

Refractive and Prismatic Analysis in Implicit Comparative Constitutional Law

di Dwight Newman

Abstract: *Analisi prismatica e rifrangente all'interno dell'“Implicit Comparative Constitutional Law”* – This essays walks the reader through the articles of the monographic section on Canadian Constitutional Law. It preliminarily answers the questions “Why would Italian scholars be interested to engage in an analysis of Canadian constitutional law?” and “why would Canadians be interested in what they have to say?” It ultimately draws some concluding observations where it casts doubt on the enduring validity of the standard liberal theory accounts vis-à-vis Canadian constitutional law.

Keywords: Canada, federalism, liberal constitutionalism, Charter.

1. Introduction

Lawyers often work in jurisdictionally bounded ways. Judges working in a particular jurisdiction give primary and even dominant weight to the legal materials of that jurisdiction. Were matters otherwise, one would no longer be able to speak of systems of law or, indeed, of a system's sources of law.

As a result, to some degree, it is also natural that the appropriate principal focus of legal scholars will be upon their own jurisdiction. That focus enables legal scholars to contribute to the development of the system and draws upon their own expertise as participants in that system. What, then, would explain, say, why a group of Italian scholars might be interested to engage in an extended analysis of Canadian constitutional law, and why would Canadians be interested in what they have to say?

The first question, though, does not need as much of an answer as the second. Though the legal scholar making a contribution might naturally do so within his or her own system, the curious mind of a legal scholar need not be jurisdictionally bounded. At one level, in academic inquiry, he or she is free to roam the landscapes of all the world as he or she sees fit to do.

The second question raises possibly more interesting questions. While the Canadian constitution is not an artefact to be secreted from the gaze of non-Canadians, Canadians might nonetheless initially wonder what is to be gained from study of the Canadian constitution by scholars from another tradition who will bring different—*foreign*—assumptions and approaches to it. The exercise might be permitted but could initially appear to some to have limited rationales for it.

An extended analysis of the constitutional law of one state by scholars from another state inherently involves a form of implicit comparative constitutional law. However, it presents a form of comparative constitutional law going beyond the discipline's usual tropes. Comparative constitutional law in general has become a significant academic movement over recent decades.¹ But the dominant trends in comparative constitutional law have generally tended to see a focus more on comparative bills of rights jurisprudence than on other aspects of constitutionalism.² To the extent that there have been exceptions, these comparisons have—even more so than in the context of bills of rights—been conducted within regionally- or systemically-bounded groups of countries. Thus, Canada's constitution has drawn attention in the context of its Commonwealth affinities, even if to draw lessons from Commonwealth contexts that may be of interest elsewhere.³ Admittedly, there has sometimes been a broader focus on specific aspects of Canadian constitutional policy that is of interest elsewhere, such as in Stephen Tierney's work on Canadian multiculturalism or Annis May Timpson's on Indigenous issues.⁴ But the overall trends have seen comparative constitutional law operate within certain established channels.

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There are obviously reasons why much comparative constitutional scholarship has operated within such defined traditions. To take one example, one aim of comparative law may be to facilitate borrowing of distinctive rules on some particular issues—what has sometimes been called *bricolage*.⁵ The adoption of a rule from another system may well be most useful if it derives from a system in which that rule is at least somewhat similarly situated within the broader network of legal rules and principles, thus offering more prospect of the transplanted rule achieving some of its same functions. That possibility is most likely in the context of legal systems that share some characteristics, which thus offers an argument for some priority of comparative focus on systems within the same family of systems.

That said, depending upon the breadth of one's viewpoint, the value in comparative constitutional law may extend much more so across traditions. One Italian scholar has rather optimistically described an affinity that may exist as between all constitutional systems: "An undeniable bond—both historical and

¹ See e.g. Ran Hirschl, "The Rise of Comparative Constitutional Law: Thoughts on Substance and Method" [2008] *Indian J. Const. L.* 11. In the context of this rise, Hirschl has argued that there is an appropriate shift underway from comparative constitutional law to comparative constitutional studies: Ran Hirschl, "From Comparative Constitutional Law to Comparative Constitutional Studies" (2013) 11 *Int'l J. Const. L.* 1. See also generally Ron Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, 2014.

