

## Canada as an “importer” and as an “exporter” of federal arrangements: A view from Europe

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**Abstract: Il Canada come “importatore” ed “esportatore” di soluzioni e assetti federali: Uno sguardo dall’Europa** – The article explores the main features of Canadian federalism from a European perspective, looking at Canada as an “importer” and an “exporter” of federal solutions. First it considers the relationship between federalism and constitutional amendment formulas. Second, it analysis the division of competences between the federation and the provinces under the Constitution Act and the case law of the Supreme Court of Canada. Third, the article deals with the composition and powers of the Senate as a problematic element for the functioning of the federation. Fourth, it moves on to explore intergovernmental relationships as a key element of the Canadian asymmetric federal arrangement. Finally, it reconstructs and elaborates on the failed attempts of Quebec to secede and how the threat of federal disintegration has been addressed. The article concludes that, despite having being “obscured” by other federations, like the United States and Germany, as a benchmark for federal solutions, Canada has become an increasingly popular federal model and shows features and challenges similar to some regional and federal countries in the old continent, when viewed through the lens of a European observer.

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### 1. Introduction: An Increasingly Popular Federal Model?

As the British North America Act 1867 turned its 150th anniversary, Canadian federalism and its many facets have increasingly raised the attention of comparative law scholars around the globe.<sup>1</sup> From the different constitutional amending formulas to the ambiguous nature of the federal Senate, the importance of intergovernmental relations, the protection of indigenous peoples and to secession, the evolution of the Canadian federation has attracted a variety of commentators to elaborate on similarities and differences. This has not always been the case as comparative legal scholarship has long relied on other more popular models of federalism, like the US in the American continent, and Germany in Europe.<sup>2</sup> The success of the Canadian federal experience, steadily growing since

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<sup>1</sup> See, e.g., the volume by R. Albert & D. R. Cameron (eds.), *Canada in the World: Comparative Perspectives on the Canadian Constitution – Part one: Federalism and Pluralism in Canadian Constitutionalism*, Cambridge, 2017.

<sup>2</sup> D.S. Law & M. Vertseeg, *The Declining Influence of the United States Constitution*, 87 *New York University Law Review* 762, 779 ff (2012) show, indeed, that Canada and South Africa are rising in prominence as the most popular reference points in comparative constitutional law while

the Trudeau era (1968-1984), the Patriation of the Constitution and the adoption of the Charter in 1982, is testified by the fact that Canadian federalism – rather than the US Constitution – is taken as a point of reference even by EU scholars for the continuous adjustment of the EU integration process as a quasi-federalising process.<sup>3</sup> However, as has been convincingly argued, thus far Canada has been an “exporter of constitutional thought” for mostly questions concerning rights protection and interpretative technique, much less for debates on the constitutional structure, like federalism.<sup>4</sup>

It is not by chance, that a topic at the crossroad between federalism and rights enforcement, namely the treatment of Indigenous peoples, has been one of the first that, although dealing with federal arrangements, has nonetheless promoted Canada as a source of inspiration in a comparative fashion, in particular in Australia, the US and Latin America.<sup>5</sup> The emergence of Indigenous self-government as a third order of constitutionally protected government in Canada’s federal system, its recognition by the federal and provincial governments as an inherent right protected under the “Aboriginal rights”, is grounded in section 35(1) of the Constitution Act 1982.<sup>6</sup> Much less emphasis, instead, has been devoted to analyse, from the perspective of comparative federalism, the effect having three levels of constitutionally protected government, among which is Indigenous self-government.

This article approaches federalism in Canada from a comparative point of view. In particular, it aims to shed light on the similarities and differences of certain Canadian federal arrangements with selected European countries that can be categorised, like Canada, as quasi-federal systems.<sup>7</sup> In doing so the article also intends to explore if Canada has been an “exporter” and “importer” of certain federal practices and institutional arrangements and to what extent such “import” and “export” have come to happen deliberately.

For the purpose of this contribution, the attention is focused on the features of Canadian federalism that can be most interesting for a European scholar

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the United States Constitution is declining as a preferred model of reference. F. Palermo and K. Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law*, Oxford, 2017, however, include Canada in their comparative constitutional analysis of federal experiences.

<sup>3</sup> See A. Verdun, *The Federal Features of the EU: Lessons from Canada*, in 4 *Politics and Governance* 100 (2016).

<sup>4</sup> See R. Hirschl, *Going Global? Canada As Importer and Exporter of Constitutional Thought*, in R. Albert & D.R. Cameron (eds.), *Canada In The World*, cit., 305-324. Indeed, S. Tierney, *Misconceiving Federalism. Canada and the Federal Idea*, in R. Albert & D.R. Cameron (eds.), *Canada in the world*, cit., at 34, has argued that “the Canadian model of federalism is unique” in light of its constitutional history and bicultural imprinting.

<sup>5</sup> See S. J. Gunn, *Introduction: Contemporary and Comparative Perspectives on the Rights of Indigenous Peoples*, 19 *Washington University Journal of Law & Policy* 155-165 (2005) and P. Macklem, *Indigenous Peoples and the Canadian State*, in R. Albert & D. R. Cameron (eds.), *Canada in the world*, cit., 59-80.

<sup>6</sup> See Royal Commission on Aboriginal Peoples, *Partners in Confederation. Aboriginal Peoples, Self-Government and the Constitution*, Minister of Supply and Services of Canada, Ottawa, 1993, 29-49.

<sup>7</sup> See K.C. Wheare, *Federal Government*, 4a ed., Oxford, 1963, 18-20, as recalled also by J. Webber, *The Constitution of Canada: A Contextual Analysis*, Oxford, 2015, 134-135 and R. Vipond, *1867: Confederation*, in P. Oliver, P. Macklem e N. Des Rosiers (eds.) *Oxford Handbook of the Canadian Constitution*, Oxford, 2017, 91.

working, in particular, in the Italian context. These elements, which will be discussed after a short description of the constitutional amendment formulas and of the main characteristics of the Federation, are: 1) the nature of the federal Senate, its composition and powers, and the many reforms put forward to change the current shape of this institution. In fact, like in many European countries with a federal or regional form of state, also in Canada the (reformed) Senate is seen as a legislative branch where the need to represent the federated entities and to preserve its role of chamber of sober second thought should be balanced. The reform, also in the light of the cumbersome constitutional amendment procedure, is particularly complex to achieve. 2) The second element of interest for a European comparative lawyer is the way intergovernmental relations, supplementing the lack of a proper federal second chamber, have developed in Canada, through a system of intergovernmental conferences and agreements. A similar dynamic has taken place also in many European countries, though in more recent years. 3) The way secessionist claims in Quebec have been addressed, in particular, based on the Reference re Secession of Quebec decided by the Supreme Court in 1998, has been at the very center of the European ongoing discussion on the attempts of regions (Flanders, Catalonia, Scotland, and Veneto) to secede from some EU Member States, Belgium, Spain, the UK and, to some extent, also Italy.

## 2. Canadian Federalism and the Constitutional Amendment Formulas

Federalism has been depicted by the Rt. Hon. Beverley McLachlin as one of the founding values of Canadian constitutionalism alongside democracy and respect for difference and diversity.<sup>8</sup> Indeed, federalism permeates any single aspect of the Canadian Constitution. Perhaps one of the most significant of these aspects, for the loyalty toward and the endurance of the *foedus*, are the constitutional amendment formulas, despite being sometimes circumvented. The variety of constitutional amendment procedures in the Constitution Act of 1982 is often recalled as one of the distinctive features of that constitutional document, not so common in many Constitutions of the world.<sup>9</sup> Such multiplicity of procedures, from a minimum to a maximum of involvement of the federal and the provincial levels of government, depends on the extent to which the constitutional change affects one or more provinces, the Federation alone, both, or the whole federal constitutional architecture, as clarified, for instance, in *Reference re Senate Reform*.<sup>10</sup> Starting from the “easiest” amendment procedure, a change in the provincial Constitution, provided that it does not impinge upon federal matters or issues of federal-provincial interest, can be achieved by majority in the provincial legislature (section 45). Second, a unilateral federal procedure, with a majority of

<sup>8</sup> See The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, *Defining Moments: The Canadian Constitution*, Remarks before the Canadian Club of Canada, 5 February 2013 and the in depth-commentary by R. Albert, *Introduction: The Values of Canadian Constitutionalism*, in R. Albert & D. R. Cameron (eds.), *Canada in the World*, cit., 1-23.

<sup>9</sup> See J. Cameron, *Legality, Legitimacy and Constitutional Amendment in Canada*, in R. Albert & D. R. Cameron (eds.), *Canada in the World*, cit., 98-122.

<sup>10</sup> *Reference re Senate Reform* 2014, SCC 32, [2014] 1 S.C.R. 704, at section 4.

the federal Parliament passing a law, is envisaged to amend constitutional provisions concerning the executive government of Canada or the Senate and the House of Commons, subject to sections 41 and 44 that prescribe the use of different procedures on particular aspects, like the powers of the Senate and the method of selecting Senators (section 44). The remaining three constitutional amendment procedures are the most “sensitive” from the point of view of the relationship between Federation and provinces. In fact, the federal Parliament and the provincial legislature(s) concerned are called to agree both on a constitutional amendment affecting the federal level of government as well as one or more, but not all, provinces (section 43). Section 38 entrenches the general amendment formula, which requests a majority in each House of the federal Parliament plus resolutions voted in 7 of the 10 provincial legislatures representing at least 50% of the population of all the provinces. This formula, which is to be used, for example, to derogate from the legislative powers, can be objected in a province through a resolution of its legislative assembly passed by the majority and expressing its dissent toward the constitutional amendment. This is typically what happened when trying to reform the federal Senate. Finally, the most challenging amendment formula – the unanimity procedure, for example for abolishing the Senate – requires all provincial legislatures as well as the federal Parliament by majority to agree on the constitutional change (section 41): something that is very unlikely to happen, as the cases of the Meech Lake and the Charlottetown accords reveal, given the number of veto players involved.

