

# Canadian Rights: A jurisprudential Canadian “Style”?

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**Abstract: Diritti canadese: uno “stile” giurisprudenziale canadese?** – The essay starts off by analysing the stratified and mixed nature of the Canadian system of legal sources concerning rights before 1982. It then offers an overview of judicial adaptation to the new rigid source of protection of such rights, namely the Canadian Charter of Fundamental Rights and Freedoms. It then addresses the influence of federalism on the interpretation of fundamental rights. With respect to this point, it argues that Federalism is in some way the preferred lens through which Canadian courts look at rights to decide their content, core, limits and to balance them against other rights or principles. Ultimately, it explores the techniques judges employed in interpreting fundamental rights upon the enactment of the Charter.

**Keywords:** Patriation, Canada, Federalism, Rights, Charter.

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## 1. Some preliminary considerations

Until now the Italian public law scholarship has dedicated very limited attention to the Canadian legal system and in particular to the topic of rights. Only two volumes have been recently devoted to Canada, one of which in non-academic series<sup>1</sup>. Canada, however, is often examined in comparative studies, mainly in the fields of federalism and multinational pluralism.

With regard to federalism, there has been interest for Canada when there have been prospective or concretely implemented reforms to the Italian system of regional government. For example, in the second half of the ‘90s the transfer of significant functions from the State to the local authorities, partially by-passing the Regions<sup>2</sup>, stirred much attention towards the relationship between municipalities and intermediate entities in comparative perspective and, as a result, the Canadian provinces suddenly became an ideal subject for case-studies<sup>3</sup>.

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<sup>1</sup> T. Groppi, *Canada*, Bologna, 2006; the other one is P. Petrillo, *Le istituzioni della libertà: esperienze costituzionali canadesi*, Padua, 2012. For earlier references, see also P.G. Lucifredi, *Primi lineamenti del sistema costituzionale canadese*, *Annali Università di Genova*, 1984-85, 384; S. Gambino, C. Amirante (eds.), *Il Canada, un laboratorio costituzionale. Federalismo, diritti, corti*, Padova, 2000. A translation of Canadian texts, mainly by J. Fremont (and others), is AA.VV., *L'ordinamento costituzionale del Canada*, Torino, 1997. On the occasion of the election of the Italian Constitutional Assembly, in 1946, a translation of Canadian statutes was published by the Ministry for the Assembly: P. Ruggeri Laderchi, *La costituzione canadese*, Florence, 1946.

<sup>2</sup> By the so-called Bassanini laws (L. 29/1997 and 127/1997).

<sup>3</sup> The occasion for such articles was also the Québec referendum: see e.g. G. Rolla, *Il referendum sulla sovranità del Québec ed il futuro del Canada. Some constitutional paradoxes*, *Giur. cost.*, 1996, 3269; R. Louvin, *Il Québec all'indomani della consultazione referendaria*, *Dir. soc.*, 1996, 271; T. Groppi, *Concezioni della democrazia e della Costituzione nella decisione della Corte Suprema del Canada sulla secessione del Québec*, *Giur. Cost.*, 1998, 3057; G. Poggeschi, *Il diritto di secessione del Québec secondo la Corte Suprema del Canada*, *Le*

Something similar happened in the first decade of the new millennium after the constitutional reform of 2001<sup>4</sup>, when the allocation of powers between central State and Regions was changed with significant consequences in terms of constitutional litigation. Again the Canadian system, with its history from 1867 onwards, together with other comparative examples, returned to the spotlight<sup>5</sup>. Approximately in the same period, between 2001 and 2009, the need to implement the new art. 119 of the amended Italian Constitution yielded a certain amount of interest towards other important experiences of fiscal federalism, among which the Canadian one<sup>6</sup>.

With regard to multinational pluralism, the growing attention of public law scholars towards immigration, which throughout Europe, and particularly in Italy, can no longer be considered an everyday phenomenon, but has become an issue that is creating enormous problems in terms of temporary hospitality, asylum in alternative to expulsion or deportation, pressure on social services of all kinds, and possible integration, has led many authors to look at Canada as an example of peaceful coexistence between different ethnic and cultural entities and to remind the Canadian contribution to the international debate about the concept of community and its implications<sup>7</sup>. Unfortunately, however, it has become almost immediately evident that communitarian models elaborated in a context where ethnic groups of European descent live together in a confederation after having adjusted to each other along almost three centuries and having construed a cluster of legal mechanisms tested and tried out with extreme and enduring care are inapplicable to sudden and massive streams of immigration only marginally available to integration, moreover in social and political systems traditionally much less stable. Even leaving aside all considerations concerning the dimension of the territory and the size and density of the population<sup>8</sup>, comparisons of this sort shortly proved impossible.

Italian scholars have devoted much greater attention to Canada's system of rights, especially after the patriation of the constitution in 1982 and once again, more recently, around 2005<sup>9</sup>. The reason for this might be the increasing relevance

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istit. del fed., 1998, 1173; E. Ceccherini, *Limiti di un federalismo senza la partecipazione delle Regioni: il dibattito sulla revisione del Titolo V e l'esperienza del Canada*, Le Regioni, 1998, 243.

<sup>4</sup> Operated by Constitutional L. 3/2001.

<sup>5</sup> See S. Gambino (Ed.), *La protezione dei diritti fondamentali. Europa e Canada a confronto*, Milan, 2004.

<sup>6</sup> See e.g. T.E. Frosini, P.L. Petrillo, *Il federalismo fiscale "decostituzionalizzato" canadese e la negoziazione tributaria tra livello federale e provinciale*, in G.F. Ferrari, *Federalismo, sistema fiscale, autonomie. Modelli giuridici comparati*, Rome, 2010, 355 ff. But see before G. Brosio, G. Pola, M. Rey, *La finanza locale dei principali Paesi occidentali*, Turin, 1979 and B. Dente, *Governare con il federalismo*, Turin, 1997.

<sup>7</sup> See e.g. V. Baldini (ed.), *Multiculturalismo*, Padova, 2012.

<sup>8</sup> Little more than 36 million persons on almost 10 million square kilometers against 60 million people in little more than 300.000 square kilometers, according to 2017 data.

<sup>9</sup> See F. Lanchester, *La "Patriation" della Costituzione: verso un nuovo federalismo?*, in Riv. trim. dir. pubbl., 1983, 337-360; more recently, S. Gambino (a cura di), *La protezione dei diritti fondamentali. Europa e Canada a confronto*, Milano, 2004; G. Rolla (a cura di), *Eguali, ma diversi. Identità ed autonomia secondo la giurisprudenza della Corte Suprema del Canada*, Milano, 2006; I. Spigno, *A comparative perspective on hate speech regulation: the emergence*

in the Italian legal literature of the dialogue between the Italian Constitutional Court and Court of Cassation and the Courts of Strasbourg and Luxembourg, which has occasionally caused tensions if not conflicts mainly on the ground of the protection of civil rights.

## 2. Mixed nature of the relevant sources in the protection of rights

A continental European public lawyer who approaches the Canadian system of rights is immediately impressed by the stratification of legal sources that one has to take into consideration when addressing the issue of the protection of rights. Almost all court decisions concerning rights of individuals or of groups have to take into account a complex system of legal sources, each source differing in terms of quality, age, force. As it usually occurs, the most recent legal sources enjoy the prerogative of supremacy, but their interaction with other sources is not that simple. The traditional, Kelsenian criteria that govern the systems of legal sources in the civil law countries, i.e. hierarchy, competence, and succession in time, are hardly applicable in a legal environment where the variety of sources is not easily amenable to a constitutional unification, capable of defining meaning and relative weight of each of them.