² See discussion in Christopher McCrudden, "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" (2000) 20 *Oxford J. Legal Studies* 499. On the dearth of comparative federalism, for example, see Vicki C. Jackson, "Comparative Constitutional Federalism and Transnational Judicial Discourse" (2004) 2 *Int'l J. Const. L.* 91.

³ See e.g. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice*, Cambridge, 2013.

⁴ Stephen Tierney, ed., *Multiculturalism and the Canadian Constitution*, Vancouver, 2008; Annis May Timpson, ed., *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada*, Vancouver, 2009.

⁵ See the helpful discussion in Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 *Yale L.J.* 1225.

cultural in nature—connects all constitutions currently in force to the ideals originating from those past revolutions that led to the recognition of such [human] rights”.⁶ To the extent that such claims are well-grounded, then the interpretation of rights in each system will be of interest to those working within every other system. To some degree, text and jurisprudence that has developed within each system represents an effort to grasp the very same law, so each system contains persuasive material for every other. And, indeed, such a take often motivates those working on comparative human rights.⁷ However, at least many aspects of constitutions not bearing directly on rights surely reflect non-universal considerations, notably the histories and identities of particular places.

While individual Italian scholars have certainly studied Canada’s constitution before,⁸ the idea of a group of Italian scholars engaging together in a project studying Canada’s constitution marks a different application of scholarly analysis. In covering a range of different areas of constitutional law, the project undertakes an analysis that involves implicit comparative constitutional law. Yet, it does so in respect of systems not necessarily easily considered within the same family of constitutions—except in so far as one constructs an immensely broad European tradition—and it does so on a wide range of matters, not necessarily those where both constitutions must reflect the same values.

The results, in my view, ought nonetheless to be of significant interest to Canadian constitutionalists. Attention by a group of Italian scholars to the Canadian constitution can facilitate both what I will call “refractive analysis” and what I will call “prismatic analysis”. Both derive from metaphors in relation to light. Refraction takes place when a light wave changes direction upon passing from one substance to another. Thus, refractive analysis considers the subject matter from a different set of underlying perspectives derived from a different system, which may lead to some interesting alteration in the understanding of the subject matter. A specific form of refraction takes place when a prism separates out the different colours contained within a beam of light. Thus, prismatic analysis is a form of refractive analysis that specifically separates out different materials within one system’s constitutionalism, enabling clearer separation of matters like values and culture from more formal aspects of the law. Both refractive and

⁶ Giancarlo Rolla, “The Two Souls of the Canadian Charter of Rights and Freedoms” (2007) 36 Int’l J. Cdn. Sts. 329.

⁷ See McCrudden, *supra* note 2.

⁸ The piece in this collection by Giuseppe Franco Ferrari surveys the Italian-language scholarship on Canadian constitutionalism in its opening paragraphs. There have also been some Italian scholarly publications on the Canadian constitution in English: e.g. Rolla, *supra* note 6; Tania Groppi, “A User-Friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies”, in Ian Peach et al., eds., *A Living Tree: The Legacy of 1982 in Canada’s Political Evolution*, Toronto, 2007. See also Alberto Cadoppi, “Recent Developments in Italian Constitutional-Criminal Law” (1990) 28 Alta. L. Rev. 427 (publication on Italian constitutional law issues in a Canadian legal journal by a visiting Italian scholar carrying out some comparisons in the process). There was also a Symposium on The Constitution of Canada held at the Scuola Superiore Santa’Anna in Pisa, Italy in May 2017, convened by Richard Albert, Giuseppe Martinico, Antonia Baraggia, and Cristina Fasone (although with many of those presenting coming from outside Italy) which will presumably lead to some sort of published volume in due course.

prismatic analysis are facilitated precisely by the presence of foreign scholars who come to the Canadian constitution with different starting assumptions, different histories, and even different values on those matters that have local dimensions. The achievement of refractive analysis and prismatic analysis is apparent in the different papers offered by the group of Italian scholars who engage with the Canadian constitution in this collection—precisely by bringing “foreign” assumptions to the analysis, these scholars illuminate the Canadian constitution afresh. My comments here thus serve both to introduce the various papers in the collection but also to situate them within these identifiable modes of implicit comparative constitutional analysis.