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Although most rigid Constitutions in federal systems foresee the participation of the federated entities in the procedure for amending the Federal Constitution – directly or by involving the federal Second Chamber – there are no many cases in which the unanimous consent of the member states is mandatory, like under section 41 of the Canadian Constitution Act. Indeed, if the entry into force of a constitutional amendment is already very difficult in federations, as under Article V of the US Constitution where super-majorities both at federal and state level are required – the situation is even more complex where the unanimity rule applies. Nevertheless the unanimity procedure, according to the Canadian Constitution, is the sign of the significance vested in the federal compact and the will to preserve the consensus among all the parties involved. This is further confirmed by the circumstance that institutional practice and legislation, at federal and provincial levels, have made even harder than the unanimity rule based on section 41 to amend the Canadian Constitution. Indeed, both the federal Parliament and the provincial legislatures approved laws that require several instances of provincial agreement on a constitutional amendment. The federal Parliament passed the so-called *Regional Veto Act*, which gives provinces a veto over constitutional amendment bills tabled under Section 38, i.e. the general formula;<sup>11</sup> and the provinces passed laws requiring or authorizing binding or

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<sup>11</sup> The Act, whose official name is the *Act Respecting Constitutional Amendments 1996* sets out new conditions, in addition to those fixed by section 38, for the adoption of a constitutional amendment. In other words some provinces – Ontario, Quebec and British Columbia – unilaterally while others jointly – at least two Atlantic provinces and two Prairie provinces representing no less than 50% of the population of the relevant cluster of provinces – can

advisory referendums before the legislative ratification of amendments is completed.<sup>12</sup>

### 3. Main Features of the Canadian Federal Arrangements

The relations between Federation and provinces in Canada has been one of continuous constitutional adaptation to the changing circumstances, between centralization and decentralisation of powers.<sup>13</sup> As in many other federal systems, like the US, the shift between strengthening of the federal government or, rather, of provinces at different moment in time has happened without important changes in the constitutional catalogues of subject-matters assigned to the legislatures at different levels of government.<sup>14</sup> Rather, it has taken place mainly through constitutional case law, legislation and conventions. The Canadian federation designs a system of 10 equal provinces as for the powers they have despite the differences in the timing of the aggregation of the provinces to the Dominion, in the size of the population and of the territory, in the language, religion, the legal family followed and wealth, also across time (given the development experienced by the Western provinces over the last decades.<sup>15</sup> Formally, when looking at the Constitution Act 1982 the provinces benefit from the same catalogue of legislative competence (with the exception of section 93, paras 1 to 4, on education for Quebec and of section 94 allowing the federal legislature to pass laws to uniform the legislation on Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick).<sup>16</sup>

The distribution of legislative competence is based on a double list of exclusive subject-matters, one for the federal Parliament (section 91) – trade and commerce, military, naturalization, marriage and divorce, criminal procedural law, just to name few – and one for the provincial legislative assemblies (section 92) – e.g. direct taxation in the province, local works, municipal institutions administration of justice in the province. In addition to it, the Constitution also envisages concurrent powers between the Federation and provinces on export of

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prevent the federal Government from presenting a constitutional amendment bill under the general amendment formula.

<sup>12</sup> See A. Heard & T. Swartz, *The Regional Veto Formula and Its Effects on Canada's Constitutional Amendment Process*, 30 *Canadian Journal of Political Science* 339-356 (1997) and R. Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 *Queen's Law Journal* 177-178 (2015).

<sup>13</sup> P. Hogg, *Constitutional Law of Canada*, Toronto, 2000, 167 and J.-F. Gaudreault-DesBiens & J. Poirier, *From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism*, in P. Oliver, P. Macklem & N. Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution*, cit., esp. 400-411.

<sup>14</sup> Limited amendments to these catalogues were adopted before and at the time of the Patriation of the Constitution.

<sup>15</sup> Besides the provinces, there are also three territories whose powers are protected, to a different extent than the 10 provinces, under the Canadian Constitution: Yukon Territory, the Northwest Territories and Nunavut. While provinces exercise constitutional powers in their own rights, powers exercised by territories are delegated by the Parliament of Canada.

<sup>16</sup> In practice, however, as highlighted in section 5 of the chapter, Canadian federalism, thanks to the development of intergovernmental agreements, has been subject to an asymmetric turn, with Quebec enjoying larger powers than other provinces in very sensitive fields, like immigration. See F. Palermo and K. Kössler, *Comparative Federalism*, cit., para. 13.2.

non-renewable natural resources, forestry resources and electoral energy (section 92A), on education (section 93), property and civil rights (section 94), on old age pensions (section 94A), and on agriculture and immigration (section 95). The reach and the objective of federal legislation in the concurrent subject-matters vary depending on the competence concerned. The Parliament of Canada shall make remedial laws for the due execution by provinces of section 93 provisions on education. Different is the case of the concurrent competence on old age pensions where federal legislation by any means can affect the operation of any present and future provincial legislation on the issue, according to section 94A. Finally, according to sections 92A and 95 likewise on concurrent powers, provincial legislation in the fields, respectively, of export of non-renewable natural resources, forestry resources and electoral energy and of agriculture and immigration cannot derogate to federal legislation on the same issue, which ultimately prevails.

The design of the distribution of legislative powers under the Canadian constitutional system is very different from the other important example in North America of federal arrangement of legislative authority, namely that of the US, based on a closed list of conferred power to the federal Congress (Article 1, section 8, US Const.) and a residual clause in favour of the states (or the People) (Xth amendment).<sup>17</sup> The allocation of legislative powers under the Canadian Constitution Act 1982 and, before, the British North America Act 1867, contrary to the US constitutional text, makes the Federal Parliament entitled, in theory, to pass most legislation, also taking into account the powers of “reservation and disallowance” of provincial legislation that the federal government enjoys, should a conflict of authority arises between a province and the Federation.

The reality, however, has moved in a different direction. According to Black, at different moments in time, the Canadian federal system has been centralist, administrative, coordinate, compact and dualist.<sup>18</sup> Canadian federalism has shown a centripetal turn during the Confederation era (1867-1883) and in reaction to the Great Depression of 1930s, when the Federation extensively used the power of disallowing provincial legislation and through conditional grants programs in the field of social assistance, health care and education. Yet, the power to disallow provincial legislation has no longer been used since 1943, while reservation has fallen into constitutional desuetude since 1961.<sup>19</sup> Moreover, in the mid of the 1960s the centralizing forces weakened and provinces were able to expand their jurisdiction over cultural and social policy, benefiting from unconditional grants from the federal government, more structured intergovernmental relations and the power to participate in international relations on issues falling under their remit. Federalism became coordinate, meaning that, although federal and

<sup>17</sup> As well as from other democratic federal systems, like India, whose Constitution provides for three different list of competences: one list for federal powers; one list for state powers; and another list for concurrent/shared powers. Rather the distribution of legislative powers under the text of the British North America Act 1867 is closer to the federal arrangements foreseen in Part VII of the German Basic Law. See F. Palermo & K. Kössler, *Comparative Federalism*. cit., para. 5.2.

<sup>18</sup> E. R. Black, *Divided Loyalties. Canadian Concept of Federalism*, Montreal, 1975, 225.

<sup>19</sup> See B. M. Hicks, *The Crown's “Democratic” Reserve Powers*, 44 *Journal of Canadian Studies* 5-31 (2010).

provincial governments are independent in their own domain the exercise of their powers is based on cooperation and unconditional grants are a good example of that.<sup>20</sup> Administrative or executive federalism, one of the most prominent features of Canadian federalism refers to the need for the federal and the provincial governments to carry out joint tasks-activities and to promote intergovernmental cooperation through ad hoc channels. As a consequence, it has been argued that the “Federal-Provincial Conference of Prime Ministers and Premiers has come to be the most crucial institution of Canadian federalism”.<sup>21</sup> Indeed, it has been precisely this Conference that played a major role in the negotiations of the Meech Lake and Charlottetown accords thus becoming an instrument to gather consensus over significant constitutional changes (although they resulted in a failure later on; see section 5 below).

The compact view on Canadian federalism, likewise the compact theory that supported the adoption of the Virginia and Kentucky resolutions (1798 and 1799) in the US, sees the Canadian Union as the outcome of a delegation of powers by the original four provinces through a treaty, which in turn legitimates their ability to control the federal government and the resurgence, from time to time, of their claim for political independence.<sup>22</sup> Finally, the dualist concept surrounding Canadian federalism deals with the idea of two nations – two linguistic, cultural and religious groups – that featured the foundation of Canada one of which is certainly represented by Quebec.<sup>23</sup>

The constitutional value of federalism in Canada, in its permanent tension between centralization and decentralization and between symmetric and asymmetric nature, especially for the steady quest of Quebec for more autonomy, has been governed quite effectively thanks to executive cooperation and constitutional interpretation by courts. Indeed, the allocation of legislative powers based on a double list of exclusive competence and on concurrent powers faces some troubles in the actual implementation, also due to the lack of a proper federal second chamber. The Supreme Court of Canada has come to endorse a “flexible” and cooperative” approach to federalism whereby it tolerates increasing areas of overlapping between federal and provincial legislation. The mutual interference and interplay between the two levels of jurisdiction, according to the Court, should be addressed first of all by political actors and intergovernmental relations.<sup>24</sup> Moving away from the “watertight compartments” approach of the Judicial Committee of the Privy Council when interpreting the exclusive catalogues of competences (sections 91 and 92)<sup>25</sup> and by making use of a progressive

<sup>20</sup> E.R. Black, *Divided Loyalties*, cit., 143.

<sup>21</sup> D.V. Smiley, *Canada in Question: Federalism in Seventies*, Toronto, 1972, 60.

<sup>22</sup> See S. Grammond, *Compact Is Back: The Revival of the Compact Theory of Confederation by the Supreme Court*, 53 *Osgoode Hall Law Journal* 799-823 (2016).

<sup>23</sup> See Quebec (Province), *Report of the Royal Commission of Inquiry on Constitutional Problems – the T. Tremblay Report*, Quebec City, 1956.

<sup>24</sup> See E. Bruillet & B. Ryder, *Key Doctrines in Canadian Legal Federalism*, in P. Oliver, P. Macklem & N. Des Rosiers, *The Oxford Handbook of the Canadian Constitution*, cit., 416 and *Reference re Securities Act*, [2011] 3 S.C.R. 837; *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457; *Canadian Western Bank v Alberta*, [2007] 2 S.C.R. 3.

<sup>25</sup> E. Bruillet & B. Ryder, *Key Doctrines in Canadian Legal Federalism*, cit., 420.

interpretation of the Constitution,<sup>26</sup> the Supreme Court has gradually embraced the principle of cooperative federalism. Cooperation has been described as “dominant tide” of modern federalism in Canada.<sup>27</sup>

The Supreme Court has devised some interpretative techniques to fix the problem of overlapping legislation between the federal and the provincial domains, usually ruling in favour of the federal Parliament.<sup>28</sup> For example, the Court has developed the “pith and substance” doctrine in order to check if the Act under review falls within the jurisdiction of the legislature that passed it and, hence, to decide on its validity. The “pith and substance” of a legislative Act refers to its true nature and essential character, its intended and actual objective, its “dominant purpose” and practical effects.<sup>29</sup> This doctrine may lead to concurrent application of federal and provincial legislation without altering the exclusive nature of the jurisdiction, as there are aspects of the issue regulated that can concern both the federal and the provincial remits (double aspect doctrine). Competence overlapping may also result and be justified under the Canadian federal Constitution and the pith and substance doctrine in cases of incidental effects on the law of the constitutionally enabled legislature by the other level of government’s legislation (incidental effects’ rule).<sup>30</sup>

However, the Supreme Court has been keen to uphold the validity of federal legislation even when it substantially affects the jurisdiction of provincial legislatures, thereby departing from its “pith and substance” because of the ancillary nature and functional connection of the contested provision to the effectiveness of the whole legislative text to which it pertains (the so-called “ancillary powers doctrine”).<sup>31</sup>

Following the “pith and substance” doctrine, the theory of interjurisdictional immunity postulates that every subject-matter shows an essential core of the exclusive competence assigned to a certain level of government (provincial or federal) that cannot be infringed by the legislature of the other level of government, which is also competent to intervene on the same subject matter.<sup>32</sup> This notwithstanding interjurisdictional immunity has been used only against provincial legislation, which despite having been validly adopted, impaired matters at the core of the federal jurisdiction. Under these circumstances relevant provincial provisions are restricted in their application as to avoid interference with the “pith and substance” of the exclusive federal competence.<sup>33</sup> The uncontrolled expansion of federal-lawmaking this doctrine has favoured has lately led the Supreme Court to resort to the interjurisdictional immunity doctrine “with

<sup>26</sup> See V.C. Jackson, *Constitutions as ‘Living Trees’? Comparative Constitutional Law and Interpretive Metaphors* 75 *Fordham L. Rev.* 921–960 (2006).

