA and NWAC 2015, p. 18). International human rights committees recognise this approach as ‘institutional stereotyping’ (CEDAW 2016, Para 205; IACHR 2014: Para 305-306) and victim blaming and instead locate the cause of this violence by state and non-state actors, in the ‘... lasting consequences of the sexual and racial discrimination against the Aboriginal Community [sic] during the colonial and post-colonial periods.’ (CEDAW 2016: Para 130). The analysis of the exercise of early suffrage as discussed in this article refutes the understanding of the history of women’s rights in Canada as purely linear and as located in the move to ‘modernity.’ It provides a powerful illustration to challenge this problematic discourse.

* Lecturer in Law in the School of Law, Politics and Sociology, University of Sussex, United Kingdom.

^I For one example see the syllabus aimed at grade 11 for the History of Canada. Defining Contemporary Canada states that ‘The history of Canadian citizenship is characterized by an ongoing struggle to achieve equality and social justice for all.’

https://www.edu.gov.mb.ca/k12/cur/socstud/history_gr11/cluster5.pdf.

^{II} The term Indigenous in the context of Canada includes, First Nations, Metis and Inuit peoples.

^{III} For full discussion of the background and consequences of the case see Robert Sharpe and Patricia McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007).

^{IV} ‘Female participation in rural protest and street politics was disturbingly visible to contemporaries if not to subsequent historians.’ (Mendelson and Crawford 1998, 388).

^V Note in *Chorlton v Lings* counsel for the appellant suggested that Coke had said that women could not be compelled to attend the ‘tourn.’

^{VI} Seymour and Frary also stated, writing in 1918, that it defies the modern historian. Stuart Anderson also notes the variation from borough to borough (Seymour and Frary 1918: I: 70; Anderson 2010: 430).

^{VII} Though D’Ewes considered that there were times when it was dishonourable for men to ‘make use of their voices.’

^{VIII} Burgage rights were rights to vote based on a ‘burgage hold’. This was a type of tenure requiring fees or services to be given to a landlord. They could be easily be transferred and bought and sold. The properties



often included residences and sometimes the residence was necessary to exercise the voting right. Holdings could be more unusual. Seymour and Frary note that one franchise in Droitwich was based on the burgage hold “being seized in fee of a small quantity of salt water rising out of a pit.” (Seymour and Frary 1918: 72).

^{IX} A Sexton was an official in charge of church property, buildings and graveyards. In addition they sometimes rang the bell and buried the dead.

^X These cases are also cited in Stopes 1894, 95. Yet in *Chorlton v. Lings* it was stated that there were no printed reports of these cases.

^{XI} Quebec was not formally “founded” until 1608, but there was contact and settlement prior to this.

^{XII} Van Kirk suggests that the prejudices of the fur-traders meant that they greatly exaggerated the degradation of ‘Indian’ women (Van Kirk 1983: 8).

^{XIII} Devens notes that one of the criticism perceived by the Jesuits was the lack of centralised authority, societies were too egalitarian (Devens 1992).

^{XIV} Williams notes that this was case with the Iroquios (Williams 1989: 1040).

^{XV} Note also that the first Constitution of the Pitcairn Islands codified the existing practice of the Polynesian inhabitants when in 1838 it provided explicitly election by the ‘free votes of every native born on the island both male and female over the age of 18’ (‘Pitcairn Islands’ 2017).

^{XVI} This mutual support was not exclusive to North America and was evident in some other nineteenth century suffrage movements, most notably New Zealand, where the movements for women’s rights and Maori rights shared some of the same leaders (Seuffert 2005: 512; Ballara 2017).

^{XVII} One of the issues discussed at this debate was whether women who could currently pass freeman franchise by marriage should be allowed to continue to do so (7 Parl. De, (3rd ser.) (1831) 1307).

^{XVIII} Section XXVII provides for ‘male’ persons with a 10 shilling freehold to vote in Boroughs.

^{XIX} S XVIII refers to “persons.

^{XX} An Act to Amend the Representation of the People Act 1832 2 and 3 William IV c. 45 section XVIII.

^{XXI} 5 & 6 William IV c. 76.

^{XXII} Though earlier instructions issued to polling stations stipulated that voters must be male (Klein 1996: 71).

^{XXIII} Garner refers to Papineau as ‘vehemently in favour of disenfranchisement.’ (Garner 1969: 158).

^{XXIV} This conflicts with the perspective put by Cec Jennings who suggested that it was French Canadian women who were more likely to own their own property (Jennings 2015).

^{XXV} While property qualifications, and the status of “Indian land,” undoubtedly formed an indirect discrimination on the grounds of race, exclusions on this ground became explicit and widespread after Canadian confederation Only Nova Scotia had explicitly excluded “Indians” before confederation; this latter criterion excluding ‘Indians’ was brought in at the same time that universal white male suffrage was introduced in 1854. Length of residency and “Englishness” also became issues, in order to distinguish resident Canadians from French and Irish immigrants and Canadians of ‘other’ heritage.

^{XXVI} This association persisted so that Lower, writing a history in 1946, described French Canadians as “a feminine people, who should be wooed as a womanly woman.” (quoted in Martin 1995, 3).

^{XXVII} It also sees that other restrictions were placed on women’s rights as a result of this process. For instance Bettina Bradbury notes that an ordinance restricting the practice of more generous rights of inheritance in Lower Canada was passed prior to union between Upper and Lower Canada (Bradbury 2012: 131).

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ISSN: 2036-5438

**Women's rights and minorities' rights in Canada.
The challenges of intersectionality in Supreme Court
jurisprudence**

by

Valentina Rita Scotti*

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





Abstract

After a discussion of the impact of the principle of equality, entrenched in the Charters approved in Canada since the 1867 British North American Act, this essay then focuses on the related Supreme Court's adjudications. A brief analysis of the case-law concerning gender equality is followed by the discussion of cases of Aboriginal and Muslim women with the aim of assessing whether intersectionality represents for these groups of women a source of double discrimination. Brief concluding remarks discuss the challenges deriving from the different options for accommodating the principle of equality with cultural rights.

Keywords

Canada, Supreme Court, principle of equality, gender equality, Aboriginal women, Muslim women



1. Introduction: framing intersectionality in the Canadian context

In the Fall of 2017 the eyes of the world turned on Canada for two, seemingly unrelated, instances: the first was the occasion of the New York ‘He for She’ meeting (20 September 2017), where Canadian Prime Minister Justin Trudeau spoke passionately in favour of gender equality, declaring his willingness to raise feminist sons. Then, on 18 October 2017, Quebec approved Bill 62, ‘An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies’ actually prohibiting face-covering in public places, with a (not-so-implicit) reference to the Islamic veil. These events suddenly interrelate when we underline that they both deal with historical discrimination against women, and that both of them apparently wanted to support women’s emancipation. Nevertheless, behind this theoretical support, one should ask what kind of feminism had Trudeau in mind when he advertised his willingness to raise his sons as feminists as well as whether prohibiting the veil is a real tool for achieving women’s emancipation.

