The Canadian constitutional history and its determinants

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Abstract: La storia costituzionale canadese e le sue determinanti – The essay analyses the Canadian constitutional history and focuses on the key-elements that have most influenced the development of Canadian constitutional law. In particular, it highlights how the *québécoise* question was the first and fundamental determinant of the constitutional order of the Nation. Subsequently, the suggestions coming from the United States and above all the question of independence from the Motherland played an equally significant role. However, the *québécoise* question re-emerges strongly when the process leading to independence from the United Kingdom comes to a positive end.

Keywords: British North America Act, Canada, Federalism, Multiculturalism, Patriation.

1. Introduction: Canadian constitutional history and Canadian constitutional law

The analysis of Canadian constitutional history is no easy task, for two distinct reasons: firstly because of the difficulty of reconstructing a perspective that covers a period of time particularly long and difficult to define with certainty; secondly, for some features of the relationship that links constitutional law, constitutional history, and history tout court of the Country.

As for the first question, it is difficult to establish the starting point of the analysis, due to the absence of a real breakpoint within the historical development of Canada. On this point there seem to be three distinct alternatives.

The first in chronological order is to identify as the starting point of the constitutional history of the Country the adoption by the King of France of the edict that established the Supreme Council of Quebec[1]. This is not, in fact, the first governing body of "New France". Already in 1647 the French monarch had provided the North American colony with a first council consisting of three members. However, it is only with the edict in question that ancient Quebec was endowed with a governing body with a certain degree of autonomy and significant powers.

The second alternative is the most common one within Canadian constitutional history studies and coincides with Britain's victory over France in the Seven Year War and with the Royal Proclamation of the 7th of October 1763. It is definitely the passage that marks the cuts more clearly. From this moment

[1] Edit de création du Conseil souverain du Québec.

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on, two of the most significant forces that led to the constitutional development of Canada begun to deploy their effects: the difficult coexistence between Francophones and Anglophones and the complex relationship of colonies with the British motherland.

The third alternative is to set the time when Canadian constitutional history begins – *rectius*, the perspective of analysis that is proposed on this topic – in 1867, the year of the adoption of the British North America Act. Several good reasons support this choice. The BNA defines some essential features of the Canadian legal order, as we know it today. In particular, it is only since 1867 that Canada is a federal legal system. At the same time, the features of the act influence markedly the subsequent constitutional development and the problems it has left unresolved.

Numerous reasons militate in favor of each of the three alternatives and do debar a decisive choice in favor of one or them. On the contrary, the complex character of Canadian constitutional history suggests that each of these three moments of transition is to be relativized. Consequently, the analysis that will take place in the following pages will have the specific object of Canadian constitutional development over the last 150 years, also in light of the subject of the conference. However, particular attention will be given to those events prior to the adoption of BNA that have to some extent significantly influenced the development of subsequent events.

As for the link between constitutional law, constitutional history and history *tout court*, the question concerns some essential features that Canadian constitutional law has derived from that of the ancient Motherland. In particular, similarly to what happened in the English experience, the normative formant of Canadian constitutional law is at the same time rather weak and fragmented. On the one hand, its weakness manifests itself in the partiality of the Canadian Constitution, especially before the adoption of the Canadian Act of 1982: the absence of a constitutional bill of rights is associated with the lack of constitutional provisions concerning important features of the frame of government. Consequently, the overwhelmingly prevalent part of the BNA relates to relations between Federation and Provinces. On the other hand, the same definition of the normative formant seems to be problematic in nature. Even after the adoption of the Constitutional Act 1982, whose sect. 52.2 defines what the Constitution of Canada is, the issue remains controversial, even in the light of *New Brunswick Broadcastiong Co. v. Nova Scotia* where the Supreme Court claims that the acts listed in the sect. 52.2 constitute a non exhaustive list. Moreover, even where the normative formant is complete, its application by courts - and in particular, until 1949, by the Judicial Commitee of the Privy Council - is largely influenced by historical circumstances and gives rise to a *Law in action* far from the *Law in the books.*

The peculiarities of the relationship between law and constitutional history hinder a clear distinction between these two domains and require dealing with the historical discourse differently from the simple analysis of the diachronic evolution of juridical institutions of constitutional law, to grasp its current conformation.

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To this end, it seems appropriate to have a grid of analysis of Canadian constitutional history focusing on those fundamental forces that have driven the historical development of Canadian institutions. This grid is then applied to the analysis of the most important aspects of the Canadian legal system in their diachronic development.

This grid is made up of the following three elements: the contrast between the French-speaking and the Anglo-speaking inhabitants; the relationship between the Dominion and the Motherland; the ties with and cultural influences from the Motherland and the United States. The aim of the research is to verify how they have intertwined and how the dialectic between the two main forces – i.e.: the contrast between the French and the Anglo-speaking, and the relationship between the Dominion and the Motherland – has constituted the fundamental tension underlying the overall Canadian constitutional development.

Based on this grid the analysis will take up the following main points: first, the period prior to the adoption of the BNA will be analyzed, highlighting how the relationship with the Motherland (para 2) and the francophone issue (para 2.1) have influenced the development of Canadian institutions. Next, we will analyze the time when the BNA was adopted (para 3) and the subsequent steps on the path of Canada's independence from the United Kingdom (para 3.1). Finally, before moving on to final observations (para 5), attention will be focused on the Patriation process (para 4) and to the Constitutional Act of 1982 (para 4.1).

2. Representative government and political autonomy from the Québec Act to the BNA

The first determinant of Canadian constitutional history is the long relationship between Canada and the United Kingdom. This begun with the Treaty of Paris[2] and the subsequent Royal Proclamation (1763)[3] and lasted over two centuries until the end of the process of *Patriation*. It was not, as is well known, a constant relationship. On the contrary, it has produced a long evolution that over the decades has presented problems of different origin and nature.