<sup>27</sup> *Ontario (Attorney General) v OPSEU*, [1987] 2 S.C.R. 2, at 27.

<sup>28</sup> J. Webber, *The Constitution of Canada*, cit., 141–145.

<sup>29</sup> *Global Securities Corp. v British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494.

<sup>30</sup> See *Attorney General (Que.) v Kellogg’s Co. of Canada et al.*, [1978] 2 S.C.R. 211.

<sup>31</sup> See *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 S.C.R. 641.

<sup>32</sup> See, e.g., *Tsilhqot’in Nation v British Columbia*, [2014] 2 S.C.R. 256 [141] and *Carter v. Canada (Attorney General)*, 2015 SCC5, [2015] 1 S.C.R. 331.

<sup>33</sup> *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 S.C.R. 749 [21].

restraint” and only in “those situations already covered by precedent”.<sup>34</sup> In the light of the flexible and cooperative view of federalism endorsed by the Supreme Court it is unlikely that such a doctrine will resume in an extensive fashion in the near future.<sup>35</sup>

The same applies to another doctrine elaborated by the Court in cases of *de facto* concurrency and conflict between federal and provincial legislation, both valid, but setting contrasting rules to address the same factual situation. In these circumstances the “federal paramountcy” doctrine lets the federal legislation to prevail while “the provincial law is suspended or rendered inoperative”.<sup>36</sup> Due to the systematic defeat of provincial legislation under the “federal paramountcy” rule, the Supreme Court has sought to define the notion of “conflict” between federal and provincial law narrowly. In *Multiple Access* Justice Dickson defined “conflict” as the “impossibility of dual compliance” with the provincial and the federal rule at the same time, i.e. when “one enactment says yes (...) and the other says no”.<sup>37</sup> In the 1990s another, more problematic, definition of “conflict” emerged in the case law of the Court for the provinces, namely conflict as frustration of a federal legislative purpose by the provincial law, which in turn is suspended or made inoperative.<sup>38</sup>

However, given the serious threat that the doctrine poses to provincial autonomy, likewise the case of the interjurisdictional immunity, the Court has recently pursued a stricter approach in the interpretation of this second understanding of “conflict” – dealing with the fulfillment of the federal legislative purpose – when enforcing the doctrine.<sup>39</sup> For instance, according to the Court, an high burden of proofs rests on the claimant that asserts the existence of a legislative conflict and without the declared intention by the federal Parliament in the legislation to supersede the provincial rule, this intention cannot be inferred by judicial authorities.

The cooperative turn in the Supreme Court’s interpretation of the Canadian federal dynamic shows developments that resemble the evolution of federal principles in Europe in order to contain the power of the central government. For example, the Court has invoked more and more often the principle of subsidiarity, which lacks an express reference in the Constitution and that finds its legal roots in European countries, in Germany in particular, and in the European Union.<sup>40</sup> As a principle that favours, in theory, the level of government that is closest to citizens while taking into account, at the same time, the effectiveness and the cost of the action in achieving the prescribed objectives, in many European legal systems, like in Germany, Italy and the European Union itself, subsidiarity review

<sup>34</sup> *Canadian Western Bank v Alberta* [2007] 2 S.C.R. 3. See E. Bruillet & B. Ryder, *Key Doctrines in Canadian Legal Federalism*, cit., 427-428.

<sup>35</sup> E. Bruillet & B. Ryder, *Key Doctrines in Canadian Legal Federalism*, cit., 427-428.

<sup>36</sup> Ivi, 429.

<sup>37</sup> *Multiple Access v McCutcheon*, [1982] 2 S.C.R. 161, at 191.

<sup>38</sup> *Bank of Montreal v Hall*, [1990] 1 S.C.R. 121 and, more recently, *Bank of Montreal v Marcotte*, [2014] 2 S.C.R. 725, [70]; *Alberta (Attorney General) v Moloney*, [2015] 3 S.C.R. 327.

<sup>39</sup> *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd.*, [2015] 3 S.C.R. 419.

<sup>40</sup> See K. Granat, *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System*, Oxford, 2018, 10-11.

by Courts has triggered controversial interpretations<sup>41</sup> or, at best, judges have tried to decide cases on other grounds and standards than subsidiarity whenever possible.<sup>42</sup> Also in Canada the Supreme Court split when dealing with subsidiarity in a landmark reference dealing with medically assisted procreation.<sup>43</sup> In *Reference re Assisted Human Reproduction Act* four justices considered the federal legislation invalid, with a view to support the provincial autonomy on issues dealing with assisted human reproduction and to let subsidiarity prevail. Another four justices, instead, held that subsidiarity cannot displace the constitutional division of legislative powers, which clearly confer to the federation the authority to legislate. Although the principle could support the aspiration to rebalance the dynamic of the Canadian federal system in favour of the provinces and there is not yet consolidated case law on it, the latter reading of subsidiarity in favour of the protection of federal powers is in line with the interpretation prevailed at European level and seconding further centralization of powers.

In the following, three interesting features of the current shape of Canadian federalism, at least from a European perspective, will be discussed: the lack of a proper federal Senate, executive cooperative federalism and the attempt of Quebec to secede from the Federation.

#### 4. The Senate and the Attempts of Reform: The Missing Federal Element

The Senate of Canada is a hybrid in between an appointed chamber of sober second thought and a chamber of territorial representation. That was the outcome of the debate of the founding fathers at the Quebec Conference in 1864, where two opposite models of second chambers were competing for shaping the future Senate of Canada: the model inspired by the US Senate, equally representing the Member States of the Federation, and the model drawn by the UK House of Lords.

Given its hybrid nature, it is not easy to find elsewhere a second chamber that looks like the Senate of Canada.<sup>44</sup> However, because of its composition, powers and institutional evolution, the Senate is affected by the same criticism as many upper houses in European countries characterized by a significant level of decentralization or devolution of powers, for example in Belgium, Italy, Spain and

<sup>41</sup> On the German case, see G. Taylor, *Germany: The subsidiarity principle*, 4 *International Journal of Constitutional Law* 115-130 (2006) (case note on the Judgment of Oct. 24, 2002, BVerfG, 2 BvF 1/01 (*Geriatric Caregivers case*)); on the Italian case, see T. Groppi & N. Scattone, *Italy: The subsidiarity principle*, 4 *International Journal of Constitutional Law* 131-137 (2006), in particular on the Italian Constitutional Court's judgment no. 303/2003.

<sup>42</sup> In the case of the Court of Justice of the EU: see A. Estella, *The EU Principle of Subsidiarity and Its Critique*, Oxford, 2003, 137-174 and K. Granat, *The Principle of Subsidiarity*, cit., 30-37 and 197. Although this Court has never annulled EU acts for infringement of the subsidiarity principle, in recent judgments the Court has nevertheless engaged with the arguments alleging a violation of the principle, like in *Philip Morris Brands SARL Case*, C-547/14 EU:C:2016:325.

<sup>43</sup> *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457. See E. Bruillet & B. Ryder, *Key Doctrines in Canadian Legal Federalism*, cit., 425.

<sup>44</sup> See R.L. Watts, *Federal Second Chambers Compared*, in J. Smith (ed.), *The Democratic Dilemma: Reforming the Canadian Senate*, Montreal, 2009, 35-48.

the UK. The main allegation lies in its inability to represent provinces and territories properly, in particular along federal lawmaking procedures.<sup>45</sup>

The Senate is composed of 105 senators appointed by the Governor General upon proposal by the Prime Minister amongst Canadian citizens of at least thirty years, resident in the province for which s/he is appointed complying with specific qualifications as property holders (section 23). The seats are apportioned according to four Divisions equally represented by 24 senators each (originally, they were three, Ontario, Quebec and Maritime Provinces): 1) Ontario; 2) Quebec; 3) Maritime Provinces (Nova Scotia (10), New Brunswick (10), Prince Edward Island (4)); Western Provinces (Manitoba (6), British Columbia (6), Saskatchewan (6), Alberta (6)). In addition to these Divisions, Newfoundland is entitled to have 6 senators appointed, while Yukon Territory, the Northwest Territories and Nunavut one each (3) (section 22). Since 1965 the office of senator is held until s/he reaches seventy-five years (whereas the appointment was originally for life, like in the UK House of Lords).

Unlike the Canadian House of Commons, the Senate is not tied with the Prime Minister and the Cabinet by the confidence relationship. Nevertheless, as an appointed Upper House it is much more powerful than the House of Lords at Westminster. In fact, the Senate's powers differ from those of the Canadian House of Commons only in three important instances: a) money bills can just originate in the House of Commons and by practice the Senate amends them (alongside appropriation and taxation bills), if it is the case, only to reduce an appropriation or a tax. The attempt of the House of Commons to challenge the authority of the Senate to alter the content of a money bill was defeated as “unwarranted” under the Constitution.<sup>46</sup> Yet, the House of Commons can still disregard Senate's amendments which seldom happens in practice. An exception occurred in 2017, when the Senate managed to delay the approval of the budget bill, presented in March, until June 2017 and the summer recess, following the rejection of Senate's amendments by the House of Commons. b) On constitutional amendments the Senate has a suspensive veto for 180 days, according to section 47. Therefore, the Senate can just delay and not prevent the adoption of a constitutional amendment. The only case of Senate's substantive veto is that of an amendment to the Constitution that does not require the consent of provinces. Under this circumstance, the will of the Parliament on the constitutional change is validly formed only if and insofar the Senate agrees. c) Finally, as anticipated, the Senate cannot vote confidence motions according to the principle of responsible government.

It follows that the Senate of Canada can potentially veto any other bills passed by the House of Commons and supported by the Cabinet in a similar vein as the Australian Senate that, however, is elected by single transferable vote

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<sup>45</sup> See D. E. Smith, *The Canadian Senate in Bicameral Perspective*, Toronto-Buffalo-London, 2003, 89-110 and P. Passaglia, *Il Senato canadese: anomalia o originalità*, *Diritto pubblico comparato ed europeo*, 4, 2003, 1913-1942.