It is not surprising, therefore, that the most prominent handbooks of Canadian constitutional law start out by devoting a huge number of pages to the history of the country and its constitutional evolution<sup>10</sup> describing the phases of this transformation in a quite analytical manner, which resembles the French manuals of *Institutions politiques et droit public*. That said, while French authors need to explain to their students the succession of eleven political regimes over a period of two hundred and thirty years before the present fifth Republic, Canadian professors have to introduce their readers to the unique blend that derives from past sources, the juxtaposition of which is the very essence of national constitutionalism and the core of all the doctrines debated by scholarship and case law.

The mix of sources that characterizes the Canadian legal system is so complex to confer on the Constitution of Canada some unique features, partially shared, for obvious historical reasons, only by Australia.

The common law blueprint has necessarily been paramount, though it was developed by British judges long before Canadian ones. Such a matrix has been fundamental in the elaboration of the attitude towards rights, both of individual and groups, including those of Aboriginal peoples. As far as the latter are concerned, even nowadays the Supreme Court of Canada often refers to the common law foundations of Aboriginal rights, when it has to decide on territorial

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of the Canadian model, in *Interpreting Canada: new perspectives from Europe*, Canadian Studies in Europe, Milan-Brno-Toronto, 2012, 169 ff.

<sup>10</sup> See e.g. P.J. Monaghan, B. Shaw, *Constitutional Law*, Toronto, 4<sup>th</sup> ed., 2013, Parts 2 and 3; P.W. Hogg, *Constitutional Law of Canada*, Scarborough, Ontario, 2017 Student Edition, chs. 1-6; The Constitutional Law Group, *Canadian Constitutional Law*, Toronto, 5<sup>th</sup> ed., 2017, Part II, Part IV, Part V, chs. 15 to 17; H. Brun, G. Tremblay, E. Brouillet, *Droit constitutionnel*, Cowansville, 6<sup>th</sup> ed., 2014, 75 ff.; 214 ff.

or collective rights of the First Nations<sup>11</sup>, their right to self-government<sup>12</sup>, their distinctive culture<sup>13</sup>, or even the special expectations of individuals<sup>14</sup>. The fiduciary nature of the relationship between such peoples and the Crown has been rediscovered independently of the 1982 patriation of the constitution.<sup>15</sup> This means for the courts the duty of keeping a careful eye to the contact moment as a turning point for the extension of aboriginal rights and their possible limitations.

The common law tradition has also contributed to the introduction of the principle of the supremacy of Parliament (at the beginning only the British one, later the Imperial Parliament, after 1867 the Provincial Legislatures as well), together with the principle of judicial independence and the general criteria for the interpretation of statutes, including the classical presumptions in favor of rights, that also concern the way how the Executive and its public officials behave. The conventions of the constitution too started to be elaborated in this period.

Many important statutes also belong to the colonial period and gave a profound contribution to the structure of rights, for instance in the area of the privileges to be guaranteed to the French minority after the incorporation of New France into the possessions of the British Crown in 1763: examples include the Royal Proclamation of 1763, the Quebec Act of 1764, and the ill-fated Union Act of 1840, following the unhappy Report of Lord Durham.

The British North America Act 1867 shared the same formal nature and strength of the other ordinary statutes, although in fact it was the conclusion of two historical processes: at local level, the birth of new colonies, needing to be incorporated into a united political entity; at the global level, the growth of the British power and its transformation in an Empire, with the consequent necessity of reorganizing the colonies in a new and more stable form. The result was the conferral on Canada of the status of dominion and its transformation in a confederation. This meant, on one hand, that the British North America Act, though adopted at the end of a cooperative procedure in which the final will was obviously of the Westminster Imperial Parliament, had a substantial strength somehow different from that of former statutes concerning Canada: its preamble – perhaps in an attempt to flatter the Canadians or, vice versa, of the Canadian

<sup>11</sup> See *Connolly v Woolrich* (1867), 17 RJRQ 75 (QueSC), in the words of Monk J. Since *Calder v Attorney General of British Columbia* [1973] SCR 313, the legal source of aboriginal rights has been more commonly brought back common law traditions independently of the Royal Proclamation of 1763. Fishing rights, for instance, were the subject of *R v Sparrow* [1990] 1 SCR 1075 and of *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535.

<sup>12</sup> See e.g. *R v Pamajewon* [1996] 2 SCR 821.

<sup>13</sup> See e.g. *R v Van der Peet* [1996] 2 SCR 507.

<sup>14</sup> Such as in *R v Marshall* [1999] 3 SCR 456, concerning a possible right of fishing and selling eels without license as an aboriginal treaty right to be interpreted according to common law.

<sup>15</sup> “On a plain meaning of the provision, s. 35(1) [of the Constitution Act, 1982] did not create aboriginal rights; rather, it accorded constitutional status to those rights which were “existing” in 1982”: *Delgamuukw v British Columbia* [1997] 3 SCR 1010[133]. See also *Guerin v The Queen* [1984] 2 SCR 335. In earlier years the “honour of the Crown” was used to describe the binding force of the agreements with Indians alike that of the treaty obligations: *Province of Ontario v Dominion of Canada and Province of Quebec; In Re Indian Claims* (1895), 25 SCR 434.

governments to please the sensitiveness of their mother-country, or, more probably, in an effort by both to distinguish the Canadian forms of State and government from those of the Southern neighbor – defined the Act a constitution “similar in principle to that of the United Kingdom”, while it was in fact much more sophisticated. It was not by chance that in 1982 it was finally renamed Constitution Act, 1867. On the other hand, by introducing a clear division of legislative powers between the provincial and the dominion levels, it forced judicial interpretation to confront with not too flexible rules governing normative competence, quite different from the familiar, supple and pliable common law principles. Above all, by conferring on the provincial legislatures the normative power concerning private property and civil rights, and local and private matters, that probably was aimed at reassuring Quebec about the survival of its civil law system, and on the dominion of Parliament the legislative power about criminal law and procedure, the Act operated a radical switch in the judicial and scholarly approaches to the interpretation of rights: since that moment the dominant problem in the construction of their core and of their limitations has become their position in the federal structure.

The British North America Act deserves at least two more short considerations. First, the protection of rights, together with the division of power between the two higher layers of government, were its main object, or at least the result turned out to be that one. No words were spent, for instance, on the form of government, presumably because the relationship with the homeland was naturally regulated according to the ongoing experience. Nor was the position of Canada in the international arena completely clear, in particular with reference to the treaty power: the Empire-dominion relationship probably did not want specifications. Second, the working out of the competence clauses and their application to rights were left with the Canadian Judiciary, but in fact the final word belonged to the Judicial Committee of the Privy Council, which had, along a span of time of about eighty years, a unique opportunity of construing and disseminating principles concerning the protection of rights in a federal system applying methods of reasoning typical of the common law. Which, among other things, allowed some otherwise obscure Law Lords such as Stankey, Watson and Haldane to conquer an immortal fame out of the Canadian case law.

Further stratification of legal sources witnesses and parallels the impervious road from the status of dominion to independence. Again a simple act of Parliament, the Statute of Westminster of 1931 did not have a direct impact on rights, but changed the hierarchy of written norms, abrogating the Colonial Laws Validity Act 1865<sup>16</sup> and stating that no further Westminster legislation would be applicable to Canada unless approved under her request and consent. The Statute of Westminster represented another dividing line in terms of legal sources, marking the transition from fully hetero-directed legislation to a somewhat improper form of representation, however relevant the difference might have been for domestic judges and the Privy Council.