In the beginning, the theme that drove the historical development was that of Canadian autonomy and representative government. The Royal Proclamation of 1763 replicated to a good extent a scheme already tested - over a century before - with the "other" American colonies. After the treaty of Paris, George III established a new government for Québec by means of a letter-patent[4]. The letter-

[2] The treaty was signed on 10th of February 1763 by the kingdoms of Great Britain, France and Spain, after the victory of Great Britain during the Seven Years' War and marked the beginning of an era of British dominance outside Europe. On the Treaty, see H.W.V. Temperley, *The Peace of Paris*, in J.H. Rose, A.P. Newton, Ernest Alfred Benians (eds), *The Cambridge History of the British Empire*, vol. I – *The old empire from the beginnings to 1783*, Cambridge, 1929.

[3] The Proclamation was issued on 7 th of October 1763, by King George III.

[4] On this instrument and its use in the context of British colonization of North America, see T.S. Hughes, *The History of England, from the Accession of George III, 1760, to the Accession of Queen Victoria*, III ed., vol I, London, 1846, 20 ff. See also G.F. Ferrari, *Le libertà. Profili comparatistici*, Torino, 2011, 70 ff.

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patent entrusted a Governor with the power to summon general assembly *in such manner and form as was usual in those colonies and provinces which were under the King's immediate government* and, with the consent of the representatives of the people, to make laws and ordinances for the peace, welfare and good government of the Colony[5].

This first constitutional arrangement, which was unsatisfactory under several points of view, lasted eleven years, until the adoption by the Parliament of Westminster of the Québec Act 1774[6]. According to this Act, the Government of the province was entrusted to a Governor and a Legislative Council; the Council was composed by no less than seventeen and no more than twenty-three members, appointed by the crown. As a consequence, the act left no room for representative government[7]. However it addressed an other issue relevant to the political autonomy of the Colony: it restored the validity of French civil law within the Colony[8].

The enactment of the Québec Act of 1774 did not resolve the question of representative government and during the '80 petitions and memorials were presented to the home government[9]. Within a context characterized by the American and the French revolution, petitions and memorials pushed the Parliament of Westminster to approve a new constitutional text in 1791. The Constitutional Act of 1791[10] dealt with the question of representative government and vested the legislative authority in a Legislative Council – composed by members appointed by the crown for life – and an Assembly – composed by representatives chosen by majority of votes in electoral districts.

Whilst the Constitutional Act dealt with the issue of representative government, it did not tackle the question of ministerial responsibility[11]. The governor general, appointed by the Crown, and his Executive Council were entrusted with the executive power and were not responsible to the Legislative Assembly.

The framework described did not undergo significant changes for more than half a century, despite the fact that, after a first relatively harmonious period of operation, political frictions between the Legislative Assembly and the Governor General had rendered unsatisfactory the rendering of the overall institutional system.

A decisive change of course took place in the mid-nineteenth century, a period that was turbulent in Canada since the adoption of the Union Act of 1840[12] and that was characterized, in Europe, by the revival of revolutionary revolts of liberal inspiration. The innovations of the period concerned two distinct areas. On

[5] See S.J. Watson, *The Constitutional History of Canada*, Toronto, 1874, 16.
[6] Formally the British North America (Quebec) Act of 22nd of June 1774 (14 Geo. III c. 83).
[7] See A.R. Hassard, *Canadian Constitutional History and Law*, Toronto, 1900, 31 ff.
[8] See J.G. Bourinot, *A Manual of the Constitutional History of Canada. From the Earliest Period to 1901*, Toronto, 1901, 11.
[9] See again A.R. Hassard, *Canadian Constitutional History*, cit., 39-40.
[10] The Clergy Endowments (Canada) Act 1791 (31 Geo 3 c 31).
[11] See again J.G. Bourinot, *A Manual of the Constitutional History of Canada*, cit., 15.
[12] The British North America Act, 1840 (3 & 4 Victoria, c.35).

the one hand, they enlarged the field of autonomy granted to Canadian representative institutions: in 1846, an imperial statute entrusted the Canadian legislature with the complete authority over taxes and provincial money and authorized it to repeal duties imposed upon goods imported from foreign countries; three years later, the Parliament of Westminster repealed the navigation laws and liberalized the use of the river St. Lawrence; moreover, in 1854 another act enacted by the Imperial Parliament enable the Canadian legislature to alter the structure of the Canadian Legislative Council and paved the way to an elective upper house for the Province[13].

Furthermore, the Executive Council was made responsible to the Legislative Assembly. As Lord Elgin was appointed Governor General in 1847, he received clear instructions to receive as members of the Executive Council "those persons who might be pointed out to him as entitled to do so by their possessing the confidence of the Assembly"[14].

2.1. The issue of French-speaking inhabitants

The second determiner of Canadian historical development, both in the period before the adoption of the BNA and afterward, is the contrast between English and French speaking inhabitants. In fact this is a contrast that emerges about thirty years after the Capitulation of Montreal, when after the American Separation War a large group of citizens of the *Thirteen Colonies* who has remained faithful to the Motherland came to the colonies of the northernmost part of North America. It was a massive migration for the time, estimated at about 60,000 people, one fifth of whom moved to the northwest of Québec[15]. As far as the previous period is concerned, however, it is more correct to talk about the opposition between the population settled in the Canadian area during the French domination and the new Anglo-Saxon dominion.

The issue of this opposition emerges first of all in the Articles of Capitulation of Montréal, in which England is committed to ensuring the people of the future Canada the privilege of maintaining their civil rights and practicing their religion[16]. However, in the early years following the Royal Proclamation, the new Motherland seems to fail to comply with the commitment because the decision to provide the colony of Anglo-Saxon institutions and the choice to impose Anglican oath as a condition for access to Public office, which inhibited the French-speaking people of Catholic religion from actively participating in the public life of the Colony[17].