2. Refractive Analysis of the Canadian Constitution

Refractive analysis involves the passage of legal materials at issue through another substance, notably through the perspectives of a lens from outside the system. In the context of Italian analysis of the Canadian constitution, refractive analysis arises when a different perspective on the Canadian constitution is apparent in light of the different starting assumptions and methods of Italian scholars. This refractive analysis is part of the richness of learning that can come from implicit comparative constitutional law.

Distinctive approaches to the Canadian constitutional law corpus are evident amongst the Italian scholars’ contributions to this collection. Giuseppe Franco Ferrari’s piece, “Canadian Rights”, refers at the outset to an interest in constitutional rights but then recognizes that any discussion of rights in Canadian constitutional law must grapple with a highly complex system of legal sources. While the presentist orientation of Canadian legal education—at least at the anglophone law schools—has tendencies to move rapidly to discussion of the *Charter of Rights and Freedoms* at the expense of other parts of the constitution, Ferrari rightly backs things up from that context and discusses the complex sources of Canadian constitutional law, the historical patterns of recognizing other principles like parliamentary sovereignty and the historical engagement with minority rights through particular constitutional privileges. By bringing a different lens, Ferrari highlights to Canadians themselves how much else is presumed when one begins talking about constitutional rights.

Edmondo Mostacci’s piece, “The Canadian Constitutional History and Its Determinants”, similarly situates Canadian constitutionalism within a deep historical background. The long shift toward autonomy from the United Kingdom—and the long, complex efforts to manage relations between different linguistic communities—are a dominant feature of Canadian constitutionalism. But they are more apparent to a scholar coming from a country with deep history, while Canadians all too often leap to present legal debates.

In her piece, “The Judicial Power in Canada: The Mirror of a Pluralistic Society”, Eleonora Ceccherini reads some of the constitutional history in Canada to have certain constant elements, notably a focus on pluralism. Mauro Mazza’s piece on “Linguistic and Ethnic Minorities” similarly identifies a focus found

throughout significant parts of Canadian constitutional law on linguistic rights, ethnic rights, and Indigenous rights. He highlights, for instance, that the recent formation of the territory of Nunavut in the Eastern Arctic was oriented to creating a territory that could be run by Inuit peoples who constituted a majority of its population. In doing so, he highlights some of the ways in which features of federalism actually serve to protect particular identity groups, a point salient with the analyses in Ceccherini and Ferrari and emphasizing a dimension of Canadian constitutionalism sometimes neglected by Canadians themselves. All too often, Canadians think of the *Charter* as the principal instrument of rights protection when rights protection runs through the Canadian constitution more broadly in ways almost better noticed from outside.

Indeed, it is fascinating that it is the forms of Canadian government that receive in this collection so much attention compared to the Canadian *Charter of Rights and Freedoms*. When David S. Law and Mila Versteeg published their piece arguing that the Canadian constitution had become more influential than that of the United States, their main focus was on the *Charter*⁹—and that was what was largely picked up by various commentators, as well as being the focus of widely-noted remarks by United States Supreme Court Justice Ruth Bader Ginsburg in Egypt.¹⁰ After citing to Law and Versteeg, Cristina Fasone’s piece on “Canada as an ‘Importer’ and ‘Exporter’ of Federal Arrangements: A View From Europe” makes the potentially more interesting claim that features of Canadian federalism are at least as interesting and worthy of attention from outside Canada. In referencing the interesting features of Canadian constitutionalism, Fasone first mentions the nature of Canada’s Senate—something that no Canadian would ever do!¹¹ She goes on to discuss also intergovernmental relations and Canada’s engagement with secessionist challenges, connecting these issues to issues in Europe itself. The lens of what an Italian scholar finds to be exportable Canadian constitutional law highlights different perspectives on what aspects of Canadian constitutionalism are of more international interest.

Notably, Simone Penasa’s piece on “The Canadian Form of Government” draws attention to some of the same issues, such as the role of the Senate, again illustrating how features of Canadian constitutionalism that have been receiving less attention from Canadian scholars are of much greater significance than Canadians might appreciate. Penasa also draws attention to some of the unique balances struck in Canada, such as in the hybridization of common law and civil law and especially in the integration of British parliamentary tradition and

⁹ David S. Law & Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87 N.Y.U. L. Rev. 762.

¹⁰ See Dwight Newman, “Conserving the Uniquely Exportable Bill of Rights”, *Washington Times*, 12 December 2016.