Answering these questions is impossible without first recognizing that for a long time feminism has been a white, middle-class, heterosexual, Christian-formed, and able-bodied prerogative unable to tackle the fact that ‘gender does not exist in isolation but intersects with other identities like race or class, as well as embedded in practices and representations which, basically, refer to the organizing system of power relation in society’ (Bonifacio 2012: 3).

In reality, the idea of gender intersectionality has only slowly developed among scholars since Crenshaw’s seminal article demonstrated how Black women have been discriminated against by US Courts, failing to understand that specific issues concern this group of women because of both race *and* gender, and that specific remedies should therefore be implemented (Crenshaw 1989). The words of the district court in *De Graffenreid v. General Motors* 1976 epitomised such incomprehension: ‘the plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new “super-remedy” . . . Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both’.¹



This single-axis frame for anti-discrimination policies and gender discourses has been abandoned only very recently, a product of a progressively rising awareness that – paraphrasing Crenshaw again – neither representatives of cultural, ethnic and/or religious groups, nor feminists, can ignore the intersectional experiences of those whom the movements claim as their respective constituents.ⁱⁱ

This rising awareness impinged on the evolution of the Canadian legal system in matters of gender equality. In effect Canada faces two challenges, the first is the measures for overcoming the well-established patriarchal assumption of male superiority as everywhere else, while the second is the need to ensure the collective rights of Aboriginal peoplesⁱⁱⁱ and of minorities increasingly inhabiting the country due to migration^{iv} with gender mainstreamed human rights without infringing the tenets of the constitutional democracy. The presence of these groups – Aboriginal peoples and ethnic and religious minorities – has been governed according to policies that have progressively shifted from attempts of assimilation, as for instance demonstrated by the content of 1947 Canadian Citizenship Act, to the recognition of pluralism. Such a recognition was notably realised with the 1982 Canadian Charter of Rights and Freedom, aiming at the preservation and the enhancement of the multicultural heritage of Canadians (sec. 27).^v The Charter was also relevant for definitively stating the principle of equality (sec. 15) together with a specific provision entrenching gender equality (sec. 28). Despite these protections at the constitutional level, and the participation of Canada in the main international Charters promoting gender equality, when its implementation crosses with cultural, religious and traditional issues Canadian institutions still face difficulties in approaching them in respect of intersectionality, in order not to disperse the protection of gender rights in the bigger issues concerning collective rights.

Therefore, this essay, relying on Gender Rebellion Feminism, defined by Paludi as feminism focusing on the ‘interrelationship among inequalities of sex, race, ethnicity, social class and sexual orientation’ (Paludi 2010: xv), discusses some cases of double discrimination predicated on the intersectionality with race or religion. Notably, after an analysis of the case-law on equality – demonstrating the difficulties in overcoming a patriarchal approach when adjudicating on gender equality – the cases of Aboriginal and religious women are discussed. In this analysis, the approval of the 1982 Charter has been considered as a turning point for the legal framework as well as for the Supreme Court’s understanding of gender equality.



2. The principle of gender equality in Canada

Due to its origins as a British colony, from the establishment of the Confederation with the British North American Act – BNA (1867) to the 1931 recognition of self-governance inside the British Commonwealth, Canada has followed British legislation, according to which the status of women was also governed. Indeed, as far as the recognition of political and civil rights went, and in line with British legislation, women could theoretically (there is a lack of evidence of their actual participation) be included among ‘persons’ allowed to vote. However, according to the provisions of the 1791 Constitutional Act, this was subject to their demonstrating that they owned a property of a certain value; a status achievable only by widows and single women, but not by married women, as the law provided an automatic transfer of the ownership to the husband at the moment of the wedding. Similarly, since 1809 Quebecois women owning properties were entitled to vote. The language of the 1840 Act of Union was neutral as well, and since its entry into force women probably started to be more politically active – and therefore object to men’s request for a clarification of the legislation in their exclusive favour – as demonstrated by a complaint raised by a defeated Reform candidate who protested that seven women voted for his Tory opponent in Canada West (formerly Upper Canada) in 1844. Indeed, at the provincial level electoral laws were progressively amended in order to clearly exclude women from those eligible to vote.

This decision was completely contrary to the tradition of the majority of Aboriginal communities, which based participation in decision-making according to rules indifferent to gender, and more akin to the ‘relevance’ of each individual inside the community. Nevertheless, the approach of excluding women from the public sphere was completely consistent with the tradition of that time in the colonial power. Therefore, the BNA, although ruling that voters’ eligibility was a provincial matter, denied women the right to vote by establishing it only for British (or naturalized) males over 21 years old.

World War I partially changed societal behaviour, and women’s participation in the military effort was rewarded with a recognition of the right to vote in some Provinces, the first of which was Manitoba on 28 January 1916. Then, following the decision taken in London, on 20 September 1917, at the national level female relatives of any person in the military who was serving or had served with Canada or Great Britain during World War I,



and also women serving in the military, were allowed to vote. On 25 May 1918, the Westminster Parliament gave women the right to vote in a Dominion election, provided they were British subjects having attained legal capacity (21 years) and otherwise met the same qualifications entitling a man to vote. Therefore, in 1920 the Dominion Elections Act was amended to recognise all Canadians, male or female, over 21 as eligible voters in federal elections. Slowly, all Provinces adapted their legislation to the new federal law, the last being Quebec on 25 April 1940 (Cleverdon 1974). As described in detail below, this evolution was not accepted without resistance, and in 1929 a specific decision of the Privy Council was needed to recognise women's voting eligibility.

In spite of this recognition of gender equality in the enjoyment of the right to vote, women belonging to minorities continued to be considered as minors for a long time: Asian women were entitled to vote only on 16 June 1948, Inuit on 12 June 1951, and First Nations on 31 March 1960.^{VI} It should be noted that Aboriginal women suffered discrimination even when compared with their Asian peers. In fact, Asian women obtained the right to vote in 1948 together with Asian men, whilst Aboriginal women were excluded from the recognition as eligible voters granted to enfranchised men – including any person of Aboriginal descent – with the 1885 Dominion Franchise Act (in force until 1898), and had to wait for the abolition of race discrimination in order to gain the right.