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<sup>16</sup> 28 & 29 Vict. C.63.



Finally, the Constitution Act 1982, again approved as an ordinary statute, completed the process of elimination of remnants of the colonial status by qualifying itself as the supreme law of Canada and declaring all laws inconsistent with it “of no force or effect”<sup>17</sup>, that is to say entrenching the new rules and consolidating a formal and formerly unknown hierarchy among written sources. The Constitution Act did have a direct impact on the protection of rights through the inclusion in its text of a real bill of rights<sup>18</sup> and the recognition of the rights of aboriginal peoples<sup>19</sup>; it also had a further indirect effect on the regulation of rights through the adjustments in the division of power between Provincial legislatures and the national Parliament. Yet, its importance for the quality and strength of the guarantees offered to political, civil and economic rights lies in the fact of having made the system of sources closed and self-sufficient, and abolishing the appeals to the Privy Council dating back to 1949.

At that point of Canadian history, the system of legal sources had reached its final, comprehensive and exhaustive stage. All the modifications requested by Quebec failed to be incorporated and the demise of the Meech Lake Accord in 1987 and of the Charlottetown Accord in 1990 sealed it in its contemporary structure. As a result, the coexistence of different kinds of sources was defined. They just needed to be amalgamated, notwithstanding their variety<sup>20</sup>. Some were customary and unwritten, such as common law and conventions of the constitution; some written and formal in the adoption procedure, such as Provincial and federal statutes. On top of the already mixed bunch of sources the Act of 1982 has put an entrenched statute<sup>21</sup>, though its rigid nature is tempered by the power of the Legislatures to resist judicial interpretation of a statute by confirming or modifying its meaning and refusing to share the opinion of courts<sup>22</sup>. In other words, supremacy of Parliament and supremacy of the Constitution itself now coexist in a quite original form, although the prevailing opinion of Canadian scholars is that the first one has been repudiated in favor of the second<sup>23</sup>. In fact,

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<sup>17</sup> S 52.

<sup>18</sup> Ss. 2-23.

<sup>19</sup> S 35.

<sup>20</sup> Similar considerations in Royal Commission on Aboriginal Peoples, Report, vol.2, Ottawa, 1996, 188 ff.

<sup>21</sup> The rules for amendment are codified in Part V of the Act.

<sup>22</sup> The reference here is obviously to the “override” or “notwithstanding” clause, included in s 33 of the Charter, which allows provincial and federal legislatures to preserve a statute from the meaning judicially assigned to it and to preserve a different interpretation. It is well known that the Quebec government, that had not agreed to the adoption of the Charter, has made a standard use of this clause since the very first months after its entry into force, by having approved by the legislature, on June 23, 1982, a general clause insulating all former provincial statutes from the application of sections 2 and 2 to 15 of the Constitution Act and therefore from all federal judicial intervention declaring provincial provisions incompatible with the Charter. The same clause has been since then systematically included in later provincial statutes.

<sup>23</sup> See e.g. J B. Dickson, Keynote Address, in *The Cambridge Lectures*, 1985, 3 ff.; A. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform*, Kingston, 1992, 12 ff.; L.E. Weinrib, *Canada’s Charter of Rights: Paradigm Lost?*, 6 *Rev Const Stud* 119 ff (2002) also speaks of a “revolutionary transformation from legislative supremacy to constitutional supremacy”.

it is true that the inclusion of many rights, some of which awarded the special label of fundamental rights<sup>24</sup>, in a statutory list means on one side their repatriation, in comparison with all former recognitions in texts approved during the condition of Dominion, before or after the Statute of Westminster, and on the other side their promotion to an entrenched status thanks to the new constitutional dimension. However, some specific limitations have been introduced so as to circumscribe judicial discretion in the interpretation of the statutory or administrative provisions concerning rights.

First, the so-called limitation clause of s 1 of the Charter authorizes and/or requires legislatures to introduce “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”<sup>25</sup>. Such a provision has inevitably multiple effects: it introduces a kind of general “law reserve”, as it is named in continental Europe, in favor of Parliament and provincial legislatures in the regulation of the content of every right, which would be unnecessary in the absence of a written constitution; the room for statutory interventions, yet, is much wider than in the traditional formulation of contemporary, as well of old liberal, charters, because the provision does not refer to individual rights with a careful modulation according to the specific structure of each of them, but is deliberately construed in very general terms, applicable to all of them in a sweeping approach. It is also undeniable that by mentioning the reasonable nature of the limits as parameters of its validity or operability, it relies on the traditional common law discretion of the judge, and that by requiring the demonstration of the justifications, it clearly puts the onus of the proof on the government; furthermore, by making reference to free and democratic societies as models for standard limitations, it opens the way to the use by judges of the comparative argument or at least to some kind of internationalization of the problem, should the national or local legislative choice be too penalizing for the core content of a right. And it is well known how controversial this prerogative has been and still is in the evolution of the case law of the U.S. Supreme Court.

Second, the notwithstanding clause affords Parliament and the legislatures a comfortable and flexible solution in order to reassert their primacy over the regulation of rights and over the Judiciary itself. Such measures necessarily presuppose a previous radical stance by the Supreme Court of Canada, but it will be always clear to the Judiciary that it is not going to have the final interpretive word, it is not going to be the only trustee in the construction of statutes, which can induce moderation and reduce political disagreement by the Courts, somehow preventing or at least abating all traces of the counter-majoritarian argument.

To the eyes of a European continental lawyer it is evident that the 1982 solution has been a compromise between different and more extreme solutions. The British heritage could not be totally set aside, though already diluted by the elimination of the appeal to the Judicial Committee of the Privy Council and by the strong post-war immigration flux. Patriating rights responded both to the

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<sup>24</sup> S 2 of the Charter.

<sup>25</sup> In detail see e.g. J. Hiebert, *The Evolution of the Limitation Clause*, 28 Osgoode L.J. 103 (1990).

international diffusion of declarations of rights, some of which Canada had already subscribed<sup>26</sup> and that were echoed by a certain number of provincial declarations, and to some centrifugal forces which eventually needed a complete reassessment. A solution completely adherent to the U.S. model, with its rigidity and the exposition of the whole institutional system to harsh tensions between Legislative and Judiciary, was deemed unacceptable. Furthermore, some tactical interplay between the Liberal and Conservative Parties added fuel to the discussion, gradually converting it into a constitutional reform program. The result could not be achieved without a political and legal compromise. The statements made in the following years by scholars of all ideological tendencies about the significance, the effects, and even the legitimacy of the Charter, confirm this assessment. Some authors criticized its supposedly regressive nature, due to the absolute lack of social rights and to the absolute preference for negative rights even in the definition of the area of fundamentality; the very idea of leaving with the courts the task of improving the defense of rights with preference on legislation, rendering the condition of the disadvantaged more unfavorable, seemed outrageous to some of them<sup>27</sup>; other critics were concerned with the triggering of a possible judicial activism in the American fashion<sup>28</sup>. Others appreciated the new opportunities for individuals and groups of vindicating their rights, the shifting of the pivotal role in the protection of rights from civil servants and executive federalism to the interaction between legislatures and judges, and the creation of new identities, among them gender<sup>29</sup>. A more thoughtful position<sup>30</sup> interpreted the compromise as an institutional dialogue, between courts and legislatures, assuming various features. Kent Roach<sup>31</sup> seems to accede to the compromise theory when he credits the Charter of having created a “fertile and democratic middle ground between the extremes of unfettered legislative and judicial supremacy”. In order to stress the intermediate nature of the Canadian machinery, one must add that the symmetrical application of the Charter provisions to Confederation and Provinces, together with the identification of fundamental rights in s 2, prevents any selective procedure of the American kind in order to

<sup>26</sup> See e.g. P. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 *Can Bar Rev* 30 (1983).