<sup>46</sup> See Library of Parliament of Canada, A. Barnes, M. Bédard, C. Hyslop, S. Spano, J.-R. Paré & J.R. Robertson, *Reforming the Senate of Canada: Frequently Asked Question*, Publication no. 2011-83-E, 12 November 2011, 25.

within every state and territory. The veto of the Canadian Senate is quite unlikely though and in such an event there are no effective devices to overcome the deadlock between the Senate and the House of Commons (the Joint Conference has not been summoned since 1947).<sup>47</sup> The only solution invoked once so far is the use of section 26, allowing the Prime Minister through the Governor General to add 4 to 8 members to the Senate, representing equally the four Divisions of Canada, up to reach the maximum number of 113 senators (section 28).<sup>48</sup>

Looking at the Senate of Canada through the federal lens, the relationship between its composition and formation and the representation of provinces and territories through the four Divisions is, at least, ambiguous. The equal “representation” of the four Divisions is considered, today, completely detached from the reality with the Western Provinces systematically underrepresented compared to Quebec and Ontario. Moreover, there is no clear link between the mandate of the senator and its action on behalf of the province of residency.<sup>49</sup> For years the whole appointment process has been heavily politicized and controlled, as the constitutional procedure allows, by the ruling Cabinet, in particular by the Prime Minister. The occurrence of vacancies in the offices of senator has been used as an opportunity by the Prime Minister to orient the balance of powers in the Senate in favour of his party, in light of the significant powers held by this Upper House without being elected.<sup>50</sup> The consequence, according to most commentators, is that the Senate has been able to function neither as a chamber of sober second thought nor as a branch representing the federated units of the union.<sup>51</sup>

Several proposals of constitutional reform, most of them failed, have been put forward over the last decades to transform the Senate of Canada into an effective federal second chamber representing provinces and territories, some of them supporting also the direct election of senators by citizens in every province and territory. Of course, the procedural matter of controversy, in this regard, concerns the way the Constitution can be amended to reform the Senate: whether through the unilateral federal procedure (section 44) or, under section 38, the general procedure, for the exceptions listed in section 42, paras 1 and 2 (see section 1 of the article) – powers of the Senate, method of selecting senators, the number of senators to which a province is entitled, the residency requirements of senators – and, in this framework, whether the list of exceptions is exhaustive or not.<sup>52</sup> According to the Supreme Court’s opinion of 1980, under a constitutional text that

<sup>47</sup> *Ibid.*

<sup>48</sup> In 1990 by Prime Minister Brian Mulroney to overcome the deadlock in the approval of the bill on the introduction of the goods and services tax.

<sup>49</sup> P. Passaglia, *Unicameralism, Bicameralism, Multicameralism: Evolution and Trends in Europe*, in *Perspectives on federalism*, 10, 2018, 15.

<sup>50</sup> The strategic use of the appointing power by the Prime Minister can also mean to refrain from filling the vacancies in the Senate.

<sup>51</sup> D. Pinard, *The Canadian Senate: Un Upper House Criticised yet Condemned to Survive Unchanged?*, in J. Luther, P. Passaglia & R. Tarchi (eds.), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Milano, 2006, esp. 502 ff.

<sup>52</sup> See *Reference re Senate Reform 2014 SCC 32*, [2014] 1 S.C.R. 704 and, before the Patriation of the Constitution, *Reference re Authority of Parliament in Relation to the Upper House* [1980] S.C.R. 54, decided, however, according to the British North American Act 1867.

did not elaborate on the power of the Parliament to reform the Senate in contrast to the current provisions, the “essential elements” and the “fundamental features of the Senate as a means of ensuring regional and provincial representation in the federal legislative process” and its role of chamber of sober second thought should not be changed without the concurrence of the province in the constitutional amendment procedure (p. 78). Therefore, not only was the Parliament prevented from unilaterally abolish the Senate, but it could not change the provincial allocation of seats nor require the direct election of senators.<sup>53</sup> For some years it remained disputed whether the Constitution Act 1982, with its many amending formulas, has led to disregard the principles set by the Court in the Reference of 1980 or, rather, it constituted a form of implementation of the Reference. As it is described shortly below, the Court has further clarified the issue in its most recent opinion in 2014.

Of the very limited constitutional changes affecting the Senate since the Confederation era – mandatory retirement age of 75, suspensive veto of 180 days accorded on certain constitutional amendments, and increase in the number of senators to 105 – only the growth in the seats reflects a transformation of the federal system, with the addition of new provinces and territories. Most proposals, with the first dating back to 1874, have to do with the need to allow each province to select its senators. To confirm that the reform of the Senate has been constantly perceived as intertwined with the good functioning of Canadian federalism, in the 1960s and 1970s, the debate on constitutional amendments resurged following the Quiet revolution in Quebec and the resentment expressed by the Western provinces on the alleged indifference of federal institutions to local problems. Given the rising role of intergovernmental conferences, the proposal advanced was to link the appointment of senators to provincial governments in a similar vein as in the German Bundesrat.<sup>54</sup>

Since 1980 the proposals that have emphasized most the significance of a strengthened relationship between the Senate’s composition, based on provincial and territorial representation, powers and the federal arrangements are those commonly described as “Triple E Senate proposals”, i.e. equal, elected, effective. What should be highlighted here is also the will to make the Senate democratically accountable through elections the lack of which, according to some, has undermined the legitimacy and authority of the Senate as well the effective exercise of its important powers, compared to the effectiveness of the US Senate.<sup>55</sup> The first common objective of these proposals is to ensure the equal representation among provinces (regardless of the population and in contrast to the House of Commons) and to make the Senate directly elected, although the Canada West Foundation Proposals (1981) supported the use of the single-transferable vote, like

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<sup>53</sup> See P. Hogg, *Comments* [Comments on the Upper House Reference], 58 *Canadian Bar Review* 631-645 (1980).

<sup>54</sup> See M. Niedobitek, *The German Bundesrat and Executive Federalism*, in *Perspectives on federalism*, 10, 2018, 202-207.

<sup>55</sup> The opponents of an elected Senate, instead, tend to argue that direct elections would jeopardise the current independent status of senators by making them more respondent to party logic. See L. Murray, *Which Criticisms Are Founded*, in S. Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew*, Montreal and Kingston, 2003, 133-150.

in Australia, while the Alberta Select Committee Proposal (1985) suggested to use the first-past-the post, already applied in federal and provincial elections. The Charlottetown Accord (1992), although in favour of a “Triple E Senate”, did not recommend any specific electoral formula. Based on this Accord, which possibly proposed the most encompassing reform of the Canadian Senate to date,<sup>56</sup> federal legislation would have regulated whether and through which formula senators were elected by the population of the provinces and territories or by members of provincial and territorial legislatures (like for the members of the Austrian Bundesrat). The elections would have taken place at the same time as those of the House of Commons and additional seats would have been reserved to aboriginal peoples. This federal upper house would have been given the power to delay the passage of legislation for 30 days or to defeat and amend legislation (including money bills), with the consequence of triggering a joint sitting of the two Houses to reach a compromise by simple majority (excluding money bills on which the House of Commons was given an overriding power). Moreover, the Charlottetown Accord would have granted the Senate also the power to ratify key federal appointments in a similar fashion as the advice and consent procedure before the US Senate.

More recent proposals of reform of the Senate on provincial and territorial representation (none of them successful), during the Harper’s Cabinets, have dealt, for instance, with the idea of holding consultative elections of senators, enabling voters in each province and territory to express their preferences for the nominees to the Senate to be considered later by the Prime Minister when recommending the appointments to the Governor General (Bill C-43, Senate Appointment Consultations Act, firstly introduced on 13 December 2006).<sup>57</sup> This way the electors, in their own province and territory, would have been entitled to influence the appointment procedure, although to an extent that was not clarified by the proposal itself. This bill, together with the bill aiming to abolish the Senate – one of the many proposals presented since the beginning of the Twentieth century to eradicate the problem of the Senate from scratch –, a bill designed to introduce a temporal limitation to the senators’ mandate and a bill intended to change the patrimonial requirements to be qualified as a Senate nominee, were subject to a Reference before the Supreme Court of Canada by the Governor General on behalf of the Prime Minister.

The Court decided in 2014 mainly clarifying what role provinces are deemed to play under the Constitution for the approval of each constitutional amendment (the reference did not focus on the suitability of the content of the bills in relation to the role assigned to the Senate). Due to the reach of the bills and their potential implications, the focus here will be only on the response of the Supreme Court on the consultative elections of senators and on the abolition of the Upper House, both issues intercepting controversial questions from the point of view of

<sup>56</sup> See S. Joyal, *Reflections on the Path to Senate Reform*, 22 *Canadian Parliamentary Review* 2-6 (1999) and D. Pellerin, *Between Despair and Denial: What to Do About the Canadian Senate*, 11 *Review of Constitutional Studies* 1-35 (2005).

<sup>57</sup> On this point see, e.g., N. Verrelli, *Harper’s Senate Reform: An Example of Open Federalism?*, in J. Smith (ed.), *The Democratic Dilemma*, cit., 49-56.

federalism and for a European and Italian scholar. The first issue was whether the bill introducing a procedure of selection, by voters, of the nominees for the Senate to be recommended by the Prime Minister, could be approved by the unilateral federal formula for amending the Constitution, i.e. excluding the provinces. The question here is precisely whether this bill falls within section 44 or rather has to be comprised under the list of exceptions foreseen in section 42, paras 1 and 2. According to the judges, although the power of appointment ultimately lies in the hands of the Governor General, the “consultative elections” would alter the whole institutional architecture because the indirect election of senators would transform the Senate into a political and partisan House, like the House of Commons, in contrast to the will of the founding fathers who rejected the idea of electing the Senate in order to guarantee its role of chamber of sober second thought. Hence the general amending formula of section 38 (federal Parliament + 7 provinces representing at least 50% of the whole population) applies here.

This issue subject to the Reference is of interest for an Italian audience since the latest attempt to promote a comprehensive reform of the Constitution and to transform the composition of the Italian Senate,<sup>58</sup> the constitutional amendment bill rejected at the referendum of 4 December 2016, envisaged a reformed Senate composed of 95 senators representing territorial institutions (regions and municipalities) and five senators appointed by the Head of State.<sup>59</sup> Interestingly, the 74 “regional” senators were to be elected by each regional legislature with proportional formula “according to the choice expressed by the voters on regional councilors at the moment of the election of the regional legislature (own translation from Italian, Art. 2, Bill S-1429 D)”. In Italy there is no way to refer a constitutional amendment bill to the Constitutional Court through a reference proceeding. However, it is interesting to note that despite the differences in the procedure for the formation of the Senates (appointment by the Governor General in Canada and “election in each regional legislature in Italy”), in Italy like in Canada it was not clear how and to what extent the choice of the voters on regional councilors would have then affected the election of senators. The Canadian case was not present at all in the discussion on the reform of the Italian Senate towards an Upper House representing regions and municipalities (in spite of the experience gained in the Canadian constitutional system with the reform of the Senate and its failure), while references to Austria, France and Germany were abundant. The reasoning of the Canadian Supreme Court in the reference of 2014, while the constitutional amendment bill was discussed and amended in the Italian Parliament, could also teach something about the trade-off between ensuring the effective representation of territories and electing the senators. The election, triggering the formation of a more partisan house, can come at the expenses of the protection of territorial interests.