In a parallel process, in the Provinces' reserved matters, a domino effect progressively introduced other tools for (white) women's emancipation, without necessarily impacting on race discrimination.^{VII} Legislation allowing for six weeks maternity leave was first passed in British Columbia in 1921; in 1922 Alberta passed the Married Women's Property Act, giving married women the same legal capacity as men and thus allowing them to maintain their ownership rights even after the marriage; and in 1951 Ontario approved the Fair Employment Practices Act and the Female Employee's Fair Remuneration Act, introducing the principle women's movements claimed for 'Equal Pay for Equal Work'. Concurrently, Federal interventions introduced in 1925 the recognition of the right to divorce on equal grounds than men^{VIII} and extended in 1953 to all the citizens of the Federation the principles already entrenched in the Ontario's labour law in 1951.^{IX}

Despite the recognition of rights and the enactment of laws (almost) equalising women to men in the field of private law, at the time of the royal assent for the entry into force of the Canadian Bill of Rights (1960), sex still was not fully conceived of as an element of



possible discrimination. Indeed, although sec. 1 of the Bill of Rights recognized that rights should be protected ‘without discrimination by reason of race, national origin, colour, religion or sex’, the then Minister of Justice Davie Fulton clearly stated in front of the ad hoc committee established for studying the Bill, that a distinction existed between the equality before the law on the basis of sex and the difference in status between men and women. Notably, he anticipated that sec. 1 ‘would not be interpreted by the courts so as to say we are making men and women equal, because men and women are not equal: they are different’ (Canada Special Committee on Human Rights and Fundamental Freedom Minutes 1960). This approach entailed obvious consequences at the provincial level. For instance, when Ontario’s 1962 Human Rights’ Code entered into force, discrimination on the grounds of race, creed, colour, nationality, ancestry or place of origin were prohibited, but not on the grounds of sex.

Acknowledging the persistence of gender discrimination, in 1967 Prime Minister Lester Pearson established a Royal Commission on the Status of Women, a precursor to the Minister Responsible for the Status of Women established in 1981.

In tackling the elimination of all discrimination in the country, the 1977 Canadian Human Rights Act definitively included gender among those discriminations prohibited by law, paving the way for the content of sec. 28 of the 1982 Canadian Charter of Rights and Freedom. This section actually represents a specification of the prohibition of any discrimination already stated at sec. 15, for whose introduction in the Charter women strongly lobbied, and finally succeeded (MacLaren 1991).

3. The Supreme Court’s adjudication on women’s rights

Established in 1875, the Supreme Court was bound by the decisions of the Privy Council until 1933, for criminal appeals and 1949, for civil appeals. As for women, the existence of this further level of adjudication has proved quite beneficial, in opposition to the original patriarchal approach of the Canadian Supreme Court. Indeed, although in 1876 British common law rulings stated that ‘women are persons in matters of pains and penalties, but are not persons in matters of rights and privileges’, it was the Privy Council which finally intervened in recognizing women as persons in the legal sense. This came about in 1929, on the occasion of the Privy Council decision in *Edwards v. AG for Canada*, better known as the



'Persons' case, and originated from a Prime Minister's request to the Supreme Court in the interpretation of sec. 24 of the BNA, in order to clarify whether the word 'person' mentioned in the section included female individuals. In spite of the Canadian Court's decision in 1928 – conceiving women as less qualified than men and therefore ineligible to sit in the Senate – the Privy Council recognized their equality and eligibility rights thus derived (Sharpe and McMahon 2007).^x

Since the Supreme Court started its role of court of last resort, and despite the legislative recognition of equality, its adjudication has, for a long time, prejudiced women due to the test used for assessing the existence of a gender-based discrimination. Indeed, the Court relied on the idea that consistency of treatment would be enough to ensure equality, assuming that whenever women and men are treated the same procedurally, they would enjoy the same opportunities; furthermore, the Court assessed discrimination only when a clear preferential treatment for a category, used as a term of comparison, could be proven (Baines 2005b). The fallibility of such a test paradoxically emerged in the *Bliss* case,^{xⁱ} when the Court refused to recognise the discrimination existing against pregnant women in the 1971 Unemployment Insurance Act. The Court relied on the fact that 'any inequality between the sexes in this area is not created by legislation but by nature', and took non-pregnant women as a group of comparison for assessing the discrimination, instead of men. In the words of Justice Ritchie, writing for the Court, 'if sec. 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women'; evidently the distinguished judges, and the whole Court, forgot that pregnancy is a condition that affects only women.

After the entry into force of the 1982 Canadian Charter, the Court seemed to adopt a more protective approach for women's rights, probably relying on jurisprudence more akin to the general protection of human rights that it was developing during that period.^{xⁱⁱ} For instance, in 1987, a case originated from the lobbying activity of women to the Canadian Human Rights Commission for a recognition of the discriminative policies of the Canadian National Railway Company (CNR)^{xⁱⁱⁱ} in hiring women. Here the Supreme Court, citing sec. 41, 2a of the Canadian Human Rights Act, ruled that the CNR had to fulfil an employment equity program to break the cycle of systemic discrimination that included exclusionary hiring and promotion policies, as well as the harassment of female employees. This decision is noteworthy because the Court also stated that laws may be discriminatory, notwithstanding



the formal equal treatment they entail, if they produced unintended adverse effects on protected groups or individuals. This reflected an approach to discrimination already advanced in *O'Malley*,^{XIV} when the Court recognized that discrimination may also derive from unintended effects of neutral practices, and recognized the effectiveness of affirmative actions in overcoming systemic discriminations. Focusing again on sexual harassment, in 1989 the Court explicitly declared it as a form of discrimination exacerbating the gender inequalities already entrenched in the work-field.^{XV} With reference to the actions aimed at restoring the gender imbalance, the Court also justified the protection of female hockey as a necessary measure to open athletic activities to women.^{XVI}

The Court overruled its previous decisions on the grounds of this new approach to gender discrimination, and radically reconsidered the rationale leading to them. Consequently, in *Brooks*,^{XVII} the Court overruled the rationale on which *Bliss* was based by stating that complainants are not bound to demonstrate discrimination through a comparison with a more favoured group. In *Turpin*,^{XVIII} the Court discussed the similarly situated test which led to the judgement in *Bliss*, and recognized that such tests failed to address some women's claims and to ensure their constitutionally granted equality, because they posited situations in which men have no comparable needs. In 1999 the Court finally conceived of substantive equality as a direct derivation of sec. 15, which, in the opinion of the Court, has the aim 'to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equality recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration'.^{XIX}

Furthermore, after the Charter entered into force, the Court protected women's autonomy of the person. Indeed, in the *Morgentaler* case,^{XX} the Court stated that the prohibition of abortion could have endangered women's security, and only allowed provincial health laws to cover its regulation, clarifying the impossibility of their prohibiting it. It is worth mentioning here the opinion of the only woman sitting in the bench, Justice Bertha Wilson, which also focused on the limits the prohibition of abortion represented for women's right to liberty, defined in terms of personal autonomy over important decisions intimately affecting an individual's private life. However, some scholars argued that the Court annulled the law only because the parameters for allowing women to interrupt their



pregnancy were too narrow, therefore criticizing the fact that the Court does not ‘guarantee women the constitutional right to control our own bodies; from this perspective, societal transformation is not yet a reality’ (Baines 2005b: 56). The issue of abortion was also discussed in *R. v. Sullivan*,^{XXI} when the Supreme Court had to deal with the case of two midwives convicted of criminal negligence for having caused the death of a foetus, and finally decided on acquittal as a foetus is not a person for the purposes of the Canadian Criminal Code.