<sup>27</sup> See e.g. A. Petter, *Immaculate Deception: The Charter's Hidden Agenda*, 45 *Advocate* 857 ff. (1987).

<sup>28</sup> Like T. Morton, R. Knopff, *The Charter Revolution and the Court Party*, Peterborough, Ont., 2000.

<sup>29</sup> See e.g. W. A. Bogart, *Courts and Country*, Toronto, 1994, 256 ff. The new category is actually contemplated in s 228 of the Charter.

<sup>30</sup> P.W. Hogg, A.A. Bushell, *The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)*, 35 *Osgoode Hall L.J.* 75 (1997); later the same authors corroborated their ideas through integrative data concerning the next ten years: *Charter Dialogue Revisited: Or "Much Ado about Metaphors"*, 45 *Osgoode Hall L.J.* 1 (2007).

<sup>31</sup> *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, Toronto, 2016.



incorporate preferred rights, that would pave the way to a much greater discretion by the Courts<sup>32</sup>.

The halfway house between the smooth British tradition and the conflictual U.S. solution has introduced a unique blend and order of sources, whose interaction may have unsuspected outputs. Therefore, Dicey, Jennings<sup>33</sup> and Kelsen somehow must go hand in hand, and the amalgam is committed to the Judiciary.

Judges trained in the typical common law perspective had to partially convert to the judicial review of statutes, though knowing to have at least, in case of inevitable short circuits caused by contrasts between ordinary statutes and the Constitution, an escape through a loophole<sup>34</sup>, a way out incorporated in the constitutional framework.

Their approach has been facilitated by former habits, as is typical of legal systems where stability and change are strictly intertwined. The Canadian constitutional reform of 1982, in fact, did not take place in a revolutionary context or in some other dramatic historical cleavage, as usually happened with the adoption of the most famous bills of rights, from the Glorious Revolution to the French Declaration of 1789, from the Universal Declaration to the European Charter of Human Rights. The Canadian Charter was approved, in the absence of any serious institutional turmoil, at the conclusion of a long and reasoned itinerary, carefully designed to give birth to a new age of the Confederation, in which the “unity in the diversity” formula was intended to survive under different and renewed clothes. It has been conceived under the banner of continuity, in order to create a new citizenship though following, bringing out and possibly improving the national tradition of regard towards community values and individual rights. In other words, it has been the last (by now) step in a process of nation-building that has gradually transformed separate colonies into a federal state. Such a progress could not be completed without the adhesion to constitutionalism, whose very nature implies not only the repatriation of rights, but also, and may be above all, the incorporation of rights of citizens and powers of the public entities, in this case Confederation and Provinces, in the same legal document, as the original Bill of rights taught the world to do, and strictly linking the first ones to constraints on the seconds<sup>35</sup>. From this point of view the Charter could be considered simply as an instrument of introduction of additional and more sophisticated safeguards for freedoms and human rights against governmental interference, in an unprecedented strict combination between rule of law, whatever it might have meant before, and primacy of the Constitution. However, if one wants to call this

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<sup>32</sup> It is not necessary here to describe the whole story of this celebrated chapter of American constitutional doctrine: see e.g. H.J. Abraham, B. A. Perry, *Freedom and the Court, Civil Rights and Liberties in the United States*, Lawrence, Kansas, 8<sup>th</sup> ed., 2003.

<sup>33</sup> Properly cited by Beetz J in *Dupond v City of Montreal et al* [1978] 2 SCR 770, par IV.

<sup>34</sup> In the words of L. Weinrib, *The Notwithstanding Clause: The Loophole Cementing the Charter*, XXVI *Cité Libre* 47 (1998).

<sup>35</sup> This proposition has been perfectly assimilated by the Canadian Judiciary: see mostly *Reference re Secession of Quebec* [1998] 2 SCR 217 46-48.

new hybrid blueprint, it is much closer to modern constitutionalism than anything before in Canada.

Coming back to the task of the courts after 1982, it might have been facilitated by former experience. First of all, immediately after 1867 they had to confront with the brand new division of powers between Dominion and Provinces, and legal historians tell that the political battle was fought in terms of provincial rights versus centralizing trends<sup>36</sup> and that individual and group rights began to be analyzed in that tune. And with extreme precocity the Canadian courts, soon followed by the Privy Council in appeal, started to measure the legitimacy of provincial and Dominion statutes against the yardstick of the British North America Act, assuming that it had been approved by the Imperial Parliament, whose legislative supremacy was the pillar of the new constitutional framework and was impossible to conciliate with inconsistent or defying acts of any nature. Justice William J. Ritchie is assumed to have been the pioneer and promoter of this method of judicial review of legislation<sup>37</sup>.

There had already been, therefore, a long-standing tradition of judicial engagement in the protection of rights through some kind of judicial review. The strangest thing, to European eyes, is that such a doctrinal trend was lead or at least presided over by the highest judicial body of the entire worldwide common law system. Contemporary authors were conscious and sometimes critical of this tendency and of its interpretive manner<sup>38</sup> -we should say style<sup>39</sup>-, randomly lamenting that the courts had favored a huge transformation of Canadian constitutional law, turning it away from the original intention of the framers.

It is correct to state that there has been no sudden page turning on April 17, 1982. The Canadian Court and, before 1949, the Privy Council were already accustomed to a mix of sources and did know how to manoeuvre and get by. The permanent tangle between rights and federalism might have contributed to make Canadian judges used to manage different and heterogeneous sources and to train them to have to deal with a sort of higher law background, totally missing in a pure British democracy. Common law and federalism, in the absence of a written constitution, already were an unusual blend, imposing on judges the function of stating whether the Dominion and the Provinces, when legislating on aboriginal rights, were interfering with common law expectations according to British North America Act parameters, specifically s 91(24) for the Dominion. A similar task had to be carried out with reference to individual and groups others than the aboriginal peoples, whose rights had to be shielded against interferences by public powers, having care to patrol the periphery of the legislative powers assigned, respectively, to Provinces, for instance by ss 92(13), 92(16) and 93 and to the Dominion. The

<sup>36</sup> See e.g. R. Risk, R. C. Vipond, *Rights Talk in Canada and Right Feeling of the People*, 14 *L & Hist Rev* 1 (1996).

<sup>37</sup> See *The Constitutional Law Group, Canadian Constitutional Law*, cit., ch. 4, and the references ibidem, 85 ff.

<sup>38</sup> See e.g. H.A. Smith, *The Residue of Power of Canada*, 4 *Can Bar Rev* 432 (1926), quoted by *The Constitutional Law Group, Canadian Constitutional Law*, cit., 139 ff.

<sup>39</sup> This terminology mounts back to K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrecht*, Tübingen, 3.Auf., 1996.

instruments available for such a work were inevitably a mix of federal norms and the typical common law presumptions in favor of individual rights against excessive public regulations, amenable to the rule of law<sup>40</sup>. In other words, it is not improper, when describing the pre-Charter era and its combination of interpretive instruments before the formal codification and entrenchment of rights, to talk of a common law constitution, or of an implied bill of rights<sup>41</sup>.