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<sup>58</sup> Currently directly elected as the Italian Chamber of Deputies and provided with the same power as the lower House, including the power to vote confidence motions. No direct regional representation is guaranteed in the Italian Senate although Article 57 It. Const. prescribes that it is elected on a regional basis.

<sup>59</sup> See N. Lupo, *La (ancora incerta) natura del nuovo Senato: prevarrà il cleavage politico, territoriale o istituzionale?*, in *www.federalismi.it*, 4, 2016.

Finally, the abolition of the Canadian Senate and, thus, of any attempt to guarantee or enhance the representation of provinces and territories in the federal Parliament, through section 44 as proposed by the Governor General, was likewise dismissed by the Court. The idea to abolish the Upper House is not new in Canada, supported by provinces like British Columbia, Manitoba and Ontario, and has been discussed recently also elsewhere, like in Ireland and Slovenia, which, however, are small non-federal states. Should the Canadian Senate be abolished – something that is very unlikely to happen politically in light of the response of the Court – Canada would be the only federal and democratic state with a unicameral legislature (the only exception being, until the recent developments, Venezuela). As anticipated, such an outcome can be prevented by the use of the unanimity amendment formula (section 41), prescribed by the Court in light of the deep alteration of the institutional architecture caused by the Senate's abolition.<sup>60</sup>

The most recent “reform” of the Senate pushed through by the Cabinet of Justin Trudeau without constitutional amendments and by executive command<sup>61</sup> has abandoned the perspective of the Upper House as the anchor of territorial representation and, rather, has emphasized the proximity of this chamber to the model of the UK House of Lords. Even before the election, in 2014, Trudeau announced that liberal senators would have been removed from the liberal caucus in order to foster their independence from the party system. Following this change, internal to the caucus, in 2015 the new Prime Minister announced a new merit-based procedure for the appointment of senators to fill in the 22 vacancies. The transformation of the appointment procedure aimed to reduce Senate partisanship and increase the authoritativeness of the institution based on the status of the members. An independent advisory board was set up in 2016 to advise the Prime Minister on future appointments, to consider a short list of candidates (not binding upon the Prime Minister) based on their outstanding personal qualities, integrity, ethics, experience in public life, community services or leadership in a particular field of expertise of the nominees. More independent senators (the majority in the current Senate) resulted, then, in a chamber that is no longer easily under the control of the majority in the House of Commons, as the episode of the budget bill 2017 reveals (see above). The new profile of senators resembles that of the peers in the UK House of Lords (despite the recurrent debate over its “regionalization” after the devolution)<sup>62</sup>, so the model of the chamber of

<sup>60</sup> For an in-depth discussion of the wider implication of the Senate reference of 2014, see E. Macfarlane, *The Uncertain Future of Senate Reform*, in E. Macfarlane (ed.) *Constitutional Amendment in Canada*, Toronto-Buffalo-London, 2016, 228-246.

<sup>61</sup> As also suggested by D.E. Smith, *The Improvement of the Senate by Nonconstitutional Means*, in S. Joyal (ed.), *Protecting Canadian Democracy*, cit., 229-270. On this reform, see M. Russell, *The failed Senate reform in Italy: international lessons on why bicameral reforms so often (but not quite always) fail*, in *The Constitution Unit Blog*, 20 July 2018, <https://constitution-unit.com/2018/07/20/the-failed-senate-reform-in-italy-international-lessons-on-why-bicameral-reforms-so-often-but-not-quite-always-fail/> (accessed 30 Nov 2018).

<sup>62</sup> See P. Leyland, *The Second Chamber Debate in the UK Revisited: Life, After Life and Rebirth?*, *Rivista AIC*, 2, 2017, 6 June 2017 and M. Russell, *Attempts to change the British House of Lords into a second chamber of the nations and regions: explaining a history of failed reforms*, in *Perspectives on federalism*, 10(2), 2018, pp. 268-299.

sober second thought rather than that of a territorial second chamber, seconding or guiding the development of federalism, appears to prevail.

As results from parliamentary documentation, throughout the years other legal systems with a bicameral Parliament have constituted a constant point of reference when discussing the reform of the Canadian Senate in the federal legislature.<sup>63</sup> In most constitutional amendment proposals the preference, however, has been accorded, either to a directly elected Senate or an appointed Senate, disregarding the model followed by most European Parliaments of an indirectly elected Upper House (Austria, France, Germany, the Netherlands) or a mixed composition, like in Spain and Belgium, quasi-federal or federal state, with an appointed component and directly elected senators. In fact, the main example to which the reformers of the Canadian Senate have looked at, if supporting its transformation into a chamber of territorial representation, has been the Australian Senate. Indeed, while being very different in terms composition, one appointed and the other elected, they enjoy similar – strong – powers in the legislative procedures.<sup>64</sup> They were both originally designed to exercise power similar to those of the lower house, to check its activity and amend legislation, to protect the least populated provinces (a feature that, at least the Senate of Canada, is no longer able to keep). With the time, however, the direct election of the Australian Senate made it a more partisan house than the Canadian Senate and more willing to use its extensive powers “against” the lower house, given the democratic legitimation, causing deadlocks and delays. This is why the influence of the model has somewhat declined in Canada.<sup>65</sup>

## 5. Intergovernmental Relationships and Asymmetric Federalism

The lack of a federal Senate effectively representing regions and territories has led the Canadian federalism to evolve mainly through intergovernmental relations and, especially, Ministerial Conferences.<sup>66</sup> Although the first Conferences were summoned already at the beginning of the Twentieth century, it was mainly under the premiership of Pierre Trudeau (from the 1970s to mid-1980s) that they started to play a key role in developing cooperative federalism in Canada. Yet, Pierre Trudeau was aware of the risk that strengthening intergovernmental conferences could have undermined the legitimacy of the Parliament, by performing tasks that

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<sup>63</sup> See J. Stilborn, *Senate Reform Proposals in Comparative Perspective*, Publication no. BP-316E, Parliamentary Information and Research Service, Parliament of Canada, Ottawa, November 1992; J. Stilborn, *Senate Reform: Issues and Recent Developments*, Publication no. PRB 07-42E, Parliamentary Information and Research Service, Parliament of Canada, Ottawa, 21 January 2008; B. O’Neal, J. Robertson & S. Spano, *British House of Lords Reform: Recent Developments*, Parliamentary Information and Research Service, Parliament of Canada, Ottawa, 27 February 2009.

<sup>64</sup> See J. Uhr, *Explicating the Australian Senate*, 8 *The Journal of Legislative Studies* esp. 4 ff (2002).

<sup>65</sup> J. Uhr, *The Australian Model Senate*, 32 *Canadian Parliamentary Review* 2009, 26-32 provides some justifications for such a trend.

<sup>66</sup> See J.-F. Gaudreault-DesBiens & J. Poirier, *From Dualism to Cooperative Federalism and Back?*, cit., 398-400 and C. Mathen, *The Federal Principle: Constitutional Amendments and Intergovernmental Relations*, in E. Macfarlane (ed.), *Constitutional Amendment in Canada*, cit., 65-84.

the federal legislature was unable to fulfill, given its structure and composition. As will be briefly explained below, such model of executive or administrative federalism, which has no counterpart in the US, for instance, has been replicated more or less successfully over the last decades also in several European countries, in particular those featured by a regional or quasi-federal arrangement of powers.<sup>67</sup> For example, in Italy, Spain and the UK intergovernmental conferences resembles (unintentionally) much more the Canadian type of executive or administrative federalism than what is described in Europe as the main model of administrative federalism, Germany, where administrative powers are mainly assigned to Länder and executive cooperation is carried out through the Bundesrat.<sup>68</sup>

In Canada, intergovernmental cooperation takes place at three levels – Prime/First Ministers, Ministers and senior officials – and with multiple purposes, from exchange of information to consensus building. As in most federations, intergovernmental conferences evolved by practice, without any constitutional basis and are not grounded in a statute. They evolved politically according to the federal-provincial needs. Despite the lack of a solid legal basis, the system of the Conferences is now well-structured.<sup>69</sup> Indeed, the responsibility for intergovernmental relations is taken up, at provincial level, by the Premiers and at federal level by the Prime Minister, assisted to this end, by the Minister for intergovernmental affairs with the support of an ad hoc secretariat within the Privy Council Office, the Canadian Intergovernmental Conference Secretariat, established in 1973 based on an Order-in-Council. The Secretariat, which is staffed by federal, provincial and territorial civil servants, is an agency of the three levels of government, at the same time, and favours the day-to-day liaison among them.

The First Ministers Conferences (or FMMs) stands at the top of the intergovernmental conference system and they provide the general political directions for the other Conferences and, more broadly, for the evolution of Canadian federalism. In addition to play an agenda-setting role, they have also served as Constitutional Conferences, for example at the time of drafting the Meech Lake and the Charlottetown accords. The procedures are very informal: meetings are not summoned regularly (it depends on the circumstances), are usually chaired by the federal Prime Minister while the provincial premiers speak according to the order of entry into the Confederation and are normally held in camera, deciding by consensus.

The greatest part of intergovernmental relations, however, are managed through meeting of sectoral Ministers taking place frequently, although some of

<sup>67</sup> For a detailed comparative analysis, see J. Poirier & C. Saunders, *Conclusion. Comparative Experience of Intergovernmental Relations in Federal Systems*, in J. Poirier, C. Saunders, & J. Kincaid (eds.), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics*, Oxford, 2015, 440-498.

<sup>68</sup> See R. Arnold, *The Intergovernmental Relations in Federal Systems: The Model of Germany*, in A. López – Basaguren & L. Escajedo San Epifanio (eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, Vol. 2, Berlin-Heidelberg, 2013, 39-47.

<sup>69</sup> See D. Cameron and R. Simeon, *Intergovernmental relations in Canada: the emergence of collaborative federalism*, in 32 *Publius* 49-71 (2002).

them, the Ministers for Agriculture, Education, Environment, Finance, Health, Internal Trade, Sport, Tourism and Transport, meet more often than others as the issues dealt with are the most controversial for the exercise of legislative and administrative powers between the federal and the provincial level. Besides these political venues, officials’ meetings are organized on a daily basis and in the departments in which most ministerial conferences are organised units devoted to intergovernmental relations have been set up on purpose.