Although, according to the Court, stereotyping is among the elements against which sec. 15 stands, gender stereotypes have affected its adjudications, at least in some cases^{XXII} concerning ‘collaborative divorce’^{XXIII}, where the Court demonstrated ‘an expectation that women should stick their agreements, no matter how unfair the consequences may be’ (Boyd 2004). This patriarchal perspective was epitomised in the decision that the Court took in *Murdoch*^{XXIV} in 1975, when it denied a share of a farm property on a couple’s separation – despite the fact that the wife used to take care of it on her own for five months of the year – arguing that the wife was simply performing activities typical of any ranch wife, and which were not sufficient to create a beneficial interest in the property. Patriarchal echoes still continued to be evident twenty years later in the *Thibaudan* decision.^{XXV} Here the Court refused to declare a violation of the principle of gender equality in the provision of the Income Tax Act, forcing a mother to pay income tax on her child support payment, despite the fact that her ex-spouse could have deducted payments from his taxable income.^{XXVI}

In a final comment on Supreme Court’s jurisprudence on gender equality, it should be also noted that in several cases a claim for gender equality was raised by men. Here, the position of the Court seemed to support men’s claims, notwithstanding the possible consequences on women. A neutral approach, for instance, was used in the case of a man challenging the legislation protecting birth mothers from forcefully acknowledging biological fathers on birth certificate and including their surnames in the child’s surname. The Court decided that this protection, although aimed at ensuring women’s self-determination, discriminated against men in so far as it denied their aspirations to affirm biological ties and familial bonds across generations.^{XXVII} Quite controversially, a gender-blind approach was used in adjudicating the claims on gender equality of men accused of sexual assaults^{XXVIII} (Baines 2012: 95).



4. Women belonging to minorities: the cases of Aboriginal and Muslim women

At the time of colonization, the rights and status of Aboriginal peoples was at first regulated through the 1763 Royal Proclamation, which guaranteed certain rights and protections for those peoples generically individuated as ‘Indians’ and established conditions for the government to acquire their lands. Evidently, this regulatory approach made the understanding of who could be considered as an Indian fundamental. The question was first regulated by the 1850 ‘Act for the Better Protection of the Lands and Property of the Indians in Lower Canada’, which defined as criteria for being an Indian the fact of having ‘Indian blood’, and therefore of belonging to the ‘Body or Tribe of Indians’. Accordingly, non-Indians who ‘intermarried with such Indians’, people whose parents (one or both) would also have been considered Indians, and ‘all persons adopted in infancy by any such Indians’ were considered to be Indian. The recognition of the existence of these peoples did not mean a recognition of their fundamental right to exist and to have extended rights. Several laws aimed at enforcing their assimilation have, instead, been approved since the 1867 BNA, such as the Gradual Enfranchisement Act of 1869, which ‘reinforced’ the measures for enacting the voluntary enfranchisement already provided by the Gradual Civilization Act of 1857. These two acts were then consolidated in the 1876 Indian Act, establishing the Department of Indian Affairs, whose first action was the replacement of the Aboriginal structures of governance with tribes’ councils (or group’s councils), thus starting the erosion of Aboriginal traditions, and fostering assimilation.^{xxx} Although Inuit were never subjected to the Indian Act, since 1939 the federal government issued programs for (often forcefully) transforming them from their nomadic original tradition into a sedentary people, and for progressively assimilating them.^{xxx}

With the entry into force of the 1982 Canadian Charter of Rights and Freedom, as said, sec. 15 introduced the principle of non-discrimination; sec. 25 also constitutionalised Aboriginal rights by clarifying that the content of the Charter cannot abrogate any of the acquired rights of Aboriginal peoples (Harder and Patten 2015). This group comprises Inuit, Metis and First Nations, according to the definition of autochthone population introduced in sec. 35 of the 1982 Constitutional Act, whose content also impinges on the placement of the treaties between the Canadian authorities and Aboriginal communities in the hierarchy



of sources of law. Indeed, according to sec. 35 such treaties now had the rank of constitutional norms, instead of that of ordinary laws as previously (Pentney 1988). It should finally be highlighted how the relevance of these provisions, with regard to the governance of Aboriginal peoples, shifted from a reasoning based on otherness/exclusion to one based on the implementation of equality (Ceccherini 2016).

The consequences for women of regulations on Aboriginal peoples, as well as the effectiveness of their implementation with regard to gender equality, are discussed below, in order to underline the possible risks deriving from the intersectionality between gender and race in the case of Canadian Aboriginal women.

Almost coevally to the Charter, in 1988 Canada also approved the Multiculturalism Act, which definitively affirmed multiculturalism as a foundational principle of the State, in accordance with an approach followed under the Premiership of Pierre Trudeau of the 1970s. In the same period, the Supreme Court intervened in its interpretation of multiculturalism, with reference to religious pluralism as a hindrance to the establishment of favourable treatments only for some religions.^{xxxii} These interventions impinged on the evolution of the Canadian system, as they involved a new approach toward minorities, aimed at respecting their collective rights as a form of protection for the cultural heritage they represent for the country.

Despite this framework establishing equality among religions and among believers, the intersectionality between gender equality and religious freedom raised critical challenges for Canada, and the way they were faced still gives rise to potential critique. Although questions of religious freedom are not limited to this group of women, only the case of Muslim women is considered here, as the consequences of intersectionality are exacerbated by an international environment intensifying attention toward Islamic symbols and religious practices.