### 2.1. Its consequences on the methods of interpretation of rights

The main assumption of this paragraph is that the stratified and mixed nature of the Canadian system of legal sources before 1982 was of great help to the Judiciary in facing the new and theoretically risky venture of assimilating an entrenched statute, where rights and freedoms did occupy a central position, into the existing framework. In some areas, it simply had to stick to former approaches and adapt them to the superimposed, more “rigid” parameter. In others, the job was more exacting: unfamiliar concepts had been introduced, such as the basic or fundamental nature of some rights or gender as a suspect classification criterion; or the need to resort more extensively or frequently to reasoning methods, such as the structural one which is more congenial to constitutional law because of its reliance on elements of the constitutional texture and less adherent to facts, or the historical one, that is in theory barred to common lawyers but that at the beginning of the ‘80s were starting to find audience in the U.S. case law. In all cases, the Canadian judges followed a line of continuity. The attitude to reasoning in terms of principles was not unknown; the preference for flexibility was innate and had had to be put into operation after 1867 in order to trace a reasonable dividing line between Dominion and Provinces. Therefore, the assimilation of the constitutional regime has not been too hard.

Between 1985<sup>42</sup> and 1988<sup>43</sup> the Supreme Court fully digested the idea that some underlying or implicit principles compose the basic structure of the Constitution as unwritten postulates. They assist in the interpretation of the text, far from dispensing with it<sup>44</sup>, and are “essential for the ongoing process of constitutional development and evolution of our Constitution”<sup>45</sup>. Featuring the Constitution as a “living tree”, however, mounted back to another fabled case decided by the Privy Council in 1930<sup>46</sup>. Principles such as federalism, democracy, separation of powers, protection of minorities, judicial independence, have been carved out of the basic constitutional structure but have also been linked to the preamble and the texture of the British North America Act as an antecedent. Thus,

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<sup>40</sup> As a typical example of this reasoning constitutional law handbooks usually quote *Roncarelli v Duplessis* [1959] SCR 121, where the revocation of a license to sell liquor by a local commission under pressure by the Governor of a Province was declared liable to damages due since discretion can never be absolute but necessarily implies good faith.

<sup>41</sup> See again *The Constitutional Law Group*, *Canadian Constitutional Law*, cit., 698, 709 ss.

<sup>42</sup> *Reference Re Manitoba Language Rights* [1985] 1 SCR 721, 750.

<sup>43</sup> *Reference Re Secession of Quebec* [1998] 2 SCR 217, 50 ff.

<sup>44</sup> *Reference Re Provincial Court Judges* [1997] 3 SCR 3 93.

<sup>45</sup> *Reference Re Secession of Quebec*, cit., 52.

<sup>46</sup> *Edwards v Attorney-General for Canada* [1930] AC 124 (PC).

tradition and change are once again intertwined. This connection also works in the carrying out of judicial review according to s 52(1) of the Constitution Act, 1982 and s 24 (1) of the Charter, in order to declare provincial or Dominion statutes unconstitutional, although this practice is described as long-standing too<sup>47</sup>, albeit in the absence of a case such as *Marbury v. Madison*. Even more noteworthy, the rule of law itself is put forward as a constitutional principle and used as such, thus completing the amalgamation effort<sup>48</sup>.

Flexibility in the interpretation of constitutional principles, which is typical of constitutional and supreme courts in legal systems with entrenched “rigid” constitutions, has been growing in Canadian jurisprudence after 1982, but it was far from absent before that turning point. The number of areas where it has been displayed is impressive.

All doctrines applied by courts in the interpretation of the division of power between Confederation and Provinces enjoy a measure of wide discretion, that has probably increased over time. For instance, the “pith and substance” doctrine, used in order to check whether the matter to which a piece of legislation refers validly belongs to the exclusive jurisdiction of one of the levels of government where the legislative power is allocated, was conceived mainly with respect to ss 91 and 92 of the British North America Act, well before 1982<sup>49</sup>, but has been more recently developed in a way as to allow judges to verify whether and how the legal and practical effects of the statute affect the rights of the persons concerned, also in order to establish the purpose of the legislation<sup>50</sup>. The courts can also distinguish between the prevalent impact of a statute and the secondary and incidental powers that it implies (the so called “ancillary powers”), by that way strengthening the discretionary approach of the courts<sup>51</sup>. Another doctrine applied in order to control the applicability of legislation that has passed the validity scrutiny, by controlling that the core of another ambit of exclusive legislative power of the other level of government, the so-called “interjurisdictional immunity”, also grants judges an almost unfettered discretion<sup>52</sup>. Finally, the operability problems deriving from conflicts in areas where the legislations of Confederation and Provinces are concurrent<sup>53</sup>, such as agriculture and immigration (s 95), export of natural resources (s 92A), and old-age pensions and supplementary benefits (s 94A), are solved through the application of a largely unwritten paramountcy rule – mentioned by the Constitution Act, 1867 only in the last case in favour of the

<sup>47</sup> See e.g. The Constitutional Law Group, *Canadian Constitutional Law*, cit., 30 ff.

<sup>48</sup> See e.g. *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 and *British Columbia (Attorney General) v Christie* [2007] 1 SCR 873.

<sup>49</sup> See e.g. W. R. Lederman, *Classification of Laws and British North America Act*, in Id., *Continuing Canadian Constitutional Dilemmas*, Toronto, 1981, 237 ff.

<sup>50</sup> Such a method is expressly described by the Supreme Court in *R v Morgentaler* [1993] 3SCR 463.

<sup>51</sup> See e.g. *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641.

<sup>52</sup> Such technique of analysis is described both in *Ordon Estate v Grail* [1998] 3SCR 437 and *British Columbia (Attorney General) v Lafarge Canada Inc* [2007] 2 SCR 86.

<sup>53</sup> The Constitutional Law Group, *Canadian Constitutional Law*, cit., 271 ff, identifies five different possibilities.

Provinces. Such doctrine was created in the ‘60s, rationalized in 1982<sup>54</sup> and apparently given a much wider application in favor of the Confederation in recent years<sup>55</sup>, in order to keep in full account the “federal intention to cover the field”.

Again, the general interest or national concern clause, which in the Canadian context is usually called the POGG clause according to “peace, order and good government” as mentioned in s 91 of the 1867 Act, was interpreted in simply illustrative terms, as a merely introductive provision, by the Privy Council<sup>56</sup>, while it has been much more generously used in later decades, even favouring the admission and use of extrinsic evidence, including social briefs and legislative history<sup>57</sup>, and incorporating emergency circumstances, mainly public welfare ones<sup>58</sup>.

The impression that a European law scholar gets from browsing superficially through the Canadian case law concerning rights and freedoms is that the growing discretion that the courts have been earning in recent years might have depended at least in part on the new role of the Supreme Court of Canada after the repatriation of rights and the entrenchment of the Constitution. The Court’s full control on the national case law dates back only to the removal of the appeal to the Privy Council in 1949, but there is a non-surprising continuity in the developing line from the origins of the Canadian experience to nowadays. Federalism is likely to have been the factor overwhelmingly conditioning the classical principle of parliamentary supremacy. The common law courts have been accustomed since the very beginning to conciliate and combine the traditional common law interpretive methods and the division of legislative powers that is typical of all confederations and federations. They kept on elaborating their case law following the British tradition under the lead of the supreme court of the Empire, keeping in mind not only the colonial form of government but also the relationship between Provinces, Governor and homeland. In 1867, when the federal nature of the Dominion was formalized, the courts must have had the problem of adjusting common law, legislative supremacy and the principle of federalism, giving birth to a unique coexistence of sources. Then, along a span of time longer than a century, came first the elimination of the appeal to the Privy Council and the self-sufficiency of the Judiciary, and finally the repatriation of civil rights and the entrenchment of the Constitution. The last step ahead, however, was not a rash one, independently of the need to give the remnants of the Empire a new framework. It had been prepared in a peculiar continuity, in succession. At that point, on the original, mouldable common law foundation the principle of federalism had already mitigated the supremacy of the legislative power along more than one century, compelling both British and national judges to keep into account some improper form of higher law, an ordinary statute having

<sup>54</sup> Multiple Access Ltd v McCutcheon [1982] 2 SCR 161.