A repercussion of such a deep weft of intergovernmental conferences is the adoption of several federal-provincial agreements and now also federal-provincial-territorial agreements. The agreements were concluded also before the formalization of the conferences – the first dating back to 1868, on immigration, a concurrent competence between Federation and Provinces since the beginning – but their number has increased since conferences have meet on a regular basis and are equipped with a Secretariat. Possibly, the most renown, although not equally successful, intergovernmental agreements are the already recalled Meech Lake and the Charlottetown accords. The Meech Lake Accord, signed in 1987, designed an inedited and non-codified path towards amendments of the Canadian Constitution beyond the five formulas entrenched. Indeed, the Accord encompassed a variety of reforms of the Constitution like Senate’s reform, introduction of proportional representation of provinces in the House of Commons, the influence of provinces over the Supreme Court of Canada’s appointment of justices and the power of provinces to opt out from federal programs in areas of provincial exclusive competence, thus taking up most of Quebec’s requests from greater autonomy and a special status within the federation (aiming to secure Quebec’s support on the Patriation of the Constitution). Although the Accord was signed by the Prime Minister, then Brian Mulroney, and all the provincial premiers, it was criticized later on by many of them and by prominent politicians, like Pierre Trudeau. The three years deadline for ratification by the federal Parliament and provincial legislatures expired without the Manitoba and Terranova and Labrador legislatures being able to comply with this temporal requirement. The failure of the Meech Lake Accord was mainly ascribed to the procedure followed and thus the next intergovernmental agreement, the Charlottetown Accord of 1992, which included all major elements of the previous Accord plus the provision of an elected (directly or indirectly) Senate and of aboriginal self-government, was subject to a different procedure of adoption that foresaw also a national referendum. The Accord was rejected by popular vote for a variety of reasons,<sup>70</sup> partly dependent upon the discontent of provinces (too little power to Quebec, according to Québécois, too much power to Quebec, according the people in other provinces) and partly upon the rising unpopularity of the Prime Minister Mulroney. With this defeat, the attempt to introduce comprehensive constitutional reforms through intergovernmental agreements and procedures which bypass the codified constitutional amendment formulas has come to an end.

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<sup>70</sup> Not only the Accord was rejected by popular vote in a national referendum, but it was also defeated in six of the ten provinces, including Quebec.

Despite these failures, intergovernmental agreements in Canada have served the objective of supporting a dynamic and asymmetric evolution of federal arrangements within the existing constitutional framework. Their significance is also proved by the case law (both judgments and opinions) of the Supreme Court of Canada, which from time to time, has elaborated on the value of those agreements acknowledging their significance but denying that they could control the “manner and form” of subsequent legislation.<sup>71</sup>

Bilateral executive agreements between the federal Government and one province or territory, in particular, have increased over the years.<sup>72</sup> This trend mirrors the reality of a federal system that predicate to be symmetric (see section 3 above), but in practice is inherently asymmetric.<sup>73</sup> The bicultural and bilingual nature of the Canadian society and institutions has found in those bilateral agreements with Quebec a solid tool to allow to keep this province within the Confederation in spite of the lack of its original inclusion in the pact of 1982 and the systemic failure to “patriate” Quebec.<sup>74</sup> Notwithstanding the absence of constitutional amendments in this regard, bilateral agreements have manage to extend the legislative authority of Quebec beyond the constitutional text on a variety of issues, including in matters of social assistance and immigration. For example, once the inability to change Article 95 of the Constitution Act has been recognised, in 1991 the federal Government has concluded a new agreement with the Government of Quebec as to grant further autonomy to the province on the selection of immigrants and on its integration policy. This “McDougall/Gagnon-Tremblay agreement” has rendered immigration an exclusive competence of Quebec, except for the regulation of issues of public order, and let the Government of the province participate in the process leading to the determination of the annual flow of immigrants and declare the annual quota it intends to welcome. Following this agreement, the federal Government has signed bilateral agreements on immigration with all provinces and territories (with the exception of Nunavut), although none of them acknowledges the same degree of autonomy enjoyed by Quebec.<sup>75</sup>

There is also another area where bilateral intergovernmental agreements in Canada contribute to shaping its asymmetric federalism, namely the protection of self-government for Indigenous peoples (entrenched in section 35 of the Constitution Act), which can be only briefly mentioned here.<sup>76</sup> As Courts have made clear that they would prefer for the details regarding the scope of the right to self-government to be negotiated in treaties with each particular Indigenous nation, a number of modern treaties, like the Nisga’a Treaty, which came into force

<sup>71</sup> See *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525.

<sup>72</sup> On this general trend, underway also in Europe, see F. Palermo, *Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons*, in *Perspectives on federalism*, 10, 2018, 49-70.

<sup>73</sup> See S. Tierney, *Misconceiving Federalism*, cit., 48.

<sup>74</sup> See T. Groppi, *Canada*, Bologna, 2006, 38-39.

<sup>75</sup> See S. Baglay, D. Nakache, *Immigration Federalism in Canada. Provincial and Territorial Nominee Programs (PTNPs)*, in S. Baglay & D. Nakache (eds.), *Immigration Regulation in Federal States*, Berlin, 2014, 95-116.

<sup>76</sup> For details, see M. Mazza, *Linguistic and ethnic minorities*, in this collection.

in 2000, include provisions regarding self-government, the rights stemming from it and the federal duty to consult.<sup>77</sup>

The main features of Canadian executive federalism, intergovernmental agreements and conferences, have developed, although without specific reference to the Canadian case, in several EU countries as well as in the EU itself, where intergovernmental institutions, like the Council of Ministers and the European Council, have been *de iure* and *de facto* strengthened and intergovernmental agreements have multiplied. For instance, in Belgium, the very complex federal arrangements set up since 1993, when the form of state was substantially reshaped, relies in its daily management on intergovernmental agreements between the Federation, the Regions and the Communities, especially on how to govern the exercise of legislative and administrative competence.<sup>78</sup> Moreover, since then the State reforms have always been preceded by an intergovernmental agreement.

In the UK, Spain and Italy intergovernmental conferences are the main devices to run regional or quasi-federal states. While in Spain, very much like in Canada, there are mainly sectoral conferences in operation, in Italy and the UK the intergovernmental venues comprise just the heads of the executives. In Spain the implementation of the 1978 Constitution on regionalism has proceeded in parallel with the setting up of the *Conferencia Sectoriales* that have been a fundamental tools to cope and gradually reduce the asymmetries alongside the *Pactos autonómicos* (intergovernmental agreements) of 1981 and 1992 (in contrast to the Canadian Meech Lake and Charlottetown Accords these *Pactos autonómicos* did not envisage any constitutional amendment but served the purpose of implementing the new Constitution). As of today there are 44 sectoral intergovernmental conferences in Spain each focusing on a different subject matter or issue with the first, the *Consejo de Política Fiscal y Financiera de las Comunidades Autónomas*, dealing with fiscal federalism, set up in 1980.<sup>79</sup> Some are grounded in organic laws, i.e. laws of the national parliament covering specific areas and approved by absolute majority in each house, some in statutes of the national parliament and some in national government’s regulations; moreover, some have adopted their own rules of procedure while some have not.<sup>80</sup>

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<sup>77</sup> On this topic, the nature and role of these Treaties and their functioning of reconciliation, see P. Macklem, *Indigenous Peoples and the Canadian State. The Prospects of a Post-Colonial Constitutional Pluralism*, in R. Albert & D. R. Cameron (eds.), *Canada in the world*, cit., 81-97, and P. Macklem, *The Form and Substance of Aboriginal Title. Assimilation, Recognition, Reconciliation*, in P. Oliver, P. Macklem & N. Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution*, cit., 325-347.

<sup>78</sup> See P. Popelier & K. Lemmens, *The Constitution of Belgium: A Contextual Analysis*, Oxford, 2015, 71-93.

<sup>79</sup> See S. Leon, *Intergovernmental councils in Spain: Challenges and opportunities in a changing political context*, 27 *Regional and Federal Studies* 645-655 (2017).

<sup>80</sup> For more detailed information, see Secretaria de Estado par alas administraciones territoriales,

[http://www.seat.mpr.gob.es/dam/es/portal/areas/politica\\_autonomica/coop\\_autonomica/Conf\\_Sectoriales/Documentacion/Conf\\_Sect\\_exist/parrafo/0/CONFERENCIAS-SECTORIALES\\_REGIMEN\\_JURIDICO\\_ACTUALIZADO0.pdf](http://www.seat.mpr.gob.es/dam/es/portal/areas/politica_autonomica/coop_autonomica/Conf_Sectoriales/Documentacion/Conf_Sect_exist/parrafo/0/CONFERENCIAS-SECTORIALES_REGIMEN_JURIDICO_ACTUALIZADO0.pdf) (accessed 30 Nov 2018).

In Italy, the State-Regions Conference has been established in 1983 and firstly regulated by statute in 1988 (law n. 400/1988). In particular since the constitutional reform of 2001, which has granted more legislative and administrative autonomy to regions, State-Regions Conference has played the role of an “hidden second chamber” of territorial representation. The Government is bound by law to obtain the consent of this Conference, where the presidents of all Regions and autonomous provinces seat, on several bills, draft legislative decrees, and executive and administrative draft acts before they are adopted.<sup>81</sup> The lack of such a consent can lead to invalidate legislation by the Italian Constitutional Court later on.<sup>82</sup> Given the historical importance of municipalities and provinces in Italy (set up well before ordinary Regions in 1970, although regions were provided already in the 1948 Constitution) a Unified Conference between State, regions and local autonomies was set up in 1997 (law 281/1997) and for the first time in 2011 within this Conference a permanent sectoral conference has been created, on the coordination of public finance (D.lgs. 68/2011), a major controversial area for the State-Regions-local autonomies’ relationship in Italy, even more so since the Eurozone crisis.

Finally in the UK, since the devolution started in 1998, based on a Memorandum of understanding and several Concordats between the UK government and the administrations of Scotland, Northern Ireland and Wales,<sup>83</sup> the Joint Ministerial Committee has been established – next to bilateral conferences between the UK Government and devolved administrations – as a consultative body comprising the UK Prime Minister, the First Ministers of Scotland and Wales and the First Minister and the deputy First Minister of Northern Ireland. Although this Conference does not meet frequently and has no binding powers, its authority has increased over the last few years, in particular in relation to claims for more autonomy and independence by devolved areas and with regard to the path towards and the management of Brexit.<sup>84</sup>

As the case of Canada and of the other countries cited show, intergovernmental relationships through Conferences and executive agreements in those federal or quasi-federal systems appear to have common features and *raison d’être*. First of all, there is no constitutional entrenchment of intergovernmental relationships, meaning that they evolve in response to particular political circumstances and are then kept and transformed without an explicit constitutional guarantee (with the exception of the peculiar case of aboriginal self-government in Canada), given the difficulty to amend the Canadian as well as the Spanish and the Italian Constitutions.<sup>85</sup> Second, intergovernmental conferences and agreements in Canada, Belgium, Italy, Spain and the UK are

<sup>81</sup> Amongst many, see I. Ruggiu, *Contro la Camera delle Regioni. Istituzioni e prassi della rappresentanza territoriale*, Napoli, 2006.