A first change of route in the sense of greater protection of the demands of the French-speaking population comes with the Québec Act of 1774, which not only restores the validity of civil law in disputes between individuals - albeit with

[13] See A.B. Keith, *Responsible Government in the Dominions*, Oxford, 1912, 645.
[14] Cfr. J.G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, IV ed., Toronto, 1916, 12-3
[15] See C.G.D. Roberts, *A History of Canada*, London, 1897, 257 ff.
[16] See art. 27.
[17] See J.G. Bourinot, *A Manual of the Constitutional History of Canada*, cit., 7.

some interference with common law, in force in the sphere of public law - but purges the oath of allegiance, necessary for access to public office, of every reference of a confessional nature.

A second step on the path to stabilizing the francophone issue is with the adoption of the Constitutional Act of 1791, which divides the Colony into two provinces – Lower Canada, characterized by a French-speaking majority, and Upper Canada, with an Anglo-speaking majority – and provides each province of symmetrical[18] and mutually independent governing bodies. The separation of the two provinces affects their legal structures and allows the population of Upper Canada to substitute the French civil law with the rules of common law[19], thus inaugurating that territorial differentiation that characterizes also the current Canadian legal system.

After a period of relative stability, the institutional system created in 1791 gets into crises because of the demand, common to both provinces, of greater autonomy, especially in tax matters. However, the impasse is particularly severe in Lower Canada where it stands up with the difficult relationship between the French population and the Motherland. The former, through its representatives, requires the adoption of important reforms aimed at giving the province greater autonomy and a truly representative government, as summarized by Ninety-Two Resolutions of 1834[20]. The second is reluctant to grant greater forms of autonomy and eager to proceed to the Anglicization of the province. The contrast between Lower Canada and the Motherland is progressively dramatized in the first thirty years of the nineteenth century resulting first in a conflict between the electoral chamber and the governor general, who «dissolved the Québec Legislative Assembly with a frequency unparalleled in political history»[21], and then in the presentation of the Ninety-Two Resolutions by Canadian representatives and in their rejection by the British Institutions. The peak of the crisis eventually leads to the Rebellion of 1837-38, to the suspension of the Constitutional Act of 1791 by the Parliament of Westminster and the sending of Lord Durham[22] to Canada as Commissioner, entrusted with large powers *for the adjustment of certain important affairs, affecting the provinces of Upper and Lower Canada.*

Returning to the Motherland, Lord Durham submits to the English Parliament an articulated report[23] outlining the state of Canadian provinces and suggesting the actions needed to resolve the ongoing crisis. The action lines suggested by Lord Durham are essentially two: to proceed on the road to grant

[18] Except the fact that Upper Canada is administered by a Lieutenant-General of the Governor-general, while Lower Canada by a direct representative of the latter.
[19] See F.P. Walton, *Civil Law and the Common Law in Canada*, 11 *Jurid. Rev.* 282, 286 (1899).
[20] A.R. Hassard, *Canadian Constitutional History*, cit., 47.
[21] According to J.G. Bourinot, *A Manual of the Constitutional History of Canada*, cit., 24.
[22] On Durham's figure and his political views, see M. Wade, *The French Canadians 1760-1945*, New York (NY), 1955, 175
[23] The s.c. *Lord Durham's Report.* It could be found in 4 *Monthly L. Mag. & Pol. Rev.* 85 (1839). On the Report, see T.J. Lockwood, *A History of Royal Commissions*, 5 *Osgoode Hall L. J.* 172, 188 (1967).

greater autonomy to Canada and to strengthen self-government institutions[24]; for the other to strengthen ties with the Motherland, in particular also through the Anglicization of the French-speaking province[25]. Based on this premise he strongly recommends the unification of the two provinces in a single entity governed by common institutions.

Based on Durham's report, several initiatives were taken[26]. On the one hand those that give rise to the developments already seen in the previous paragraph; on the other hand, the approval of the Act of Union of 1840, with which Upper and Lower Canada are reunited in a single province, divided into two districts.

The institutional framework laid down by the Act of Union is characterized by the readaptation, at least in the form, of the one already laid down for the two provinces in the Constitutional Act of 1791, with the peculiarity that the two chambers of the legislature are now composed of two parts, each of them respective to one of the two districts in which the unified province is organized.

In short, the period ending on the eve of the BNA approval saw the existence of a Canadian province whose autonomy from the Motherland had made a number of advances. Simultaneously, these same advances were partially offset by a reasonable solution to the problem of the self-government of the French-speaking population, which first found a partial solution in the division of the territory in Upper and Lower Canada and then was largely expunged from the political agenda of the Parliament of Westminster.

3. The enactment of the British North America Act

In the years immediately preceding the adoption of the BNA, Canada shows an institutional framework that gives the Colony an adequate level of autonomy from the Motherland: legislative power is in the hands of a Legislature that, since 1856, is composed of elective representatives; Executive power is in the hands of an Executive Council responsible to the representative Assembly. In this context, in 1865 the Imperial Parliament enacts a law of particular importance in rationalizing and better defining the relations between Motherland and Dominions: over the years the general relationship between the Imperial Parliament and Legislature of the Dominions has been reconstructed in terms similar to the concept of hierarchy. The Colonial Laws Validity Act of 1865 (CLVA) intervenes to clarify this relationship and to state what acts of the imperial parliament are to prevail over the laws adopted by the colonies and which acts are not binding[27]. The CLVA sets out that an Imperial Statute is an act of the Parliament of Westminster extending to the colony *by the express words or necessary*

[24] C.R. Cahow, *Comparative Insights into Constitutional History: Canada, the Critical years*, in 45 *Law & Contemp. Probs.* 33, 45 (1982).
[25] W. Renwick Riddell, *The Constitutional History of Canada*, in 46 *Am. L. Rev.* 24 36 (1912)
[26] However it must be highlighted that the British government adopted only a part of the Durham's proposal. In particular, it granted responsible government to Canada only in 1847. See W. Morton, *The Canadian Identity*, Toronto, 1972, 38.
[27] On the act ant its impact on Dominion-Motherland relationships, see A.B. Keith. *Dominions as Sovereign States: Their Constitutions and Governments*, London, 1938, 167.

intendment and prescribes that colonial laws are void when they are repugnant to an imperial statute. As a consequence, colonial laws are valid even when they are repugnant to other statutes (s.c. received statutes) or common law rules.