<sup>55</sup> See e.g. Alberta (Attorney General) v Moloney [2015] 3 SCR 327.

<sup>56</sup> See K. E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*, Toronto, 1990, 219 ff.

<sup>57</sup> Re: Anti-Inflation Act [1976] 2 SCR 373.

<sup>58</sup> See S. Choudhry, *Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy*, 52 Un. Tor. L. J. 227 ff. (2005).



substantially constitutional status at least from the angle of the relationship between the levels of government and in need of being garrisoned by the Judiciary. When the entrenched constitutional text came on the scene, the impact was remarkable but could not be revolutionary<sup>59</sup>. The blend of sources was then complete. However, in the eyes of a continental European public law scholar it seems that the new formal Constitution might have notably contributed to increase the rate of discretion of the Supreme Court and of judges in general, by compelling them to reason more and more in terms of principles. Once again, federalism might have been the leading force of this transformation. The division of power in a federalist or regional context imposes frequent resort to balancing of principles and rather often of values, to be made compatible and promoted together, without exclusion of any of them, in the line that German scholars have first taught. All talks of communitarian values, of functional effectiveness, of subsidiarity<sup>60</sup> clearly demonstrate that the debate about federalism have been taken to a different level of discourse, and, to say so, hypostatized. Such a process is typical of constitutional courts, which the Supreme Court of Canada might have imperceptibly become.

### 3. The importance of the federal perspective in the treatment of rights

Federalism is obviously one of the main features, if not the pivotal one, of the whole structure of the Canadian constitutional fabric. We have already mentioned the importance of the principle of federalism in softening the centrality of the supremacy of Parliament and compelling the courts to apply some form of judicial review of statutes, so slowly preparing for the coming of an era with an entrenched constitution. It must also be underlined that the principle of federalism apparently has been and still is the preferential key to the interpretation of provisions concerning rights and to the formation of the pertinent case law. Federalism is in some way the preferred lens through which Canadian courts look at rights in order to decide their content, their core, the limits to their protection and their balancing against other rights or principles.

This peculiar reading of rights and freedoms has developed although two of the main forces that have influenced the culture of rights in the U.S. in this area have been totally absent in Canada. First, there has never been a problem of selection of fundamental rights as an instrument of additional protection by the federation of rights neglected or violated at local level: s 2 of the Charter already defines fundamental rights, so that courts have ever been induced to elaborate

<sup>59</sup> Some Canadian authors (see e.g. A. C. Hutchinson, *Constitutional change and constitutional amendment, A Canadian conundrum*, in X. Contiades (Ed.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada, and the USA*, New York, 2013, 53) venture to write that “The difference is more a matter of emphasis and degree than difference and kind. Constitutional adjudication, therefore, is simply a particular kind of common law adjudication”. This interpretation goes probably too far.

<sup>60</sup> See e.g. R.E. Simeon, *Criteria for Choice in Federal Systems*, 8 *Queen’s L. J.* 131 (1982/1983); R. Elliot, *References, Structural Argumentation and the Organizing Principles of Canada’s Constitution*, 80 *Can. Bar. Rev.* 67 (2001), and P. W. Hogg, *Constitutional Law of Canada*, cit., Part II.

unnecessary incorporation techniques. Second, the race factor has never been really momentous in Canada, or at least not so important as to become a leading force in the evolution of the equality principle, drawing with it an increasing betterment of the guarantees of all rights, like in the U.S.: the treatment of aboriginal groups and Métis people has been made object of attention and care in relatively recent times<sup>61</sup> and has been cultivated as an autonomous part of constitutional law.

In the absence of these two possible influence factors, however, the judicial reading of several constitutional clauses concerning rights has been carried out in an overwhelming measure, if not exclusively, from the viewpoint of federalism.

The approach to economic themes, for instance, typically focuses on ss 92(13), i.e. the provincial legislative power over property and civil rights, and 91(2), the federal power to regulate trade and commerce, the Canadian “commerce clause”. Several other provisions are relevant in this area, such as land, mines, mineral and royalties under s 109, where property rights often change into regulatory powers, natural resources under s 92A, banking and copyright. Furthermore, s 121 guarantees the free movement of goods between Provinces, and such provision has been strengthened by s 6 of the Charter, concerning mobility rights, with reference to goods, services, labour or capital. Much of the case law thus concerns the extension of the federal power: whether federal regulations of potentially provincial economic matters are necessary or incidental to national commerce, inter-provincial trade or international obligations, deriving either from NAFTA or from other globalized institutions; whether cooperative instruments have been provided, although they are often arranged after judicial decisions in form of sequel to them. The by far prevalent perspective seems to be the federal one: how the legislative powers can be balanced and adjusted in order to achieve a viable dividing line. Problems of content of the regulations and of compatibility of them with constitutional provisions from a substantive viewpoint are not ordinarily in the front line<sup>62</sup>. It is often assumed that the general trend in the interpretation of the courts is towards facilitating the creation of a real common market and as of consequence towards removing obstacles to circulation and in general restrictions to trade and imposition of national or international standards<sup>63</sup>. The main judicial concern, anyway, refers to the respective regulatory role of Provinces and Confederation, so that the Supreme Court works as the leader of constitutional change in the evolution of federalism.

<sup>61</sup> Although the roots of the doctrine of aboriginal rights are frequently referred to the Royal Proclamation of 1763, the real story is told by the Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Final Report*, Ottawa, 2015. The date of 1973 is generally considered as the beginning of a serious interest for aboriginal rights in the case law: *Calder v British Columbia (Attorney General)* [1973] S.C.R. 313. Then the Constitution Act, 1987 recognized aboriginal rights in s 35(1), treated by the Supreme Court in *Delgamuukw v British Columbia*, cit., where aboriginal rights (fishing in the case) are defined *sui generis*. As far as the Métis people are concerned, they seem to have been recognized for the first time in the Manitoba Act of 1870 32 & 33 Vict. Ch.3.

<sup>62</sup> See e. g. *Ontario Hydro v Ontario (Labour Relations) Board* [1993] 3 SCR 327; *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641; *Reference Re Securities Act* [2011] 3 SCR 837.

