

## Between Judicial Activism and Political Cooperation: The Case of the Canadian Supreme Court\*

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1. On the occasion of the 150<sup>th</sup> anniversary, of the British North America Act (1867), a group of Italian comparative law scholars dedicated two publications to Canadian constitutional law. They are G. Martinico, G. Delledonne, L. Pierdominici, *Il costituzionalismo canadese a 150 dalla Confederazione. Riflessioni comparatistiche*, Pisa University Press, 2017; and the special issue of “Perspective on federalism”, vol 9(3), 2017, *The Constitution of Canada: History, Evolution, Influence, and Reform*. These two works – which also involve distinguished foreign scholars – cover a wide range of topics: the legal systems, federalism and the Québec case, fundamental rights, the Supreme Court, etc. Despite the variety of authors and the heterogeneity of their backgrounds, all the chapters are well linked one with the other, and homogeneous in style and methodology.

In this post, I will focus only on the chapters dealing with constitutional adjudication. On this issue, Canadian constitutionalism plays a relevant role, because it is placed in a middle ground between English and American traditions. Moreover, Canadian law brought on peculiar innovations in the landscape of comparative law, and represents, as I will try to underline, a model for alternative approaches to constitutional adjudication.

2. Canadian constitutionalism has always been a crucial case for comparative law, because of the peculiarities of its multicultural society, its heterogeneity, and its interconnections of the legal systems, which shows the asymmetric structure of its federalism. In this perspective, Canadian constitutional law is a lab in which many solutions of legal syncretism and institutional innovation are experienced. Another relevant element for understanding the significance of Canadian law in comparative analysis is the traditional

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The Case of the Canadian Supreme Court

interest of Canadian culture to comparative learning. Canadian scholars and politicians have always looked at foreign countries to draw inspiration for their institution-building processes and for the development of innovative methods of legal interpretation.

Of course, the Canadian legal environment has deep roots in the Anglo-American constitutional tradition, but its special position “in-between” these two countries gave Canada the opportunity to broaden its sources of inspiration, opening a globally widespread process of mutual learning of constitutional practices. This effort is particularly evident in the judicial dialogue, a frequent practice of the Canadian Supreme Court, mainly interested to the case law of Supreme and Constitutional Courts in countries such as Israel, South Africa, Australia and New Zealand, as well as European supranational Courts. Due to its dialogic attitude, the Supreme Court’s case law is now quoted and considered as a source of inspiration by many Supreme and Constitutional Courts around the world. Comparative learning is one of the main drivers of global constitutionalism, and Canadian legal culture is a protagonist in this. Judicial dialogue is going to shape a constitutional *koiné* of values, concepts and techniques in which the Canadian Supreme Court plays a central role, thus influencing the evolution of global constitutional law.

3. However, “openness” is not only a result of the previously mentioned availability of comparative learning. In Canadian constitutionalism and more generally in Canadian culture, openness entails a special sensibility to social transformations, to the evolution of values and social behaviors.

This attitude is the starting point of Leonardo Pierdominici’s chapter, dealing with a theory of constitutional interpretation elaborated by the Canadian Supreme Court: the “Living Tree” doctrine. According to this theory, constitutional norms are not rules frozen and turned to stone, but rather they evolve as a tree, reacting to and interacting with context.

Thanks to the Living Tree doctrine, the Canadian Supreme Court is now equipped with a powerful tool of activist interpretation of the Constitution, a value-based method of constitutional

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The Case of the Canadian Supreme Court

construction, independent from both text and original meaning and purposes of the framers. The case law confirming this approach is huge. Let me only mention the Supreme Court's decision on same-sex marriages (2004), which Leonardo Pierdominici correctly emphasizes. In this case, the Supreme Court considered the right to same-sex marriage encompassed in the general right to marry. It is interesting to notice that, in a completely opposite way, the Italian Constitutional Court stated that the notion of "wedding" in art. 29 of the Constitution entails a "preexistent legal notion" not subject, therefore, to any evolutionary interpretation: a sort of "counter-Canadian argument".