While the twenty years before the adoption of the BNA create a positive settlement of relations between Canada and the Motherland, the francophone issue seems far from having found a positive accommodation. An attempt to do so is made within the Canadian political system thanks to the principle of the *double majority*[28]: no act affecting the territory of a district can be approved without the consent of – other than the two chambers – the majority of the representatives assigned to the same district. At the same time, when in 1848 the principle of ministerial responsibility begins to be applied, the principle of double majority implicates that the two districts should be equally represented in the government[29].

However, the principle of the double majority, applied to the formation of the Executive Council, ends up weakening the government and making it a target for dialectics between Anglo- and French-speaking components of the Country, with consequences also affecting the normal functioning of the legislative power[30]. In addition, the more general historical context increases the need for a well-structured institutional system[31] and the urgency of addressing the weakness of the Canadian frame of government. In particular, two circumstances are of particular relevance. On the one hand, the socioeconomic evolution of Canada and, more generally, of the western world[32]; on the other hand, the American Civil War, which raises concerns about the prospective expansionism of the United States[33], on the backdrop of what had already happened in the early nineteenth century, and determined the need to balance the cumbersome north American Country with a likewise strong legal system, with the contribution of the other British provinces in North America.

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[28] See A.R. Hassard, *Canadian Constitutional History*, cit., 59, and O.D. Skelton, *Canada under responsible government, 1854-1867*, in J.H. Rose, A.P. Newton, Ernest Alfred Benians (eds), *The Cambridge History of the British Empire*, vol. VI – *Canada and Newfoundland*, Cambridge, 1930, 343 ff.

[29] See B.K. Baker Long, R. Chaffey, *Framework of Union. A Comparison of Some Union Constitutions*, Cape Town, 1908, 16.

[30] The principle of the double majority was found to be unworkable, according to A.R. Hassard, *Canadian Constitutional History*, cit., 59. See also D. Creighton, *The 1860s*, in J.M.S. Careless, R. Craig Brown (eds), *The Canadians 1867-1967*, MacMillan, 1969, 8.

[31] See R. Vipond, *1867: Confederation*, in P. Oliver, P. Macklem, N. Des Rosiers, *The Oxford Handbook of the Canadian Constitution*, Oxford, 2017, 84.

[32] The Second Industrial Revolution (1850-1880) affected also the northern part of the American Continent and required an institutional framework capable of providing the nascent industrial system with the necessary infrastructures. See D.G. Creighton, *British North America at Confederation: A Study Prepared for the Royal Commission on Dominion Provincial Relations*, Ottawa, 1938 7.

[33] After the *Trent Affair* the relationship between the U.S. and the British Empire became particularly tense. See W. R. Riddell, *The Constitutional History of Canada*, in 32 *Can. L. Times* 225, 241 (1912). Few years later, the Campobello Island and the Niagara Raids showed that a political union among British colonies «was necessary to ensure territorial integrity against a military power wanting to punish Britain for its support of the South» (R. Vipond, *1867: Confederation*, cit., 87).

In 1864, this critical circumstance drives the leaders of both government and opposition to agree to a mutual understanding, in order to deal with the institutional problem. The perspective to make a federal system with New Brunswick and Nova Scotia[34] leads to a coalition government[35]. A first convention in Charlottetown decides to inspect the question of a larger union of the North America British Colonies in a specific conference to be held in the Ancient Capital of Québec. As a result, after a eighteen days conference in October 1864, the representatives of the Colonies draft seventy-two resolutions, as an outline of the future Act of Union. The legislature of Canada scrutinizes the seventy-two resolutions at the beginning of 1865 and, after an in-depth debate, addresses them to her Majesty so that a measure will be subject to the Parliament of Westminster. After a new conference in London (1866), where small adjustments to the seventy-two resolution are made to accommodate specific interests of the maritime colonies, on the 12th of February 1867, a Union Bill is submitted to the Imperial Parliament and enacted without (significant)[36] amendment within two weeks. On the 29th of March the British North America Act receives the Royal sanction from Queen Victoria.

In the process of drafting[37] the Seventy-two Resolutions, the two driving forces of Canadian constitutional history do not cease to play a significant role. However, if the steps taken towards autonomy in the previous decades allow the fundamental terms of the relationship with the Motherland to remain now unaltered, the francophone issue shows intact all its historical significance. In addition, a new and different force comes into play: it is the dialectic between British cultural influences[38], the importance of which is heightened by the need to involve the Imperial Parliament in the overall process, and the influence of the legal U.S. culture. It is evident that the eighty years of experience of the first federal legal system has to be seen as a fundamental comparison term for constituents of the new Canadian federal order.

By proceeding with order, the establishment of a federal order allows first to find a balance between the instances of autonomy of the French-speaking population and the needs of the Motherland to bridle Quebec self-government within a broader framework, able to preserve the positioning of this geographical area within the British colonial empire. At the same time, it also allows to preserve the interests of the Anglo-speaking population not only in the Upper but also in Lower Canada, especially those of economic nature. Here, then, the dialectics

[34] The idea of gathering in a single federal state the British colonies of North America had emerged about a fifteen years earlier (see P. Buckner, *The Maritimes and Confederation: A Reassessment*, in 71 CHR 1 (1990)), even if the political conditions to concretely pursue the design were realized only in the sixties.
[35] Composed by the Liberal and the Conservative Party of Upper Canada and the Conservaties of Lower Canada).
[36] See N. Mcl. Rogers, *The Compact Theory of Confederation*, in 9 *Can. B. Rev.* 395 (1931).
[37] On this process, see A.P. Poley, *Federal Systems of the United States and the British Empire: Their Origin, Nature and Development*, Boston, 1913, 191.
[38] See M.D. Walters, *The British Legal Tradition in Canadian Constitutional Law*, in P. Oliver, P. Macklem, N. Des Rosiers, *The Oxford Handbook of the Canadian Constitution*, cit., 113 ff.