<sup>63</sup> See e.g. The Canadian Constitutional Group, *Canadian Constitutional Law*, cit., 419 ff.;

The same approach is followed in the area of criminal law and procedure, which is traditionally assigned to the Confederation by s 91 (27) of the British North America Act<sup>64</sup>. Even in this ambit the intergovernmental perspective is dominant. The main problems that courts have to confront is whether the definition of criminal law must be formal and strict or substantial and wide, or in other terms whether the federal normative power encompasses any case where Parliament opted for the introduction of a criminal sanction in order to promote all kinds of public interests or it is necessary for the court to find out some substantially criminal law purpose<sup>65</sup>. Is a prohibition and penalty requirement sufficient or the mere presence of such a requisite is not enough at a time when regulating activities more and more often recommends or imposes the imposition of a criminal sanction? If the second alternative is chosen, then a pith and substance analysis must be applied, widening the discretion of the court, and the reasoning method will need some measure of balancing between the federal interest, however construed, and the provincial competences protected by other constitutional provisions. This has been the technique used in order to decide on the validity of federal statutes concerning the licensing of the ownership of weapons and the introduction of a registration system<sup>66</sup>, of federal environmental regulations of PCB emissions<sup>67</sup>, of statutes regarding food and agricultural products to be standardized or limited<sup>68</sup>, and so on. Provincial or local measures responding to problems of safety, health, public order and morality can also be questioned<sup>69</sup>. All these cases require balancing methods and often imply purpose analysis and some measure of historical research about the intention of the legislatures.

Freedom of expression cases, even after 1949, seem to have been managed on the basis of the relationship between provincial and federal legislative power<sup>70</sup>, although later there has been a shift towards a more substantive analysis<sup>71</sup>.

Even in the sensitive area of religious freedom, the initial attention of the courts was concentrated around the theme of the division of legislative power: the BNA<sup>72</sup> conferred exclusive authority on legislation in the educational field, together with family, culture and charitable organizations, on the Provinces, while

<sup>64</sup> The historic precedent is assumed to have been the Quebec Act of 1774, that declared the English law applicable to the former French colony, while preserving the application of French private law according to the conditions of the peace treaty.

<sup>65</sup> The most important cases mentioned in handbooks and other literature are *In the matter of a Reference as to the Validity of Section 5(a) of the Dairy Industry Act* [1949] SCR 1 and *Reference re Assisted Human Reproduction* [2010] 3 SCR 457.

<sup>66</sup> *Reference re Firearms (Can)* [2000] 1 SCR 783.

<sup>67</sup> *R v Hydro-Québec* [1997] 3 SCR 213.

<sup>68</sup> E.g. *Ward v Canada (Attorney General)* [2002] 1 SCR 569.

<sup>69</sup> Such as in *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)* [1987] 2 SCR 59, concerning liquor licensing, or *R v Morgentaler* [1988] 1 SCR 30, concerning abortion practices restricted by provincial legislation imposing penal sanctions.

<sup>70</sup> See *Reference re Alberta Statutes* [1938] 3 SCR 100 and *Switzman v Ebling* [1957] SCR 285.

<sup>71</sup> See K. Roach, D. Schneiderman, *Freedom of Expression in Canada*, in E. Mendes, Stéphane Beulac (Eds.), *Canadian Charter of Rights and Freedoms*, Markham, Ont., 2013, 431 ff.

<sup>72</sup> At s 93.

imposing the obligation to guarantee the privileges of minority denominational schools, the Dominion being left in charge of the preservation of unitary standards and diversity of local cultures. Some cases, mainly before 1982, were decided on the ground of lack of power on the side of the Provinces or local agencies to restrict religious freedom, more than with reference to the content, the limits, and the ideological justification of religious freedom itself<sup>73</sup>. Only after 1982, due to the new tool introduced by s 2 of the Charter, have the courts begun to shift to a substantive interpretation of freedom of religion and conscience in its negative meaning<sup>74</sup> first, and to a full requirement of state neutrality towards beliefs and practices<sup>75</sup>. In this ambit, therefore, the entry into force of the Charter has been apparently decisive in moving the interpretive focus from a division of power approach to a content analysis approach. It must be noted however, that value reasoning must have been helped by the preamble of the Constitution Act 1982, which states that “Canada is founded upon principles that recognize the supremacy of God and the rule of law”.

A complete analysis would be needed in order to reach a more scientifically persuasive conclusion, but it is clear beyond any doubt, at this state of the research, that federalism is not only the pivotal issue in the judicial case law and in the scholarly literature due to its obvious centrality in the form of state, but it is also the prism through which most of the other constitutional problems are based, formulated and solved. The common law blueprint must have contributed to moulding the interpretation techniques, but it is its confrontation with federalism that has really defined the peculiar judicial style of the Canadian courts, before and after 1982. The elaboration of the three basic criteria to decide on validity, applicability and operability of statutes, together with their corollaries, in division of power cases has not been an end in itself. It has created a platform, both methodological and substantive, ready for a non-mechanical use in other areas of constitutional law. Above all, it has yielded the habit of thinking in terms of principles and balancing approach. And if one scratches the surface of the judicial reasoning, very often values emerge under the most superficial layer of principles. Whenever the courts talk of subsidiarity or communitarianism, which are not mentioned in the constitutional texts, they are value-reasoning. When the Supreme Court talks of public morality, public health or safety, public order in cases about abortion, prostitution, liquor licensing in order to draw a dividing line between provincial and federal legislation or to govern their concurrency in the criminal law field, then federalism issues deeply influence the argumentation and accustoms the Judiciary to reasoning in terms of values. The same considerations

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<sup>73</sup> See e.g. *Saumur v City of Quebec* [1953] 2 SCR 299, concerning a byelaw banding the distribution of religious literature on the streets without prior consent of the police, aiming at restricting the activity of Jehova’s Witnesses; *Chaput v Romain* [1955] SCR 834, regarding a break into a private home by the local police and the consequent seizure of religious materials, deemed in violation of the federal criminal code. A detailed history of the attitude of the courts towards the religious phenomenon in *R. Moon, Freedom of Conscience and Religion*, Toronto, 2014.

<sup>74</sup> Such as in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

<sup>75</sup> Such as in *Mouvement laïque québécois v Saguenay (City)* [2015] 2 SCR 3.

apply to the POGG power cases, where public welfare interests, emergency and national concern have to be balanced in a federal perspective.

All constitutional courts at work in entrenched constitutional contexts usually come to principle- and value-reasoning. However, they are normally forced or strongly boosted towards such a result by the incorporation of principles and values in the very text of a “rigid” constitution, usually adopted after some dramatic turning point in the constitutional history of a country. In Europe, that process was fulfilled after World War I in Germany, Austria, Czechoslovakia; after World War II in Italy and again Germany; after 1989 in all the legal systems of the former communist countries. The European Communities needed the full incorporation of principles and values in their so-called constitution with the inclusion of the Nice Treaty into their system of legal sources, before the ECJ could complete the long way, autonomously started in the mid ‘70s, towards the way of reasoning of a constitutional court. In the case of Canada, the road seems to have been more oblique: it assumed the features of types of argumentation immanent to federalism issues, starting from division of power rules introduced by way of ordinary statute and then spreading out into other fields of constitutional law, even before the entrenchment of 1982. The final result is, however, that there are more similarities that one could expect between a European constitutional court, designed in order to be the vestal virgin of a written entrenched constitution, and the Supreme Court of Canada, born as the top judicial body of a common law Judiciary. Indeed, the Canadian Supreme Court has been the agent of transformation and absorption of so many constitutional changes: from Imperial statutes to a bill of rights and an entrenched charter, it has followed a unique route towards a full constitutional status.

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#### 4. After 1982: techniques in the interpretation of the Charter

Any short statement about the global state of the protection of civil, political and social rights in Canada runs the risk of oversimplifying the interpretation of a legal system whose complexity is obvious, from the point of views of the coexistence of a multiplicity of heterogeneous sources, of the stratification of different layers of constitutional evolution, of the ethnic pluralism representing a historical hallmark of this peculiar Western democracy.