¹¹ Indeed, the Senate receives only scant references in Peter Oliver, Patrick Macklem & Nathalie des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution*, Oxford, 2017—despite being one of the distinctive institutions of Canadian federalism, it receives no separate chapter. Indeed, today, the Senate is mainly under discussion in respect of potential reforms: see e.g. Emmett Macfarlane, “The Uncertain Future of Senate Reform”, in Emmett Macfarlane, ed., *Constitutional Amendment in Canada*, Toronto, 2016, 228. Older traditions of Canadian writing were much more ready to acknowledge its important roles: see e.g. F.A. Kunz, *The Modern Senate of Canada, 1925-1963*, Toronto, 1965.

American judicial review. The latter has, of course, received some meaningful attention in the context of discussions about the so-called “New Commonwealth Model of Constitutionalism”.¹² In Canada, a “notwithstanding clause” enables parliamentarians and legislators to substitute their interpretation of rights in circumstances where they disagree with the interpretations offered by judges.¹³ As I have argued elsewhere, one feature of such a clause is the possibility that in cases of tensions between rights that are and are not enumerated in the written constitutional text, it may permit parliamentarians and legislators to ascribe continued weight to those rights outside the constitutional text.¹⁴ It thus marks the possibility of a unique rights tradition in Canada.

However, Nausica Palazzo’s piece on “Anti-Discrimination Law in Canada: Future challenges”, tends to call some of that potential on the uniqueness of the Canadian rights tradition into question. Palazzo powerfully highlights how the Canadian courts more readily accept individualistic claims under the security of the person and freedom of association guarantees within the Canadian *Charter* and tend to reject equality-based claims that do not have normative standing within a particular liberal model of constitutionalism. Thus, poverty-based claims have not succeeded under the equality rights provision of the *Charter*—even while some poverty-related claims have succeeded under security of the person—and non-normative family forms have struggled to receive *Charter* recognition unless they can be made to resemble traditional family forms. Here, we have a bridging into prismatic analysis.

3. Prismatic Analysis of the Canadian Constitution

Prismatic analysis, as suggested earlier, is a form of refractive analysis that specifically separates out different colours. It enables clearer separation of matters like values and culture from more formal aspects of the law. The piece just referenced from Palazzo is an example of an Italian scholar’s approach to implicit comparative constitutionalism identifying the presence of significant values of liberalism within Canadian constitutionalism. While the Canadian constitutional text would appear to give equal priority to security of the person and to equality rights, liberal claims based on the former right fare better than more transformative claims based on the latter right. By engaging with Canadian anti-discrimination principles in innovative ways, Palazzo implicitly separates the roles of formal legal text and deeper values of Canadian constitutionalism that bear on Canadian rights discourse.

The emphases on history in several of the pieces also help to separate out various different considerations going into present legal analyses. Notably, the

¹² Gardbaum, *supra* note 3.

¹³ On the notwithstanding clause generally, see Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd edn., Toronto, 2017, 603-608.

¹⁴ For my explanation elsewhere, see Dwight Newman, “Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities”, in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions*, Cambridge, forthcoming 2019.

analysis offered by Ferrari highlights that the modern rights context must be read against a deeper set of historical dimensions of Canadian constitutionalism. Mostacci, Ceccherini, and Mazza also highlight how the historical shape of Canadian constitutionalism bears significantly on modern understandings, each illustrating the point in various different ways, and the latter two of these authors also highlight the role of values of pluralism and respect for diversity as a dimension separate from and undergirding the formal legal texts.

Both Fasone and Penasa are oriented to the forms of Canadian government. The forms of Canadian government are not a mere present construction but build upon deeper history and values. Both Fasone and Penasa draw attention to dimensions of the Canadian governmental structure that presentist-oriented Canadian lawyers neglect, thus highlighting some of this role of history and values in richer ways.

The collection as a whole engages with Canadian constitutionalism differently than most Canadians would. That is a real strength to it. The different emphases of a group of Italian scholars confronting the Canadian constitution show afresh what parts of Canadian constitutionalism may be truly distinctive and may be of particular significance to those elsewhere. The different focus of Italian scholars compared to many Canadians writing on the Canadian constitution offers refractive and prismatic analyses that highlight different aspects and help to separate out the roles of text, values, and history in ways that may be escaping the attention of many Canadian scholars immersed daily in the quotidian legal disputes of the country.