between the Anglophone group and the Francophone group moves at the Québec conference on future relations between provinces and federation and, in particular, on the distribution of competences between the two levels of government. On the one hand, representatives of the Anglo-speaking population imagine a more perfect union stronger than the United States: the federation is endowed with a broad supremacy clause against provincial laws and the clause on residual competences is addressed to the federation; at the same time, competences expressly assigned to the federal legislature have a mere exemplifying character; in addition, in the field of economic relations, the federation is attributed a seemingly wider competency – the *regulation of trade and commerce* – than that attributed by the U.S. constitution to the Federation (*to regulate commerce with foreign nations and among the several States*). The French-speaking delegation, on the other hand, tries to oppose a certain resistance to pervasive federal power in order to maintain a higher level of autonomy, and in any case succeeds in getting provincial powers on property and civil rights, in order to maintain and develop its legal system of civil law.

But in terms of the dialectic between the influences of English and US legal cultures, it would be misleading to be driven by a mere quantitative criterion: considering the need to maintain the bond with the Motherland and to obtain the approval of the imperial parliament, it is natural that British influence remains dominant. Thus, not only the form of government continues to recall the English one, but also some of its fundamental rules remain entrusted to constitutional practice and customs, in accordance with the legal sensibility of the Motherland. Likewise, the constitutional text is not accompanied by a bill of rights able to restrict the parliamentary sovereignty.

On the contrary, US legal culture strongly influences the federal structure of the legal system ruled by the BNA, both in positive and negative ways. On the one hand, the U.S. federal system is the archetype that inspired the Seventy-two Resolutions; on the other hand, the majority of Canadian *founding fathers* want to avoid the weaknesses that have affected the first decades of life of the U.S. Federation and have contributed to triggering the Civil War[39]: the choice of orienting in favor of the federation the residual clause and the choice of providing for a pervasive supremacy clause in favor of the federation are explained in this way.

3.1. A slow development towards independence (1867-1949)

At least from a symbolic point of view, the adoption of BNA marks an important moment in the process of progressively releasing Canada from the Motherland. The focus on the representative government theme and the completeness of the federal-style institutional system drawn from the act leave little room for colonialist regressions. Similarly, the sect. 129 of the BNA reiterates the capacity of the Canadian government to intervene in all matters of interest to the extent possible, with the limitation of imperial statutes, as established by the CLVA of

[39] See R. Vipond, *1867: Confederation*, cit., 89.

1865[40]. From a legal and formal point of view, there are still two elements of supremacy of the Motherland on the Dominion. Firstly, the possibility for the Parliament of Westminster, admitted by the CLVA, to adopt imperial statutes capable of constraining the Canadian political decision maker; furthermore, the role of appellate jurisdiction of the Judicial Commitee of the Privy Council (JCPC). These are two elements that will only be overcome in the course of the twentieth century.

The power of the Imperial Parliament to adopt imperial statutes, from a formal point of view, is expected to remain in force until the end of the patriation process in 1982. However, it lost its substance at the beginning of the thirties with the Statute of Westminster of 1931.

The process leading to the adoption of the Statute – an act affecting United Kingdom relations with all the Dominions – lies at the end of World War I: on the one hand, in the international context, the principle of self-determination of peoples, emphatically enunciated by U.S. President Wilson at the Versailles Conference (1919), shows the anachronism of the colonial claims of the States of the old continent. On the other hand, the participation of the British colonies in the war effort, costing to Canada more than 60,000 casualties, is a persuasive argument for parity between Dominions and the Motherland. In this context, the first announcement of a new course comes in 1920, when the Canadian Prime Minister William Lyon Mackenzie King denies assisting British troops in Turkey without the approval of the Canadian parliament[41]. Some years later, in 1926, the King-Byng crisis puts the issue of independence from the UK at the center of public debate[42]. In particular, Prime Minister Mackenzie King declines the issue underlying the crisis not as much as a frame of government problem, but from the perspective of political relations between Canada and the crown, its representative in Canadian soil and, therefore, with the Motherland. In addition, in the same year, the Privy Council declares null and void a 1888 federal statutes, which has abolished appeal to the Judicial Committee of Privy Council in criminal cases, due to its inconsistency with two imperial statutes and the CLVA of 1865.

These (and other) events caused pressures from the governments of the Dominions to address the issue of relations with the UK, which led to the convening of the Imperial Conference of 1926[43]. The meeting of the Prime Ministers of the United Kingdom and the Dominions therefore adopted the Balfour Declaration, according to which the UK and the Dominions «are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs».

The Balfour Declaration declares the principle of parity between the Dominions and the (ancient) Motherland, but still leaves unsolved the problem of

[40] On the relationship between CLVA 1865 and BNA, see A.B. Keith, *Responsible Government in the Dominions*, Oxford, 1928, 342.

[41] On the relationship between "Dominions" foreign policy and the sunset of the British Empire see F.R. Scott, *The End of Dominion Status*, in 38 *Am. J. Int'l L.* 34 (1944).

[42] On the importance of this crisis, see A.M. Dodek, *Rediscovering Constitutional Law: Succession upon the Death of the Prime Minister*, in 49 *U.N.B.L.J.* 33, 48 (2000).

[43] See J.A.R. Marriott, *Evolution of the British Empire and Commonwealth*, London, 1939, 300.

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the hierarchical relationship between the Imperial Statutes adopted by the Parliament of Westminster and laws adopted by the legislature of Commonwealth countries. The issue is dealt with a few years later during a new Imperial Conference, which adopts an agreement that, while formally enforcing the supremacy of the Imperial Statutes, aims to resolve the issue pragmatically[44]: the Imperial Conference of 1930 adopts a convention according to which «no law hereafter made by the parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and at the consent of that Dominion». At the same time, the Conference recommends the formal adoption of this principle by the Parliament of Westminster through an Imperial Statute. The imperial parliament fulfills this task the following year through the adoption of the Statute of Westminster, whose sect. 4 reproduces verbatim the text of the previous year convention[45].