4.1. Aboriginal women

Ethnically discriminated against for a long time along with their male mates, Aboriginal women started to suffer gender discrimination with the approval of the 1951 amendment of the Indian Act. Here, provisions confirmed the exclusion of women from voting in tribes' councils, and ruled on the definition of the status of Indian by entirely attaching it to the marital condition. Moreover, a non-status woman who married a status-man would gain



status herself, but a status woman who married a non-status man lost her status, even when she was widowed or abandoned by her husband. As a partial compensation for the loss of their membership, women received a per capita share of the tribe's capital funds (Weaver 1974). Evidently, the aim of preserving tribes' assets and reserves from the possible threat represented by non-Indian men marrying with Indian women given as a justification of the loss of status was nullified by the provision of such a compensation draining groups' assets, to the point that the Royal Commission on Aboriginal Peoples^{xxxii} considered the 1951 amendment as a 'legal fiction', apparently introduced for ruling the phenomenon of group exclusion and instead legalizing women's discrimination.

In 1969 Trudeau's government released a White Paper, devoting special attention to the conditions of Aboriginal peoples, including women, and declared the intention of abolishing the Indian status and the Department of Indian Affairs and of entirely assimilating Aboriginals into Canadian society. Obviously, Aboriginals harshly contrasted the idea of assimilation, and issued a Red Paper, the content of which led to the withdrawal of the proposals in the White paper.

The 1977 Canadian Human Rights Act did not affect the conditions of Aboriginal peoples due to the notwithstanding clause of sec. 67, and only in 1985, with Bill C-31, were remedies introduced with regard to the issue. This Act allowed women who lost their status through marriage to be reinstated as Status Indians and as group members; as for their children Bill C-31 confirmed their status too, but at the same time granted groups two years to enact their own membership codes. A group's Code, therefore, could have excluded children – but not their mothers – from the group only when enacted prior to June 1987; otherwise, children were directly entitled to a full group membership. In an attempt to incentivize the recognition of the status of children, the Act linked the assessment of funding allocations to tribes, through the Indigenous and Northern Affairs Canada (INAC), to the demographic consistency of tribes (i.e. counting the number of status members of each group). Nonetheless, discrimination was maintained in the fact that the child of a woman whose status was reinstated under Bill C-31 would not be able to pass the status over to her/his children if the other parent was a non-status, according to the so-called 'double mother' rule. With the aim of remedying these persisting discriminations, and to align the Human Rights Act with the 1982 Charter, the 2008 amendment to the Act removed sec. 67



and clarified that regard given to Aboriginal legal traditions and customary laws should not be interpreted as giving the possibility of infringing the principle of gender equality.

The discrimination women suffered due to the regulation of their status until the 2008 reform still, however, affect their children. Indeed, in an on-going attempt to introduce further reform to the Indian Act, the government has individuated the issues: the cousins' issue, concerning the differential treatment of first cousins whose grandmother lost her status having married with a non-status man before 17 April 1985; the siblings' issue, concerning the differential treatment of children born out of wedlock of status fathers between 4 September 1951 and 17 April 1985; the issue of omitted minors, concerning the differential treatment of those minor children having lost their status when their mother (re)married a non-status men after their birth. The federal government is still dealing with all these issues.^{xxxiii}

The discriminative policies enacted by the federal government during the pre-Charter period were supported by discriminative decisions in the Supreme Court, the most notorious of which was issued in the 1974 *A.G. Canada v. Lavell* case.^{xxxiv} Here, the Court held that the provision tying a woman's status to that of her husband cannot be considered as a gender discrimination, despite evidence deriving from the fact that status-men kept their status if they married out. In fact, the Court refused to recognize a discrimination, confirming the decision of the first instance tribunal, because the group of comparison was individuated in non-status women, rather than on status-men. The issue of status was subsequently appealed at the United Nations Human Rights Commission, which in 1981 declared that Canada had violated article 27 of the International Covenant on Civil and Political Rights with reference to the case of Sandra Lovelace,^{xxxv} a Maliseet woman who had lost her status through marriage and was thus prevented by the government from returning to her community. Since then, a more protective approach has developed, involving lower Courts too, which prompted the on-going reforms of the Indian Act. This was the case of the British Columbia Court of Appeals in the 2009 *McIvor*^{xxxvi} case, which highlighted existing discrimination against the descendants of Aboriginal women married to non-status men, and of the Québec Superior Court judge in the 2015 *Descheneaux*^{xxxvii} case, who denounced the subtler forms of sexual discrimination persisting under the Indian Act.

Besides the issue of having their status recognized on an equal footage to men, Aboriginal women had to face the challenge for having their interest groups conceived of as being equal



to those not explicitly lobbying for women. This was the case in *Native Women's Association*,^{xxxviii} when the Native Women's Association of Canada (NWAC) was excluded from the directly State-funded participation in the discussions on the Beaudoin-Dobbie Committee Report.^{xxxix} The NWAC therefore claimed that the State funded only male-dominated groups, violating both freedom of expression and the right to equality, and applied to the Federal Court of Appeal, which refused to issue an order of prohibition but recognized that the federal government had restricted freedom of expression of Native women, infringing sec. 28 of the Charter. Nevertheless, in its decision, the Supreme Court stated that the exclusion of NWAC from directly funded associations did not infringe sec. 28, as it does not impose on the government a positive obligation of consulting or funding anyone; moreover, the Court did not see any infringement of gender equality judging that the NWAC failed to demonstrate that the convened groups were unable to represent women's points of view.

Aboriginal women also failed to obtain recognition of their gender equality in decisions concerning the acquisition of properties, a topic on which the discriminative approach of the Court with broad reference to Canadian women has been already discussed. Notably, in *Derrickson*,^{xl} the Court rejected the appeal of a wife claiming one-half of the interest in the properties her husband owned according to the land reserve provided by sec. 20 of the Indian Act, affirming that the Family Relations Act on which the woman based her claim could not apply to lands on reserve. However, recognizing the inequalities deriving from this exclusion, the Court introduced the possibility of awarding compensation in order to adjust the division of family assets between the spouses. Relying on this reasoning, in *Paul v. Paul*,^{xli} the Court also dismissed the appeal of a wife claiming possession of the family residence her husband owned according to sec. 20 of the Indian Act.

Finally, it should be noted that some hindrances to the implementation of gender equality for Aboriginal women may derive from the establishment of means for alternative dispute resolutions, which in the case of Aboriginal peoples takes the form of 'circles' – generally composed of the victim and the accused, their relatives, a judge, the elders of the community and the remaining members of the community – aimed at providing restorative justice (Wall 2001). This system has been criticized for the consequences it may entail on the protection of women from domestic violence, as the composition of the circles may reduce their self-confidence and their ability to bear witness to the violence (Goel 2000), as clearly appeared



during the circle hearings that the Court of Quebec discussed in *R. v. Naappaluk*.^{XLII} The Supreme Court addressed this point in the 1999 *R. v. S.G.N.* case, stating that, although the creation of circles in matters of criminal law is consistent with Canadian law, they cannot represent a means for reducing the protection that the Canadian legal system grants to Aboriginal women.^{XLIII} On these grounds, in *R. v. Morris*,^{XLIV} concerning the case of a man who beat and raped his partner, the Court of Appeal of British Columbia clarified that circles can be established only once the community clearly condemns crimes against women as well as any form of their subjugation. As a consequence, the Court overruled the decision of the first instance tribunal, based on the determinations of the circle, because of the ‘toxic atmosphere’ during the meeting of the circle.