4. Conclusions: From Light to New Visions

Shedding light differently on the Canadian constitution may help Canadians think differently about it as well. One dominant narrative since the adoption of the 1982 *Charter*—much trumpeted by Canadian scholars seeing the Canadian constitution as linking on to a universal human rights discourse—has tended to see the Canadian constitution as a standard liberal constitution. To some degree, the fascinating piece by Palazzo supports that reading, but it must be read alongside the various sets of analyses offered here. While the initial political theory of Pierre Trudeau was fundamentally liberal—and that conception has continued to have prominence for a certain cadre of scholars and judges—the richer set of considerations of history and distinctive values identified in the discussion here may make us think differently and consider the possibility that Trudeau’s initial political theory actually set the groundwork for a potential transition away from traditional liberalism.

Notably, the liberal rights of the *Charter* are actually textually framed as the least important rights in several different ways. They are uniquely subject to the notwithstanding clause, which does not apply to the language rights clauses. They are also constrained in their interpretation in light of Indigenous rights in section 25 of the *Charter*, in light of multicultural heritage in section 27, in light of separate school rights in section 29, and the list could actually go on. Section 28

also contains a trumping sex equality provision, albeit one framed around the binary of “male persons and female person”—thus, without any anticipation of the contemporary transgender revolution. Though these provisions have been little applied, all of them textually rank liberal rights lower than group rights, subject to a partial liberal priority on sex equality.

That arguably is not new with these provisions. As noted by several of the pieces in Amnon Lev’s recent collection on *The Federal Idea*—notably those by Nicholas Aroney and by Stephen Tierney—the very idea of federalism has a tendency to subvert traditional notions of the nation-state and to embody forms of plurinationalism in ways that find no place in standard liberal theory accounts.¹⁵ John Rawls’s theory of justice has no variegation of citizens.¹⁶ In respect of a variety of aspects of our Constitution, Canadian engagement with post-liberal notions of the state may well have much to offer as a case study of potential interest to elsewhere.

Indeed, while the point deserves more attention from scholars, in many ways the sorts of cultural and linguistic policies drawing attention from so many of the pieces in this collection serve as state-building and nation-building policies. And there is meaningful evidence that one of Trudeau’s aspirations in framing language rights as they were was not to serve specific aims of liberal individualism but to subvert minority nationalisms.

Thinking also of rights going beyond standard liberal formulations, an Italian Indigenous rights scholar based in the United Kingdom, Mauro Barelli, has highlighted the uniqueness of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in the international human rights world in recognizing collective rights in a relatively full-fledged way for the first time in international law.¹⁷ There are of course many complex questions on how to understand and work with collective rights, some of which have already been implicitly raised in Canada and some of which remain ahead.¹⁸

The Canadian constitution, rooted in the deep histories of diversity highlighted by a number of Italian scholars approaching it outside Trudeau’s liberal shadow, continues to contain many provisions oriented to rights protection in more collective forms. It is no simple liberal constitution inscribing into Canada some set of simple universal values. As implicit comparative constitutional law highlights, the Canadian constitution contains complex historical dimensions and complex values choices going well beyond the simple tropes of many Canadian scholars. We should all consider ourselves indebted to those from outside who

¹⁵ Nicholas Aroney, “The Federal Condition”, in Amnon Lev, ed., *The Federal Idea*, Oxford, 2017; Stephen Tierney, “Federalism and the Plurinational Challenge”, in Lev, ed., *ibid.*

¹⁶ That said, for an interesting recent argument that Rawls’s political liberalism opens the way for many diversity-oriented policies and, indeed, for a certain model of collective rights, see Michel Seymour, *A Liberal Theory of Collective Rights*, Montreal, 2017.

¹⁷ Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples*, London, 2016, 18.

¹⁸ See Dwight Newman, “Aboriginal Rights, Collective Rights, and Adjudicative Virtues”, in Dwight Newman & Malcolm Thorburn, eds., *The Dignity of Law: The Legacy of Justice Louis LeBel*, Toronto, 2015, 285. For my deep theory account of collective rights, see Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*, Oxford, 2011.

highlight aspects of Canadian constitutionalism that are ever-present but often escape presentist attention.