In the Canadian experience and more generally in contemporary constitutional law, activist interpretation of the Constitution and judicial supremacy over the legislation are the best recipe for the protection of fundamental rights. However, I would like to underline the consistent impact of the Living Tree doctrine in terms of unification of law through common standards of protection of fundamental rights. In Canada, as in the United States during the Warren Court's age, as well as in the European Union nowadays, integration through fundamental rights has been and still is a significant driver of integration.

In the United States, the Supreme Court based the 14<sup>th</sup> amendment's due process clause on its technique of incorporation of fundamental rights, in order to enlarge the set of rights binding in a general way all the member states of the Union. Such a method implies a unitary protection of fundamental rights over the entire Nation, crossing the boundaries and the peculiarities of member-states' legislation, fostering a common culture of rights. The intense use of the due process clause by the Warren Court was a fundamental enhancement toward a true and permanent unification of the American Nation. Common constitutional traditions in the European Court of Justice's case law have played the same role (Repetto). They carry out, indeed, a twofold function: on one side they improve the standards of protection of fundamental rights and liberties; but on the other they support harmonization of law, smoothing national regulations and leading them toward common standards.

*Andrea Buratti*

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The Case of the Canadian Supreme Court

4. The Living Tree theory of constitutional interpretation is connected to the cultural tenets of Canadian society. However, institutional causes also explain the emergence of such a theory.

The powerful metaphor of the Living Tree must be contextualized in the legal and political history of Canadian law. The doctrine, indeed, was born in a place, the Judicial Committee of the British Privy Council, and in a moment, 1929, in which Canadian constitutional law was not available for Canadian people and Government. Prior to Patriation, Canadian basic legislation depended on Acts passed by the Parliament of Westminster and was not amendable by Canadian Parliament. The Living Tree doctrine was, in that framework, a useful method for allowing the evolution of national law independently from a text far and foreign to Canadian society and culture. Furthermore, before the Patriation, constitutional law applicable to Canada was flexible, consistent with the English legal approach. In a flexible constitutional law environment, historical evolution is a fundamental and plainly accepted resource of legal interpretation.

With the Patriation and the enactment of an entrenched and rigid Constitution, the Supreme Court has not changed its methodology in constitutional interpretation. On the contrary, the Living Tree doctrine still guides the interpretation of constitutional law, especially in the case of the Canadian Charter of Rights and Freedoms.

However, in this new framework, the Living Tree doctrine raises serious problems of compatibility with both representative democracy and federalism. An activist role of the Supreme Court in constitutional interpretation, indeed, overcomes at the same time, parliamentary sovereignty and the right of Provinces and Territories to take part in the constitutional amendment process. It is not by chance that the warning on the emergence of a “juristocracy”, leading with constitutional decision-making and replacing the political role of the people and of their representatives, came from a Canadian scholar, Ran Hirshl.

5. A further element of judicial activism in Canadian Supreme Court, which again confirms the participation of the Supreme Court to global trends in constitutional law, is its use of the proportionality principle.

In the last 20 years, the use of the proportionality principle in judicial review of the legislation, and more in general in constitutional adjudication has spread exponentially in comparative law, becoming one of the most widespread methods in the activity of constitutional and supreme courts of the western world. Quoting Aharon Barak, «we now live in the age of proportionality» (Barak, Nishihara).

The list of constitutional and supreme courts whose case law refer to and rely on the proportionality principle is huge. It is worth mentioning that the widespread use of the proportionality principle happens in most of the cases without any textual constitutional basis (Ferrerres Comella). This does not only occur in common law legal systems, but also in civil law. The dissemination of proportionality is, therefore, emblematic of the way in which global constitutionalism grows: common concepts, legal tools, and techniques spread around the world through judicial dialogue and mutual learning among the courts, emphasizing the virtues of judicial constitutionalism, which operates independent from and above state enacted law. As a basic tenet of global constitutionalism, the proportionality principle exhibits the same characteristics of other general concepts and legal techniques of global law, such as human dignity. «Proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism» (Stone Sweet-Mathews).