The framework drawn up by the Statute of Westminster is supplemented by Sect. 7, dealing with the Imperial Statutes already in force and, through the abolition of the CLVA of 1865, enables the legislation of the dominions (and, for Canada, the Provinces besides the Federation) to repeal and modify them. The only exception, with regard to the Canadian legal system, is the BNA with its amendments[46]. The extension of the principle to this act would have required an autonomous constitutional review procedure for the Canadian Constitution, an objective that will be achieved only fifty years later with the Patriation of 1982.

A second significant step is the adoption of an amendment to the Supreme Court Act aimed at revoking the appeal jurisdiction of the Judicial Committee of the Privy Council (JCPC) for the Canadian legal system. As is well known, since its establishment in 1833, the judicial power of last resort for all colonies was vested in the JCPC. In addition, despite the fact that Canada was granted the opportunity to regulate the types of appeal that could be submitted to the JCPC, attempts to limit the jurisdiction of the English organ were unsuccessful. This is the case of the *Memorandum* prepared by Justice Minister Edward Blake following the establishment of the Supreme Court of Canada[47]. The memorandum aimed to launch a process to revoke the jurisdiction of the JCPC, replacing it with that of the newly created court. However, it was rejected without any particular delay from the Colonial Office. Again, in 1888, the Canadian Parliament adopted a law abolishing the appeal jurisdiction of the JCPC in criminal cases. However, several years later, the JCPC declares that the law is null and void for breach of the Colonial Laws Validity Act[48]. It is only with the Statute of Westminster that the Dominion is entrusted with the power to regulate the subject and then proceed to

[44] See again J.A.R. Marriott, *Evolution of the British Empire and Commonwealth*, cit., 305.
[45] It sets out: «No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof».
[46] See sect. 7.1. of the Statute of Westminister.
[47] The Supreme Court of Canada was established in 1875 by the enactment of the Supreme and Exchequer Courts Act.
[48] See *Nadan v. The King*, [1926] A.C. 482.

the suppression of the appeal authority of JCPC for the Canadian territory. The definitive release of the Canadian judicial system from the Motherland takes place in 1949, thanks to the approval of an amendment to the Supreme Court Act of 1875.

The importance of such a passage does not seem to need any particular explanation. However, with regard to the Canadian legal system, it is of particular significance. Under Canadian constitutional law, the dynamics between the various legal formants[49] – particularly between the legislation and case-law – appear to be particularly unbalanced in favor of the work of the Courts[50], both for the general membership of Canada to the common law countries and the fragmentation of the normative formant, and finally for the creative attitude shown throughout the years by the PCJC. From this point of view, the case of relations between provinces and the Federation seems to be emblematic. The BNA text, which also has margins of uncertainty and ambiguity, seems to draw up a rather centralized federal system, especially in the area of trade regulation. In spite of the literal figures of BNA, the JCPC, especially thanks to the work of Lord William Watson and Lord Richard Haldane[51], maximizes the provincial competences, especially the one on *Property and civil rights*, and instead offers a very restrictive reading of sect. 91 of the BNA[52]. The consequence is that what appears to be a centralized federal system, from the point of view of law in action is a system that is particularly attentive to provincial autonomy.

The relevance of the jurisprudential formant in the definition of constitutional law is certainly not a typical circumstance of the Canadian legal system alone; however, where the supreme authority of the Judicial System is not self-contained but firmly rooted in the UK legal system, the relationship between Dominion and Motherland is definitely affected to the benefit of the latter.

In sum, the period between the Balfour Declaration and 1949 shows that it is decisive from the perspective of the independence of the Canadian legal system from the Motherland. After 1949, beyond the membership in the Commonwealth, the last remnant of colonial supremacy is linked to the adoption of amendments to the BNA, which still requires the involvement of the Parliament of Westminster. However, this participation is of an eminently formal nature: the adoption by the British Parliament of amendments is subject to the Statute of Westminster and is therefore fully subject to the political will of the Canadian legislature.

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[49] On the concept of legal formants, see R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in 39 *Am. J. Comp. L.* 1 (1991).

[50] J.B. Kelly, C.P. Manfredi, *Courts*, in J.C. Courtney, D.E. Smith (eds), *The Oxford Handbook of Canadian Politics*, Oxford, 2010, 39.

[51] On J. Haldane, see: D. Sommer, *Haldane of Cloan*, London, 1960; J.G. Hall, D.F. Martin, *Haldane: Statesman, Lawyer, Philosopher*, Chichester, 1996; F. Vaughan, *Viscount Haldane: The Wicked Step-Father of the Canadian Constitution*, Toronto, 2010.

[52] See, as leading cases, *A.-G. Can. V. A.-G. Alta. (Insurance)* [1916] 1 A.C. 588, *Re Board of Commerce Act* [1922] 1 A.C. 191, *Toronto Elettric Commissioner v. Snider* [1925] A.C 396, and *The King v. Eastern Terminal Elevator Co.* [1925] S.C.R. 434. See also, among new deal cases, *Natural Products Marketing Reference* [1937] A.C. 377. See also E. Mostacci, Commerce power *e* federalizing process. *Il governo dell'economia nell'evoluzione dei federalismi di* common law, Milano, 2018, 114 ff.

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4. The Patriation process and the re-emergence of the issue of the French-speaking inhabitants

As we have seen in the previous paragraph, the definitive emancipation of the Canadian legal system from the United Kingdom still needs an element that, despite being eminently formal in nature, nevertheless has a high symbolic significance: the complete and formal reconnection of the constitution to the Canadian system of sources of law, with the enactment of an autonomous procedure for adopting amendments to the BNA and other constitutional acts.

It would seem to be a simple process: independence from the UK is a politically and legally acquired reality[53]. However, it still requires more than thirty years because of the other great force that has led the evolution of Canadian legal system: the constitutional position of the French-speaking minority, now declining in the level of autonomy and the constitutional status of the Québec province.