4.2. Muslim women

As said, religious communities in Canada benefit from a legal framework based on multiculturalism, which accords them great margins of discretion in ruling some aspects of their lives according to religious precepts. In the recognition of a role for these precepts, however, lies the risk of endangering the implementation of gender equality and therefore specific attention must be paid to adjudications balancing the protection of religious freedoms with the protection of gender rights.

Although the risks deriving from intersectionality between gender and religion concern women belonging to all religious communities,^{XLV} it was decided here to pay specific attention to the cases of Muslim Canadian women, as the risks for their gender equality are twofold. On the one side, they may be endangered by a strict interpretation of the religious precepts of Islam, which could confine them to an unescapable position of subjugation. On the other side, a lack of protection may derive from stereotypes against Islamic culture consolidated since the affirmation of Orientalism (Said 1979) – which had consistent impacted on gender stereotypes (Yeğenoğlu 1998) – and through the wrongful interpretation of the theory of the clash of civilizations (Huntington 1993 and 1997) that has conceived of all Muslims as potential terrorists.

The possibility of an overly strict interpretation of religious precepts with reference to women in the field of family law was at the centre of the complaints against the establishment of a Muslim Court of arbitration, according to the 1991 Arbitration Act of Ontario. Indeed, when in November 2003 the Islamic Institute of Civil Justice was established for applying



Islamic Law to the fields of family laws and inheritance, several Civil Society Organizations (CSOs) rose up against the risks for women. Despite the results of the Boyd Report,^{XI.VI} the Provincial Government of Ontario intervened in 2006 by amending the Arbitration Act, and prohibited the establishment of religious courts. The Provincial Government seemed to understand the possible risks deriving from this kind of Court, where judges may decide to adjudicate following the general principles of law, gender equality included, or alternatively according to a strict interpretation of religious precepts, which in the case of an Islamic Court would have meant a literal interpretation of the Quran apparently justifying women's subjugation, beating and never-ending control by male relatives. Given that no appeal can be made against the arbitration, with only minor exception, this control could have resulted in pressure on women in accepting to submit their claim to religious courts, thus losing the possibility to access other – and possibly more consistent – means for overcoming their status of discrimination.

Conversely, gender stereotypes deriving from a consolidated fear of otherness may affect Muslim women when it comes to the most discussed symbol of their religious belonging: the veil. As the veil is clothing that only Muslim women are committed to wear – under certain interpretations of Islamic precepts – a clear case of discrimination in the enjoyment of the freedom of expression of religious behaviours, deriving from the intersectionality between religion and gender, can occur.

This issue was notably raised for the first time in 1994, when several Quebecois schools decided to expel Muslim girls because of their refusal to remove the *hijab* when attending classes. Finally, in trying to regulate the issue, in 2010 the Provincial Government introduced Bill 94 to the Assembly in order to prohibit the full-face veil in public institutions. Notwithstanding both the reaction of those who hailed it as a modernist victory – such as the Quebec Council on the Status of Women or the Canadian Muslim Congress – and of those who conceived of it as having a specific discriminatory intent – such as the Canadian Council on American-Islamic Relations or the Canadian Council of Muslim Women – it is worth underlining that the Bill could have been attacked for unconstitutionality on the grounds of an infringement of the freedom of religion, and also for putting Muslim women under serious threat of gender discrimination (Fournier and See 2014: 275-292). It was probably for this reason that the Bill died on the order paper. However, Bill 62, mentioned above, was approved in October 2017 and has brought the ban back to life. Following the



same strategy already put forward in France in 2010 and in Belgium in 2011, full-face coverings have been prohibited in the name of state neutrality, without explicitly mention Islamic full-face veils. Such an omission is quite controversial, as it may turn into a prohibition of wearing big sunglasses, whilst at the same time permitting other religious signs to be shown, such as crucifixes, kippahs or the turban.

While we are still waiting to see the role the judiciary will eventually play in the implementation of Bill 62, it is worth to remembering that, at this stage, the issue of the veil was only discussed for the first time before the Supreme Court in 2012,^{XLVII} when, in a rape trial in Ontario ‘N.S.’ claimed her right to take the witness stand wearing the veil. ‘N.S.’ was a woman accusing her aunt and her cousin of rape, who refused to remove her veil at the request of the defendants, who claimed that this garment would have concealed her facial expression, thus jeopardizing their right to full answer and defence. After a colloquium with her, the prosecutor forced ‘N.S.’ to remove the veil, taking the fact that she already removed it for her driving license photo as proof of her moderate adherence to the religious precept. As a consequence, ‘N.S.’ appealed to the Superior Court of Justice and then to the Court of Appeal of Ontario, which both refused to take a decision and affirmed the need of a case-by-case decision to be taken by the prosecutor, although inviting the latter to deeply evaluate women’s religious behaviour. Consequently, ‘N.S.’ appealed to the Supreme Court for a final decision. However, the Court confirmed that this kind of decision cannot be taken according to a general rule and has to be assessed on a case-by-case evaluation pertaining to the prosecutor.

The issue of the veil became relevant again in 2015, when a woman claimed her right to wear the *niqab* when taking her citizenship oath.^{XLVIII} Notably, she challenged the content of sec. 6.5 of the manual for taking the oath, which since 2011 provided a duty for the citizenship candidates wearing face coverings to remove them during the ceremony in order to avoid the termination of their application for citizenship, on the grounds that the removal of the veil was not justified by reasons of security or of identity certification. Despite the government’s argument that removal was not mandatory, as the manual only offered guidelines, the Federal Court invalidated section 6.5 on the assumption of its mandatory nature, and affirming that it interfered ‘with a citizenship judge’s duty to allow candidates for citizenship the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath’.^{XLIX}