<sup>82</sup> See, e.g., the judgment of the Italian Constitutional Court no. 251/2016.

<sup>83</sup> See J. Poirier, *The Functions of Intergovernmental Agreements: Post-Devolution Concordats in a Comparative Perspective*, London, 2001, 18-30.

<sup>84</sup> See N. McEwen, *Still better together? Purpose and power in intergovernmental councils in the UK*, 27 *Regional & Federal Studies* esp. 681-683 (2017).

<sup>85</sup> In Italy, there has been an attempt to constitutionalise the State-Regions Conference in 2006, by the constitutional reform that was rejected y referendum on 25-26 June 2006.

working well to supplement the lack of a well functioning upper house as a chamber of territorial representation, i.e. they perform tasks that elsewhere, like in Austria and in Germany, are performed by a second chamber. Third, intergovernmental conferences and agreements serve to prevent constitutional conflicts on federal-regional relationships to go to courts and block their activity or, in the case of the UK, to counter the weakness of constitutional review on devolution issues by the Supreme Court.

There are nevertheless also remarkable differences. For example, while in Canada and in the UK intergovernmental relationships helps to manage and preserve the *de facto* and *de iure* asymmetric nature of the federal or quasi-federal arrangements, in countries like Italy and Spain intergovernmental conferences and agreements have been functional to contain the asymmetries and to favour a process of approximation – though not homogenization, given the constitutional boundaries – of competences among the regions.<sup>86</sup> Another significant difference is the lack, among the European countries considered, of indigenous peoples subject to ad hoc constitutional protection, like in Canada, where indigenous self-government is guaranteed through the deployment of intergovernmental relationships and treaties.

## 6. The Failed Secession of Quebec

The last issue of particular significance about Canadian federalism to be discussed comparatively and that triggers a special interest from a European perspective is secession, especially in light of the current heated debate on secession threats in EU Member States like Spain and the UK.<sup>87</sup> The unity of the Canadian federation has been put under pressure and the constitutional questions surrounding the secession of Quebec have been dealt with – although not ultimately “solved” – by the Supreme Court years before similar problems arose in Europe, with the partial exception of Flanders in Belgium, where, however, secession’s tensions have been somewhat appeased at the moment.<sup>88</sup>

In Canada, the first referendum through which the government of Quebec, led by the Parti Québécois, asked the population of the province for a mandate to negotiate sovereignty for Quebec as well as an economic and political Union with Canada, took place before the Patriation of the Constitution, in 1980. Nearly 60% rejected the proposal of the provincial executive. Later no Quebec objected to the signature of the Constitution Act 1982, on several grounds, among which is also the content of the Charter of fundamental rights and freedoms. Despite the several

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<sup>86</sup> See R. Bifulco, *La cooperazione nello stato unitario composto. Le relazioni intergovernative di Belgio, Italia, Repubblica federale di Germania e Spagna nell'Unione europea*, Padova, 1995.

<sup>87</sup> See I. Spigno, *Constitutional Judges and Secession. Lessons from Canada ... twenty years later*, in *Perspectives on federalism*, 9, 2017, 105-132 and G. Delledonne & G. Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference*, London, forthcoming, 2019.

<sup>88</sup> See V. Laborderie, *La fin de la Belgique et ses impossibilités: l'hypothèse d'une indépendance flamande à l'épreuve des faits*, in *Outre-Terre. Revue européenne de géopolitique*, 3, 2014, 114-123 and N. Dupont, *Il federalismo belga al bivio*, in *Diritto pubblico comparato ed europeo*, 2, 2015, 381-404.

attempts made, for instance in 1987 and 1992, to include Quebec into the constitutional pact, this province has not yet signed it, which is questionable from the perspective of federal principles such as loyalty and sincere cooperation. A second referendum was held, then, in 1995, after a new victory of the Parti Québécois in the provincial elections the year before, asking the population to vote on the option of a sovereign Quebec and an optional partnership with Canada. Meanwhile the National Assembly of Quebec had passed a bill on the future of the province and the path towards secession, expecting a positive result at the referendum. This time the secessionist option was defeated by a narrow margin. Finally, the plan for a third referendum was announced in 1996 and in response to that the Prime Minister Jean Chrétien initiated a reference proceeding before the Supreme Court on the constitutionality of a unilateral secession of the province. Based on the opinion of the Court, unilateral secession is unconstitutional; a negotiating procedure between the province and the rest of the federation, just outlined in the opinion, is a requirement for a lawful secession and a constitutional amendment is needed.<sup>89</sup> According to this Court, “a clear majority vote in Québec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all the other participants in Confederation would have to recognize”.<sup>90</sup> The application for secession by a province triggers a process of negotiation among the province in question, the other provinces and the federal Government, but this could also lead to disagreement rather than consensus.<sup>91</sup> A by-no-means lawful secession would happen in Canada as the result of a unilateral act by a province, even if it was supported by the majority of the Québécois.<sup>92</sup> Despite its conciliatory approach,<sup>93</sup> the opinion of the Court has only temporarily succeeded in appeasing the relationship between the parties of the controversy, thus preventing the disintegration of Canada in the aftermath of the reference proceeding.

Indeed, following the opinion, while the federal Parliament approved the *Clarity Act 2000* aiming to implement and detail the conditions imposed by the Court for a lawful secession, the legislative assembly of Quebec has patently departed from the opinion of the Court. In fact the *Act respecting the exercise of the*

<sup>89</sup> *Reference re Secession of Québec*, [1998] 2 SCR 217. S. Mancini, *Secession and Self-Determination*, in M. Rosenfeld & A. Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 497–501 and D. Haljan, *Constitutionalising Secession*, Oxford, 2014, 309–312.

<sup>90</sup> *Reference re Secession of Québec*, para. 150.

<sup>91</sup> See A. C. Cairns, *The Constitutional Obligation to Negotiate*, in D. Schneiderman (a cura di), *The Quebec Decision. Perspectives on the Supreme Court's Ruling on Secession*, Toronto, 1999, 143–148 and J. Leclair, *Constitutional Principles in the Secession Reference*, in P. Oliver, P. Macklem & N. Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution*, cit., 1023–1026.

<sup>92</sup> Interestingly, the Supreme Court did not prescribe following one of the specific constitutional amendment procedures provided for by the Constitution Act 1982 (Sections 38 to 49) for the secession of Quebec. R. Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 *Alberta Law Review* 85–113 (2015), highlights that the path traced by the Supreme Court in this case and the subsequent Clarity Act constituted a derogation to the Canadian written constitutional amendments' rules.

<sup>93</sup> See N. Des Rosiers, *From Québec Veto to Québec Secession: The Evolution of the Supreme Court of Canada on Québec-Canada Disputes*, 13 *Canadian Journal of Law and Jurisprudence* 171–183 (2015).

*fundamental rights and prerogatives of the Quebec people and the Quebec state* (SQ 2000, c.46) supports the right to self-determination of the province, the authority of the Quebec people and institutions to decide on their own about the legal status and political regime of the province and, in contrast to what predicated by the Supreme Court, the ability to vote by simple majority on a secession question in a provincial referendum. Given such a sharp contrast, almost twenty years after the reference on secession the litigation in courts on the issue is still on the rise and may end up again before the Supreme Court in the near future.<sup>94</sup>

With respect to secessions within EU Member States, in the UK the procedure leading to the first attempt of secession by Scotland has somewhat followed the “advice” of the Canadian Supreme Court to duly negotiate amongst interested parties, although the whole process has been politicised there – indeed no court has intervened – and, unlike in Canada, the negotiation has preceded the referendum. A constitutional ‘agreement’ was reached between the seceding territory – Scotland – and the central government on how to manage secession and on what could be considered a legitimate secession from a constitutional perspective, although the UK lacks a codified constitution and thus a formal procedure to amend it.<sup>95</sup> This “constitutional compromise” is entrenched in the Edinburgh Agreement of 2012.<sup>96</sup> No agreement, instead, has been reached regarding the new secessionist claims of the Scottish government, following the result of the referendum on Brexit on 23 June 2016 and the formal opening of the negotiation for the withdrawal with the EU in March 2017. It appears, however, that following the serious defeat of the Scottish National Party at the general elections of 8 June 2017 the demands for a new referendum on secession in the region have been put on hold.<sup>97</sup>

In Spain, instead, the secessionist claims have been primarily addressed by the Constitutional Court in a series of judgments.<sup>98</sup> Likewise in Quebec, in Catalonia the proceeding originated from the unilateral attempt by the Catalan Parliament to declare the region as a sovereign state through the *Declaración de*

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<sup>94</sup> Indeed, 17 years after the proceeding started, on 18 April 2018 Madam Justice Claude D'Almeida of the Superior Court of Quebec upheld the validity of the Quebec Statute on the ground that it was purely a declaratory law in *Henderson v. Procureure générale du Québec*, 2018 QCCS 1586. The appellant, Mr. Henderson, declared that he will appeal the decision before the Supreme Court of Canada while the Government of Canada noted that it is satisfied by the ruling of the Superior Court. See A.-G. Gagnon, *Political Dynamics in Quebec*, in R. Albert & D.R. Cameron (eds.), *Canada in the world, cit.*, 34-58.

<sup>95</sup> See S. Tierney, *Legal Issues Surrounding the Referendum on Independence for Scotland*, 9 *European Constitutional Law Review* 359-390 (2013) and P. Martino, *La questione indipendentista scozzese: le nuove frontiere della Britishness*, in *Diritto pubblico comparato ed europeo*, 2, 2015, 405-428.

<sup>96</sup> See Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh, 15 October 2012. This consensual process has been praised by S. Tierney, *Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum*, in 86 *The Political Quarterly* 226-233 (2015).

<sup>97</sup> See Constitution Unit, *Monitor* 66, July 2017, 1 and 11, [http://www.ucl.ac.uk/constitution-unit/publications/Monitor\\_66](http://www.ucl.ac.uk/constitution-unit/publications/Monitor_66) (accessed 30 Nov 2018).

<sup>98</sup> J. M. Castellà Andreu, *Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional*, 37 *Teoría y Realidad Constitucional* 561-592 (2016).

*soberanía y del derecho a decidir del pueblo de Cataluña*, approved on 23 January 2013.<sup>99</sup> The Spanish Constitutional Court tried to provide initially a conciliatory answer by using an interpretation in conformity with the Constitution and recognised that a constitutionally legitimate political aspiration does exist for the Catalan people in this regard (§4, c) but it has to be exercised in such a way as to activate the procedure for amending the Spanish Constitution under its Article 168 and then eventually to call for a referendum on Catalonia's independence (S.T.C. 42/2014).<sup>100</sup> Just calling a (unilateral) popular consultation in the region is not enough and, in any event, the holding of referendum falls within the exclusive competence of the State. By the same token, arguing that the Catalan people holds, by reason of democratic legitimacy, legal and political sovereignty is in breach of the Constitution: only the people of Spain as a whole is sovereign.