On the other hand, throughout the years the question of the constitutional status of Québec did not find a solution, but remained somewhat underdeveloped during the first part of the twentieth century, to re-emerge to a very significant extent at the beginning of the seventies, as witnessed by the founding of the *Parties québécois*, a party of declared sovereignist inspiration, able to take 23% of the vote in the 1970 elections and to reach 41% just six years later[54]. Beyond the achievement of the Quebec Parties, during the seventies the constitutional status of Québec became one of the main topics of the provincial political agenda. The main political forces of the Province share the need for greater autonomy[55] and the the very permanent presence of Québec within the Canadian Federation even becomes a main political cleavage.

The relevance of the theme is witnessed in particular by the referendum on sovereignty-association put by the Québecois Party leader at the center of its political manifesto in the victorious election campaign of 1976 and then convened in 1980. Despite the defeat of separatists, in fact, most of the unionist forces, while campaigning for the permanence of Quebec in the federation, openly claim that the negative vote is not equivalent to a mere approval of the status quo. On the contrary, it is the premise of staying in the federation by negotiating new and broader margins of autonomy for the Province.

Beyond the historical context, the definition of an approval procedure for constitutional amendments, especially within a federal legal system, is never a simple task. It has a significant impact on the role and level of constitutional protection of the federal states, as it is capable of modifying the basic provisions governing the relationship between center and periphery.

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[53] See *British Coal Corp. V. The King*, [1935] A.C. 500, 520.

[54] After the general election of 1976 René Lévesque, leader of the Parties québécois was appointed as Premier of Québec.

[55] A. Noël, *Quebec*, in J.C. Courtney, D.E. Smith (eds), *The Oxford Handbook of Canadian Politics*, cit., 96 ff.

Within the context of the Canadian legal system, the theoretical issue comes with the question of Québec[56], generating for many years the conviction that all Provinces, and in particular Quebec, should consent to the adoption of a procedure to approve Constitutional amendments. Thus, a first attempt to enact a self-constitutional constitutional revision procedure in order to proceed to Patriation, comes already to a stop in 1964 against the disagreement of the French-speaking province[57]. Similarly, a second attempt was made in 1971 and failed because of the refusal of Québec to ratify. Further proof of the delicacy of the issue, in both cases, the proposed procedures provided for extensive involvement of the provinces: their unanimous consensus, at least for the most significant changes, according to the 1964 proposal; an articulated threshold system – which in any case guarantees a veto power to Quebec – in the 1971 proposal.

The historical context that emerges during the seventies certainly does not facilitate reaching an agreement on patriation and an amending formula. It is politically difficult to keep separate two seemingly different issues: the reform of the constitutional status of Quebec and the definition of a procedure for approving the constitutional amendments. Moreover, as early as the 1971 attempt, patriation is no longer seen as a mere substitution of the intervention of the Parliament of Westminster with a procedure internal to the Canadian legal system. On the contrary, the ambition is wider: modernizing the constitution of the country and, in particular, providing Canada with a constitutional bill of rights that can replace the *Canadian Bill of Rights* of 1960.

All three of these issues make a very complex picture, in which the room to reach an agreement between the Federation, the Anglo-French Provinces and the French-speaking province is very narrow. Diametrically opposed needs have to find an arduous equilibrium: on the one hand, the demand of Québec for greater independence; on the other hand, the definition of a renewed constitutional framework that promises to be more pervasive for provinces. In fact, the adoption of a federal bill of rights does not limit its effectiveness to the Federation alone: the expansive force that rights have taken in the course of the twentieth century, coupled with the fundamental unity of federal legal systems, no longer allows to imagine Federation and provinces as two distinct and separate spheres; on the contrary, as the American constitutional history teaches[58], fundamental rights – also beyond the intentions of the founding fathers – inform the legal system in its entirety and require a positive implementation by the federal and provincial government. At the same time, the definition of a bill of rights, as the British constitutional experience clearly evidenced, is strongly linked with the history, the culture and the juridical-political sensibilities of a citizenry.

It is not surprising, though, that even in the 1980-1981 period there is no agreement between Quebec and the rest of Canada. Likewise the choice of Prime

[56] See D.C.M. Yardley, *The Patriation of the Canadian Constitution*, in 7 *Holdsworth L. Rev.* 84, 87 (1982).
[57] On the Fulton-Favreau Formula, see Scott, *Editor's Diary: The Search for an Amending Process (1960-67)*, in 12 *Mc Gill U.* 337 (1967).
[58] Through the long process known as incorporation. See H.J. Abraham, B.A. Perry, *Freedom and the Court, Civil Rights and Liberties in the United States*, New York-Oxford, 1998.

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Minister Trudeau to proceed on the path leading to patriation and with the approval of the Canada Act of 1982, despite some attempts to stem the conflict[59], brings the issue of the constitutional status of Quebec to a particularly difficult decade.

Shortly after the entry into force of the Constitutional Act of 1982, the first sign in this sense came into being. In the three-year period 1982-1985, the French-speaking Province makes a massive use of the notwithstanding clause set out in the sect. 33 of the Canadian Charter of Rights and Freedoms, aiming to emphasize its distance from the new constitutional text, both in legal and political terms[60].

In such a context, the arrangement of the francophone issue does not cease to dominate the public debate and, between the end of the eighties and the beginning of the next decade, two major attempts are made to reach a solution. The first, in 1987, came with the Meech Lake Accord[61], which succeeded in coagulating the consensus of all the Premiers of the ten Provinces and the approval by the Legislature of Québec. However, the deal fails for the deadlocks that are being created in Manitoba and Newfoundland. The failure of the previous agreement leads to a new attempt producing the Charlottetown Accord of 1992[62]. However, in this case too the outcome is not the one hoped for: the agreement is submitted to a referendum and rejected by the majority of the Canadian people. The failure of the attempts to find a solution to the francophone issue leads to the second referendum on the sovereignty of Quebec in 1995, when the leavers come out with a very small defeat.