4.3. Concluding remarks

Cultural traditions imbued with patriarchal traits represent the main hindrance to a full implementation of the principle of gender equality, even when this is a clearly stated aim in fundamental Charters, as has occurred in the case of Canada. Furthermore, this principle is notably endangered when it has to be balanced with the need to accommodate ethnic and religious minorities, whose understanding of it may vary greatly from ideas affirmed in liberal democracies. In Canada, this meant a rising tension between two prominent principles of the legal system: equality and multiculturalism. In fact, the way conflicting equalities should be reconciled has represented a highly debated point among scholars (Deveaux 2000: 523-525). Some have argued that liberal democracies should accord protection to cultural rights providing that compliance with them does not infringe the respect of individual autonomy and of equality (Okin 1997 – Kymlika 1997: 29-30); others have maintained that discrimination deriving from cultural traditions should be respected (Carens 1990) and ultimately only modified through dialogue and confrontation among groups and communities (Parekh 1996). Both these points of view, however, may be accused of approaching the topic from a very selfish and ‘western’ perspective, according to which there is a specific perception of equality to be protected, despite the fact that they propose two different paths to provide such protection. At the same time, it could be hard to abandon the perception of equality which might recognise a community’s option of carrying out discrimination in name of its specific culture, or even justify crimes with the so-called cultural defence,¹ given the fact that equality is a quintessential principle for ensuring the peaceful coexistence among people. In this regard, the cited cases of Aboriginal circles, and religious arbitration courts, demonstrate the risks potentially deriving from the inclusion of traditional means of adjudication in the legal framework, as they could be detrimental for groups representing a minority inside the minority, such as women or children.

When dealing with the accommodation of cultural traditions with the principle of equality, it should not be ignored, however, the adverse (and unexpected?) impact that the Euro-North American approach produced. Again, the case of Canadian Aboriginals is noteworthy. Before colonization, these communities grounded gender differences on behavioural differences instead of biological ones (Native Women’s Association of Canada 2010: 61), and were therefore deeply affected by the process of progressively equalizing



Aboriginal to European women, whose discrimination instead derived from a patriarchal position grounded on the pretence of biological differences. Disregarding this sociological element, Canadian authorities favoured the substitution of women with men in farming activities, maintaining that this would be more consistent with traditional European gender roles, and that the devotion of women to agriculture in Aboriginal communities was due to their subjugation to 'lazy' men only devoted to hunting. In fact, Europeans completely misunderstood that farming was considered a skilled activity by Aboriginals, and that it granted women a position of equality with men inside the community. Therefore, substituting men to women in farming actually lessened women's relevance and fostered inequalities (Native Women's Association of Canada 2010). This misunderstanding about Aboriginal gender roles resurfaced when the Supreme Court, deciding on the governmental duty to consult with Aboriginal peoples and accommodate their interests, ignored the recognized role of women in decision-making councils of Aboriginal communities, and failed to ensure their duty to consult with Aboriginal women.¹¹

Despite failures like the one mentioned above, the Supreme Court's activism has proved fundamental in the evolution of the interpretation of the principle of gender equality in the Canadian legal framework, from an initial lack of a consistent test for gender discriminations – i.e. in *Bliss* – to the awareness of the relevance of intersectionality (Jamieson 1978) – i.e. in *Lavel*. Notably, the Court has not only recognized that 'equality, when constructed as sameness, perpetuates race and gender oppression' (Monture and Okanee 1992: 237), but has also understood the risks of discrimination deriving from intersectionality between gender and religion.

In this regard, gender stereotypes play a crucial role in fuelling the paradoxical idea that women are simultaneously agents of religious fundamentalism and victims of a male-dominated religious society. The cases concerning the veil are illuminating, depicting women as stubborn opponents to the removal of the veil when required by public authorities despite the fact that it is just a patriarchal imposition.

In order to overcome this paradox, the Canadian Court again had to face the *vexata questio* of the respect of formal equality in front of the respect of substantive equality, the former being satisfied from the imposition of an equal appearance between men and women and among women – everyone has to accede to the public service without showing symbols of religious belonging – whilst the latter being satisfied by the recognition of women's right to



follow their religious (or any other) trappings, with of course the attendant possibility of introducing limitations when necessary in a democratic society. This clearly appeared in the (non)decision in ‘N.S.’, when the Supreme Court merely requested prosecutors to more carefully consider their motivations in the final decision, thus refusing to introduce a general precedent for balancing freedom of religion and rights to a defence, as it could have done following examples quoted by the Court itself. Although it is not clear whether this is an approach the Court will continue to follow, and as it entails the related risk of imposing the choice between the protection of gender rights and the guarantee of their religious rights on women (Scotti 2014), the positive effects of promoting a case-by-case evaluation should be highlighted. According to some scholars, in order to solve the issues connected to intersectionality the principle of anti-discrimination should be substituted with the principle of anti-subordination (Volpp 1996), better able to tackle the fact that what is deemed to be cultural is not undeniably accepted by all members of a community, and that every individual may have a personal interpretation of cultural precepts. On these grounds, the case-by-case analysis approach is considered beneficial, as it may allow for the effective assurance of substantive equality, avoid discrimination, and solve the possible issues raising from intersectionality. In a concrete application to the cases on the veil, therefore, the principle of anti-substitution will allow the taking into consideration of women’s multifaceted identity, instead of asking them to choose between their gender belonging and their religious ‘membership’.

The application of this principle, however, still deserves analysis and scholarly discussions, for the questions it still raises. For instance: taken to its extremes, could the case-by-case approach frustrate the certainty of the law, in its meaning of general principles valid for all? If accommodation were made through case-by-case adjudications, might this endanger weaker women unable to access Courts, as the cases of circles or of arbitrary courts in Canada already demonstrated?

As evident, the issue of gender intersectionality with race and/or religion should be handled with care, for it carries a risk of hierarchizing women, instead of ensuring a fair application of the principle of equality. Indeed, intersectionality must be conceived of as a tool for discussing discrimination with the aim of protecting women and their multifaceted identities, and not as a tool for justifying discrimination on the ground of those cultural elements that contribute to create the identity.



* Post-doctoral Researcher in Comparative Public Law at the Koç University Law School, Istanbul.

^I *De Graffenreid v. General Motors*, 413 F Suoo, 142 (E D Mo 1976) at 143.

^{II} Actually the doctrine has evolved even further. La Barbera, for instance, assumed that the Crenshaw approach to intersectionality should be broadened in order to be intended as an attribute of gender, assuming the latter 'inherently made up by different conditions all of which simultaneously shape gender in a non-predefined way' (La Barbera 2009).

^{III} It is worth remembering that lands currently belonging to Canada, whose name derives from the Huron-Iroquois world *Kanata* (settlement), were originally sparsely inhabited by Aboriginal tribes then colonized by French and British since mid-XVIII century and unified in a Confederation with the 1867 British North American Act (BNA). Because of the colonisers' ambition of creating a white and Christian country, Canada for long time had a legal framework discriminating Aboriginal peoples. It should be clarified that the noun 'Aboriginal' is used here with reference to First Nations peoples – for long time individuated as Indians – Metis and Inuit; when different treatments were provided for them it is explicitly stated.