Several elements differentiate the stance of the Spanish Constitutional Court from that of the Canadian Supreme Court: first, the former prescribes to follow a precise constitutional amendment procedure, while the latter remains vague on the point; second, the Spanish Court considers unconstitutional, for the sake of the validity of the secession claims, the result of a regional referendum, where the Supreme Court of Canada refers to a clear (qualified) majority of the Quebec voters; third, while in Canada a constitutional obligation to negotiate is considered to stem from such a result at the provincial level, the Spanish Constitutional Court supports the dialogue amongst the relevant institutional actors as to protect the loyal cooperation, but does not fix a constitutional obligation to negotiate, possibly because the point of reference is Article 168 Sp. Const. that entails in itself a common agreement; fourth, while the Supreme Court of Canada was asked to give its opinion on the constitutionality of unilateral secession, in the Catalan case what is at stake is also the constitutionality of a regional referendum.

This notwithstanding the Spanish Constitutional Court is clearly inspired by the *Reference on the secession of Quebec*, as demonstrated by the extensive citation of the Canadian Supreme Court's opinion in judgment STC 42/2014, the first of the rich case law of the Court on the Catalan attempt to secede. Despite the different constitutional context, the approach and the tone of the two Courts on the sensitive issue of secession is similar.<sup>101</sup> In the constitutional judgments and

<sup>99</sup> This Declaration is just a parliamentary resolution paving the way to a procedure which could lead to calling a 'popular consultation' in Catalonia on its independence. This consultation was finally held on 9 November 2014 as the Spanish Constitution does not allow regions to provide for and call referendums despite the case law of the Spanish Constitutional Court. Of those who voted, – 41 per cent of the Catalan population – 81 per cent said 'yes' to independence.

<sup>100</sup> The Catalan Parliament can initiate such a constitutional amendment bill before the Spanish Parliament, but of course there are no guarantees that it will be adopted (Art. 87(2) and 166 Spanish Constitution). Under Article 168 Const., allowing even for the total revision of the Constitution, the principles underlying the bill have to be approved by the Congress and the Senate that are subsequently dissolved and have to be approved again by the new Parliament. Then each chamber has to vote on the constitutional amendment bill by two thirds majority and eventually the bill is subject to referendum. See J. M. Castellà Andreu, *The Proposal for Catalan Secession and the Crisis of the Spanish Autonomous State*, *Diritto pubblico comparato ed europeo*, 2, 2015, p. 429–488.

<sup>101</sup> See G. Martinico, *Identity conflicts and secession before courts: three case studies*, in *Revista General de Derecho Público Comparado*, 21, 2017, 2–30.

orders of the Spanish Court following the Catalan elections of 2015 and the approval of new resolutions by the Catalan Parliament on a roadmap toward independence, all declared unconstitutional, the opinion of the Supreme Court of Canada has no longer been cited but the endorsement for a dialogic and collaborative solution is always present.<sup>102</sup>

Finally, the Italian case law on the recent attempt of Veneto to secede not only disregards the opinion of the Canadian Supreme Court – consistently with the persistent lack of citation of foreign precedents by the Italian Constitutional Court while the opinion is certainly well known by the judges – but considers any attempts of secession unconstitutional and a constitutional amendment would not alter this status quo.<sup>103</sup> Indeed, judgment no. 118/2015, on the regional law of Veneto no. 16/2014, which established a procedure to call a referendum on the independence of the region, reflects the more trenchant position of the Italian Constitution and constitutional case law on the point of the constitutional sustainability of secession.<sup>104</sup> According to the Court, Regional law no. 16/2014 amounts to an *extra ordinem* initiative of Veneto which violates Articles 5, 114, 138 and 139 of the Italian Constitution and in particular the principles of the unity and indivisibility of the Italian Republic which stand as unamendable principles of the Constitution. By contrast to Spain, in Italy there is no constitutional clause like Article 168 of the Spanish Constitution paving the way to the total revision of the Constitution without substantive and explicit limits. Moreover, unlike the opinion of the Canadian Supreme Court, the Italian Constitutional Court considers that “regional referendums, even those having an advisory nature, cannot entail a choice of constitutional value” (own translation, § 6).

As can be easily detected not all secessions are alike and there is a variety of solutions envisaged by Constitutional and Supreme Courts or politics, as in the case of the UK, depending on constitutional provisions, conventions and case law. Although the opinion of the Supreme Court of Canada in the reference on the secession of Quebec is not applicable to the European legal systems examined as it stands and is expressly cited only by the Spanish Constitutional Court in judgment STC 42/2014, it is certainly well known and studied in these countries, by scholars, practicing lawyers and judges in the top courts. Indeed, possibly with the exception of Italy, some constitutional principles set in the Supreme Court’s opinion have been adopted and followed also in Spain and in the UK on secession: in particular, the democratic principle, that demands the expression of a clear majority through a popular vote or through democratic representative

<sup>102</sup> See, e.g., S.T.C. 259/2015, S.T.C. 185/2016, S.T.C. 215/2016, *Auto* 24/2017, and S.T.C. 114/2017.

<sup>103</sup> A comparable approach can be found in the recent order of the German Constitutional Tribunal of December 2016, 2 BvR 349/16, on the secessionist attempt in Bavaria. See G. Delledonne, *I Länder non sono i padroni della Costituzione*: il Bundesverfassungsgericht di fronte a un tentativo secessionista bavarese, *Quaderni costituzionali*, 1, 2017, 145-148.

<sup>104</sup> D. Tega, *Venezia non è Barcellona. Una via italiana per le rivendicazioni di autonomia?*, *Le Regioni*, 5-6, 2015, 1141-1155 and C. Fasone, *Una, indivisibile, ma garantista dell'autonomia (differenziata): la Repubblica italiana in una recente pronuncia della Corte costituzionale sulle leggi regionali venete nn. 15 e 16 del 2014*, *Blog de la Revista catalana de dret public*, 15 September 2015.

institutions, the principle of loyal cooperation and the need to duly negotiate with a view to achieve a shared solution.

### **7. Concluding Remarks, From a European Perspective**

The Canadian federal system, with its dualist, cooperative and executive features, shows many elements of interest for a European comparative lawyer and this article has tried to illustrate some of them: the relationship between constitutional amendment formulas and the incremental involvement of the Federation and the provinces; the ambiguous role and composition of the federal Senate and the difficulty to reform it; the pervasive role played by intergovernmental relationships, in particular through ministerial conferences and executive agreements; the “proceduralisation” of the secession of Quebec as a confirmation of the cooperative ambition of Canadian federalism.

Although in several European countries with federal or quasi-federal arrangements, like Italy, Spain and the UK, the institutional debate on the transformation of the upper house into a second chamber of territorial representation has been on the agenda for years and important lessons can be drawn from the Canadian case of attempts and failures of Senate’s reforms, Canada is not usually considered as a point of reference for modeling proposals of reform by political institutions. A preference is rather accorded to other European second chambers, considered the proximity of the legal systems. By contrast in Canada, although the main models from which to draw inspiration for the reform of the Senate are the UK House of lords and the Australian Senate, at institutional level the features of the many bicameral systems in Europe are considered when debating about potential or actual constitutional amendments. The same consideration can apply to the success of intergovernmental relations as a common characteristic of Canadian federalism and of several federal and regional states in Europe. Although in Canada executive federalism dates back at least to the 1970s, institutional actors in European countries do not appear to look at the experience this federation has in the field when developing intergovernmental conferences and signing intergovernmental agreements. This can be a consequence of the very informal nature of intergovernmental relationships and their development in response to the specific circumstances and needs of the national and local communities. Yet executive or administrative federalism in Europe tends to be identified with Germany that, however, is much more distant than Canada from states like Belgium, Italy, Spain and the UK for what concerns the nature and the procedure of cooperation among national- federal and regional-state executives.

By contrast, despite the differences amongst the Constitutions on the admissibility of secession and the fact that the questions surrounding the independence of Quebec have not yet been solved, the reference of the Supreme Court of Canada is considered as an obliged point of departure when addressing secessionist claims concerning the enforcement of democratic principles and the principle to duly negotiate amongst the interested parties, even if the solution found in the concrete case is different. European legal scholarship and judges are

very attentive towards the case law of the Canadian Supreme Court on federal issues (as well as on many other constitutional questions). In Italy, for example, developments in Canadian federalism have always triggered studies and publications by scholars.<sup>105</sup> In contrast, so far political institutions have somewhat disregarded the influence of the Canadian model of federal-provincial relationships, although the similarity of the challenges and of the federal-national responses are impressive in some cases.

To conclude, when dealing with federal arrangements Canada has been more an “importer” – from the US, Australia and even the UK – than an “exporter” of institutional solutions, despite the existence of peculiar successful experiences, such as the protection of Indigenous self-government.<sup>106</sup> Although possibly federalism is the value of Canadian constitutionalism that, until now, has been less successful in being “exported” compared to democracy and the respect of difference and diversity,<sup>107</sup> since the Patriation of the Canadian Constitution in the particular case of the European states not only the level of interest by scholars towards this federal experience has steadily increased but when dealing with certain issues, such as secession, Canada appears to be the first point of reference to look at.<sup>108</sup>

<sup>105</sup> Just to mention some of them, see G. Rolla, *Il referendum sulla sovranità del Québec ed il futuro del Canada. Alcuni paradossi costituzionali*, in *Giur. cost.*, no. 5, 1996, 3269 ff.; T. Groppi, *Il federalismo canadese*, in *Amministrare*, 1-2, 2002, 5-8; T. Groppi, *Canada*, Bologna, 2006; R. Bifulco (cur.), *Ordinamenti federali comparati. Vol. I- Gli stati federali “classici”*, Torino, 2010, Part V; T.E. Frosini & P.L. Petrillo, *Il federalismo fiscale “decostituzionalizzato” canadese e la negoziazione tributaria tra livello federale e provinciale*, in G.F. Ferrari (cur.), *Federalismo, sistema fiscale, autonomie. Modelli giuridici comparati*, Roma, 2010, 355 ff; E. Ceccherini, *La giurisprudenza della Corte suprema del Canada nel biennio 2014-2015*, in *Giur. cost.*, 5, 2016, 1989-2020; T.E. Frosini, *Le “derivazioni” dirette del sistema inglese: Australia, Canada e Nuova Zelanda*, in P. Carrozza, A. Di Giovine, G.F. Ferrari (cur.), *Diritto costituzionale comparato*, Bari, 2017, 62-69.

<sup>106</sup> See P. Macklem, *Indigenous Peoples and the Canadian State*, cit., 81-97.

<sup>107</sup> See R. Hirschl, *Going Global? Canada As Importer and Exporter of Constitutional Thought*, cit., 305-324.

<sup>108</sup> As confirmed by G. Martinico, *Identity conflicts and secession before courts*, cit., 2-30.