European public law scholars, more accustomed to U.S. case law and scholarship, due to their influence on continental experiences, cannot do without noticing some quite different shades. The Canadian approach is definitely less dogmatic, less conflictual, less ideological, more pragmatic, more inclined to a case-by-case analysis, though one could argue that during the Roberts Presidency the U.S. Supreme Court too has indulged to lower profile decisions<sup>76</sup>. Examples can be drawn from different areas of interest.

In the field of the state/religion matters, the Supreme Court has left trial judges to decide whether a witness in a criminal trial or hearing can wear a *niqab*

<sup>76</sup> See e.g. P.D. Foote, *Moderate Behavior on the Roberts Court*, paper, 2015 Meeting of the Western Political Science Association, April 2-4, Las Vegas, Nevada.



while giving evidence, according to the particular circumstances of the case<sup>77</sup>. Moreover, it is very cautious in taking a position when asked to enforce agreements between religious community members on traditions or practices<sup>78</sup>. When requested to decide about establishment questions, given the absence of any provisions in the Charter, it has set aside all concepts of absolute neutrality, preferring a concrete idea of “true neutrality”<sup>79</sup>. State support for religious institutions, under s 2(a) of the Charter, is tolerated when religious groups are treated in an even way and some protection of denominational schools is deemed justified when historical or political reasons rooted in the adhesion of a Province to the Confederation are at stake<sup>80</sup>. The minimal impairment doctrine applied in the treatment and accommodation of religious minorities<sup>81</sup> also avoid too abstract theories, at the same time leaving wide discretion with the courts, inviting them to use gauged proportionality tests.

The case law concerning freedom of expression is by far too copious and complicated to allow the observer to utter simple-minded interpretations. In this area, the Bill of Rights of 1960 was superimposed on the common law tradition, blended with the need to deny jurisdiction to the Provinces according to the BNA Act, in some way “freezing” the state of the guarantees at that date<sup>82</sup>, up till the entry into force of the Charter and its fundamentality clause found in s 2<sup>83</sup>. The reasoning of the Court, after that, has moved from the search for the rationale underlying a statute limiting freedom of expression, in terms both of purpose and effects; it has chipped out the “speech versus conduct”, the “form versus content” and at least formally the “high value versus low value expression”<sup>84</sup> techniques of analysis amenable to s 2(b), though applying alternatively a strict or attenuated standard of scrutiny to s 1 justifications. The limitation of sexually explicit expression was construed initially on community standards, without defining whether of local or national level<sup>85</sup>, but it was then converted into an analysis of the harmful consequences of obscene material, now re-christened pornography<sup>86</sup>. It is noteworthy that, on the way to “the final balance”, the Chief Justice has proposed to read into the law an exclusion of the application of a section of the Criminal Code<sup>87</sup>, thus applying what is called in Europe an additive type of decision to such a sensitive matter. The same pragmatic method is used in the

<sup>77</sup> R v NS [2012] 3 SCR 726.

<sup>78</sup> See e.g. Lakeside Colony of Hutterian Brethren v Hofer [1992] 3.

<sup>79</sup> Mouvement laïque québécois v. Saguenay (city), cit., 170.

<sup>80</sup> See e.g. Trinity Western University v British Columbia College of Teachers [2001] 1 SCR 772.

<sup>81</sup> Syndicat Northcrest v Anselem [2004] 2 SCR 551 and Multani v Commission Scolaire Marguerite-Bourgeoys [2006] 1 SCR 256.

<sup>82</sup> R v Burnshine [1975] 1 SCR 693.

<sup>83</sup> For the whole fascinating story of this mix of sources and its effects, see again K. Roach, D. Schneiderman, Freedom of Expression in Canada, cit.

<sup>84</sup> See K. Roach, D. Schneiderman, ibidem, and a short summary in The Constitutional Law Group, Canadian Constitutional Law, cit., 993 ff.

<sup>85</sup> R v Dominion News & Gifts [1964] 2 SCR 251.

<sup>86</sup> R v Butler [1992] 1 SCR 452.

<sup>87</sup> R v Sharpe [2001] 1 SCR 45.

cases concerning control on election spending: search of justifications for the parliamentary incursion on free speech, verification of the pressing or substantial nature of the law's objective, proportionality text<sup>88</sup>. The leit-motiv, grossly speaking, seems to be the preference for reasoning techniques that are not easily pigeon-holed in multiple-prong tests, that allow a certain scope for concrete adjustments that conciliate the original common law flexibility with elements of constitutional rigidity and look for compromising solutions. The defamation cases confirm this diagnosis: the Supreme Court has not only declared that the traditional common law protection does not lose intensity after the Charter, but has even avoided adopting interpretation schemes such as the "actual malice" requirement or the "chilling effect" requested by the U.S. Supreme Court<sup>89</sup>.

In the field of life, liberty, and security of the person, the fundamental justice clause included in s 7 of the Charter has permitted the courts to look deep inside the common law in search of legal principles, other than simple rules, attracting the consensus necessary and vital to a "societal notion of justice" and capable of "general acceptance among reasonable people"<sup>90</sup>. The Supreme Court has therefore been able to preserve ample discretion, without incurring in excessively rigid formulas, but on the contrary remaining free to sanction arbitrariness, grossly disproportionate effects of whatever state action, overbroad measures and so on<sup>91</sup>, even resorting to the comparative argument if necessary. Among other things, property is not included in s.7 and the Canadian Supreme Court has explicitly avoided to qualify freedom of contract as a liberty interest<sup>92</sup>, taking a much less ideological position than the U.S. one.

In the area of welfare benefits and social citizenship, the courts till now have constantly refused to draw positive obligations for the Provinces or municipalities from s. 7, though one cannot exclude there being different interpretations in the future under the "living tree" doctrine<sup>93</sup>. The courts have taken this stance either due to lack of evidence on the facts of a violation of security or more openly to the absence of "a freestanding constitutional right to health care"<sup>94</sup>: it remains to be seen how the courts would react in a case of government revoking a welfare scheme or limiting it to more restricted groups and whether a fairness rule would be applied in such a case, like the U.S. Supreme Court happened to do during the Burger years.

More articulated conclusions are impossible. European observers, looking at the Canadian jurisprudence in the field of rights and freedoms, can only state that a peculiar jurisprudential Canadian "style"<sup>95</sup> does exist: it is well distinguishable

<sup>88</sup> See e.g. *Harper v Butler* [2004] 1 SCR 827.

<sup>89</sup> *Hill v Church of Scientology* [1995] 2 SCR 1130 and *Grant v Torstar Corp* [2009] 3 SCR 640. The reference to U.S. case law is obviously to *New York Times v Sullivan*, 376 U.S. 254 (1964).

<sup>90</sup> *R v Malmo-Levine*; *R v Caine* [2003] 3 SCR 571, 112.

<sup>91</sup> See H. Stewart, *Fundamental Justice*, Toronto, 2012.

<sup>92</sup> Reference re ss 193 and 195.1c of the Criminal Code (Man) 1 SCR 1123 (Prostitution Reference).

<sup>93</sup> *Gosselin v Québec* [2002] 4 SCR 429.

<sup>94</sup> *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791, 104.

<sup>95</sup> See n. 39, *supra*.

from the U.S. one; it has much deeper and longer roots in the common law tradition; it has been much more careful in the assimilation first of statutes concerning rights and later of entrenched legislation, thanks to a century-long practice with the British North America Act and its problems of division of power; it has tried to provide continuity together with inevitable change; it has reached a satisfying compromise between doctrinal theory and practical needs; it is adverse to dogmatism; it shares with continental European legal systems an attitude to reason in terms of principles and values, which resembles the methods of the constitutional courts.