^{IV} It has to be noted that migration flows to Canada were composed of European people until WWII, whilst later on they were mainly composed of Asian, Caribbean and Latin American people.

^V In this evolution, a significant role was played by the Royal Commission on Bilingualism and Biculturalism, which in 1969 recommended integration, instead of assimilation, as the main policy to be fulfilled by the federal government.

^{VI} It is worthy to note that, differently from Inuit and First Nations, Metis never experienced restrictions in their right to vote.

^{VII} The process however needed several years, as emerges from the consideration that the first recognitions of spouses' equality occurred in the 1920s, but Quebec recognized it only in 1964.

^{VIII} See 1925 Marriage and Divorce Act.

^{IX} See 1953 Fair Employment Practices Act.

^X See Privy Council, *Edwards v. AG for Canada*, 18 October 1929.

^{XI} *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183.

^{XII} See: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.); *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 (S.C.C.).

^{XIII} See *Action Travail des Femmes v. Canadian National Railway Company et al.* [1987] 1 S.C.R. 1114.

^{XIV} See *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, [1985], 2 SCR 536.

^{XV} See *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252.

^{XVI} See *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 and *Blainey v. Ontario Hockey Association* (1988), 9 C.H.R.R. D/716.

^{XVII} *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

^{XVIII} *R. v. Turpin*, [1989] 1 SCR 1296.

^{XIX} *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 51. Substantive equality was introduced in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, but the test to be used for its safeguard is still contested by Supreme Court's judges (see *Quebec A.G. v. A.*, [2013] 1 SCR 61). On the evolution of the test and on its impact in cases concerning gender issue, see Baines 2012.

^{XX} *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

^{XXI} *R. v. Sullivan*, [1991] 1 S.C.R. 489.

^{XXII} See *Miglin v. Miglin*, [2003] 1 S.C.R. 303, and *Hartsborne v. Hartsborne*, [2004] 1 S.C.R. 550.

^{XXIII} It is based on the idea that spouses willing to terminate their marriage should find a settlement out of court. An approach that feminist scholars have criticized for the consequences this may entail on women (Bryan 1999).

^{XXIV} *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

^{XXV} *Thibaudau v. Canada*, [1995] 2 SCR 627.

^{XXVI} It is worthy to note, however, that the failure of the claim raised a huge debate in the country persuading the government in introducing a new and fairer legislation on the point.

^{XXVII} See *Trocink v. British Columbia*, 2003 S.C.C. 34.

^{XXVIII} See *R. v. Hess and Nguyen*, [1990] 2 S.C.R. 906; *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; *A.(L.L.) v. Beharriell*, [1995] 4 S.C.R. 536; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Ewanbuk*, [1999] 1 S.C.R. 330.

^{XXIX} It can be relevant to remember that, for instance, the Indian Act and the amendments progressively introduced to it, imposed on Aboriginal children a requirement to attend schools in the non-Aboriginal cities,



and forbid traditional ceremonies including dances, in a clear attempt of obliterating Aboriginal traditions among younger generations.

XXX The assimilationist attempt was led in a very crude way, which completely ignored Aboriginal traditions. For instance, a campaign for individuating each member of the communities by imposing a single name – against the tradition according to which Inuit may have been known by several names throughout their lives and depending on context – was led by providing them with leather discs, originally to be worn on one's person.

XXXI See *R. c. Big M Drug Mart Ltd*, [1985] 1RCS 295.

XXXII Composed of four Aboriginal and three non-Aboriginal Commissioners, it was established in 1991 with the aim of investigating and reporting back to the Government of Canada on a proposal for reforming the relationship between Aboriginal and non-Aboriginal peoples. After public hearings and research studies, the Commission released a five-volume report in 1996.

XXXIII Bill S-3, introduced in the Senate of Canada on 25 October 2016, is still under consideration.

XXXIV *A.G. Canada v. Lavell* [1974] S.C.R. 1349. *A.G. Canada v. Canard* [1975] 52 DLR 548 was also relevant in that period for demonstrating the inconsistency of several provisions of the Indian Act with the Bill of Rights.

XXXV *Sandra Lovelace v. Canada*, Communication n. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977.

XXXVI See *McIvor v. Canada*, 2009 BCCA 153.

XXXVII See *Descheneaux v. Canada*, 2015 QCCS 3555.

XXXVIII *NWAC v. Canada*, [1994] 3 S.C.R. 627.

XXXIX This was the name of the report issued in 1991 by the Special Joint Committee of the Senate and of the House of Commons appointed to consult with Canadians and report upon the process for amending the Constitution of Canada, which took into account also the rights of Aboriginal Peoples.

XL See *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

XLI *Paul v. Paul*, [1986] 1 S.C.R. 306.

XLII *R. v. Naappaluk*, [1994] 2 CNLR 143.

XLIII See *R. v. S.G.N.*, [1999] 133 BCAC 277.

XLIV *R. v. Morris*, [2004] 3 CNLR 295.

XLV It could sound quite rhetorical to quote here the *Markovitz* case, when a Jewish man refused to consent to a divorce citing religious reasons (*Bruker v. Marcovitz*, [2007] 3 S.C.R. 607).

XLVI When CSOs and feminist groups – included the Canadian Council of Muslim Women – asked the Government to consider the possible discriminations against women a Sharia Court would have justified, the Government appointed Marion Boyd, provincial MP and feminist activist, as rapporteur on the topic. Her report, issued in 2005, suggested that the Government not amend the Arbitration Act.

XLVII See *R. v. N.S.*, [2012] 3 SCR 726.

XLVIII See *Ishaq v. Canada (Citizenship and Immigration)*, [2015] 4 FCR 297.

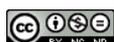
XLIX The Conservative government in force at the time of the decision appealed to the Supreme Court, but the Liberal government, having meanwhile settled, dropped the appeal.

L The possibility of cultural defense has been explicitly rejected as an option for defending the perpetrators of violence against women in the Istanbul Convention, elaborated by the Council of Europe and considered as the golden standard at the international level (see UN statement at <http://www.unwomen.org/en/news/stories/2013/3/the-istanbul-convention-strengthening-the-response-to-ending-violence-against-women>) as for the prevention of gender violence. It is worthy to underline that Canada participated to its elaboration as a non-CoE country, but has not yet signed it.

¹⁴ See *Haida Nation v. British Columbia (Minister of Forest)*, 2004 SCC 73.

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PERSPECTIVES ON FEDERALISM

Centre for Studies on Federalism

Via Real Collegio, 30

10024 Moncalieri - Torino - Italy

Tel. +39 0116705024

Fax +39 0116705081

Mail to: castaldi@csfederalismo.it