4.1. The Canada Act of 1982

The Canada Act of 1982 is made up of two fundamental parts. The first aims to repeal the sect. 7.1 of the Statute of Westminster, in order to break the bond between the two countries left alive in 1931. The second, formally the Schedule B of the Canada Act, is the Constitution Act of 1982. It fulfills several key tasks. First, sect. 52 sanctions the Primacy of the Constitution of Canada and lists the acts that constitute the Constitution and to which the principle of supremacy applies. symmetrically, Part V (Sect. 38-49) establishes a general procedure to amend the constitutional texts as well as other special procedures. Also, sect. 50

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[59] Among these attempts, the Notwithstanding Clause played a significant role: it aimed at mitigating the "centripetal aptitude" of the federal Charter of Rights. See J.D. Whyte, *Sometimes Constitutions are Made in the Streets: The Future of the Charter's Notwithstanding Clause*, in 16 *Const. F.* 79, 82 (2007).

[60] See P. Passaglia, *Modello inglese vs. Modello Statunitense nell'edificazione del sistema canadese di giustizia costituzionale*, in E. Ceccherini (ed.), *A trent'anni dalla Patriation canadese*, Genova, 2014, 53 ff.

[61] See D. Owram, *The Historical Context of Meech Lake*, in 2 *Const. F.* 23 (1990-1991), and A. Tupper, *Meech Lake and Democratic Politics: Some Observations*, 2 *Const. F.* 26 (1990-1991). Furthermore, on the relationship between the Accord and Canadian constitutional history, see R.A. Macdonald, *Meech Lake to the Contrary Notwithstanding*, Part I, in *29 Osgoode Hall L.J.* 253 (1991), and Part II, in *29 Osgoode Hall L.J.* 483 (1991).

[62] P.W. Hogg, The Difficulty of Amending the Constitution of Canada, in 31 *Osgoode Hall L.J.* 41 (1993).

modifies the BNA – now renamed the Constitutional Act of 1867 – inserting a sect. 92A dedicated to provincial jurisdiction on non-renewable natural resources, forestry resources and electrical energy. Finally, Part I sets out the Canadian Charter of Rights and Freedoms.

From a historical point of view, it is to be noted that, in an attempt to prevent the opposition of Provinces – in particular the French-speaking one – to the Bill of Rights and, more generally, the Canada Act of 1982, sect. 33 of the Constitutional Act of 1982 sets out a clause aimed at making the application of a relevant part of the bill of right more flexible. The notwithstanding clause allows federal and provincial legislatures to subtract, with a specific declaration, a law from the scope of sect. 2 or sect. 7 to 15 of the Canadian Charter of Rights and Freedoms.

This element is of particular interest not only because it gives the country a bill of rights whose effectiveness is potentially variable – and it is worth pointing out that, apart from the polemical use that has been made by Québec, the notwithstanding clause has not been widely applied by Canadian legislatures. On the contrary, it is the testimony at the highest normative level of the peculiar importance that historical development has had in the progressive formation of Canadian constitutional law.

Beyond this specific peculiarity, the adoption of the Constitutional Act of 1982 deeply affects the essential features of Canadian constitutional law. Following the completion of the patriation process, not only Canada has a constitutional bill of rights, but consequences on the relations among the powers of the federal government and those between the Federation and Provinces are really significant.

As for the first profile, the role played by the Supreme Court is clearly strengthened. The extension of the constitutional parameter does not only result in a quantitative increase in the norms imposed on federal and provincial legislatures, but also on the nature of the judicial review of legislation, which is no longer called upon only to be the guardian of the relationship between center and periphery. On the contrary it becomes the defender of the proper exercise of the sovereign power by the central body of the frame of government and the political-representative process. From this perspective, it does not appear incongruous to see in the patriation a significant hybridization of the Canadian legal system of British derivation with the experience of the United States.

5. Concluding remarks

The analysis expounded in the previous pages leads to some conclusive remarks.

The first element that seems to be highlighted concerns the importance of the relationship with the Motherland for the constitutional development of the Country: the main stages of the historical process that have been reconstructed here have led a significant change in the relationship between Canada and the United Kingdom. This is the case, for example, of the development of the representative government and of the principle of ministerial responsibility that

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have gradually marginalized the role of the Governor General, appointed by the crown; it is still the case of the progressive granting of new field to Canadian legislation and of the symmetrical decrease of the role played by the Parliament of Westminster since the adoption of the CLA of 1865 to the Westminster Statute, more than half a century later.

The bond with the homeland and its progressive development have also forged numerous institutes of Canadian law – in particular the frame of government – and above all the legal culture of the country. As with the patriation of 1982 we can speak of a hybridization of the original model with elements that characterize the constitutional experience of the U.S.; it should be noted that it has been a hybridization rather than an assimilation. Moreover, the idea of binding the legislative power to a higher law can be attributed not only to the process of hybridization with the United States but also to some features of the relationship between the Dominion and the Motherland, starting from the need to respect the imperial statutes, as expressly sanctioned by the CLVA of 1865.

Lastly, the role played by the French-speaking issue should not be underestimated. On the one hand, it appears to have forged some elements of Canadian federalism, at least through the inclusion of property and civil rights within the competences with which provinces are entrusted by sect. 92 of the BNA. On the other hand, as highlighted before, the francophone issue significantly affected the process of patriation and, at least in part, the results that it achieved. Beyond the legal-formal aspects, however, it would seem appropriate to point out that the presence of a cohesive and combative French minority has not only contributed positively to the development of Canadian constitutional law, but also positively affected the context in which the constitution is interpreted and deploys its effect, promoting a pluralistic vision of the power and the law[63] and a gentle approach to traditions and cultural diversities.

[63] See D. Schneiderman, *Constitutional Culture: A Genealogical Account*, in P. Oliver, P. Macklem, N. Des Rosiers, *The Oxford Handbook of the Canadian Constitution*, cit., 913.