6. We must ask ourselves whether or not constitutional adjudication must rely on methods of neutralization of political conflict, through case-by-case approaches, activist interpretations of the Constitution, judicial supremacy, and references to value-based balancing; or whether the courts must follow a different path, based on deference to parliamentary legislation, limiting their role to cleaning up and reactivating the channels of the democratic process.

Jeremy Waldron, the author that more than any other has defended the dignity of the legislation and the traditional English

*Andrea Buratti*

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The Case of the Canadian Supreme Court

model of parliamentary sovereignty, expressly supports this last solution. He criticizes judicial supremacy, in both centralized and judicial constitutional review of the legislation. He also criticizes the Canadian Living Tree doctrine, citing it as a threat to “popular constitutionalism”.

The tension between the goal of protection of fundamental rights, on the one side, and parliamentary sovereignty, on the other, is a typical and perhaps unavoidable condition of constitutional democracy. However, the possibility of a more cooperative pattern of the relationship between the legislation and constitutional review exists (Duranti). Once again, the Canadian case contributes to this outcome. Moving from Mark Tushnet’s “third model” of constitutional review, we can sketch a constitutional review in which the judiciary branch holds the power to advise and guide the Parliament toward the repeal of unconstitutional provisions.

This is what happens in the United Kingdom under the Human Rights Act, for violations of the European Convention, and in New Zealand under the Bill of Rights. In these countries, the judicial review does not imply a power of annulment or disapplication, but rather the power to issue a declaration of incompatibility, consisting of reference to the Parliament, thus advising Parliament and reactivating parliamentary deliberation (Duranti, Tushnet, Shor). In Canada, the “notwithstanding clause”, which allows federal and provincial Parliaments to provisionally overrule a judgment of the Supreme Court, plays a similar role. It is a sort of parliamentary “last resort” power. Furthermore, in Canada, the opportunity of dialogue between Parliament and the Supreme Court on constitutional interpretation is also allowed by the advisory role of the Court on matters of constitutionality: a resource that Parliament has used in significant occasions, such as to tackle Québec’s claims of independence.

Scholars typically characterize this form of judicial review as a “weak” model. However, this model is not weak at all: these methods provide a sort of “judicial penultimate” (Gardbaum) in the review of the legislation that has until now determined a general deference by the Parliament to the declarations of incompatibility issued by the

*Andrea Buratti*

Between Judicial Activism and Political Cooperation:  
The Case of the Canadian Supreme Court

Courts. In the United Kingdom, there are only two cases in which the Parliament decided to maintain its position despite the declaration of incompatibility. Even in Canada, the application of the notwithstanding clause is limited (Waldron, 2014, 10). More generally, we have to keep in mind that in common law countries with judicial review systems, the problem with enforcing decisions on unconstitutionality is extensive. Cooperation with the Government, and in cases of federal states, along with their Governments, is often necessary for enforcing judgments of unconstitutionality throughout the nation. In American history, the civil rights revolution is the result of the Warren Court case law *and* the Civil Rights Act. President Andrew Jackson's statement after the Supreme Court's *Worcester v. Georgia* decision is well known. He strongly contested: "Mr. Marshall took his decision. Now, let him enforce it". So, what is strong and what is weak in the judicial review? (Gardbaum).

There is a further element that must be taken into account when assessing the potentiality of a cooperative method of constitutional review, which is usually underestimated by American scholars and is conversely fundamental in Europe and in Canada: indeed, such a cooperative approach would determine a positive role of the jurisdiction, including a power to guide the Parliament to comply with constitutional objectives and goals and not limited to the resolution of disputes on the compatibility of the legislation with Constitution. Constitutions committed to substantive equality, rich in programmatic norms and social rights, have to be implemented not only by negative declarations of avoidance of the legislation but also with incentives to fulfill these goals.

The Canadian system of constitutional adjudication is, therefore, an interesting one: on one side, the Canadian Supreme Court has over time developed all the means of judicial activism in constitutional interpretation that we know in other countries. On the other side, however, constitutional constraints lead the Court toward a cooperative dialogue with Parliaments, allowing a dialogue in which the Constitution looks more like a common heritage to keep alive, rather than a holy and forbidden temple to preserve.

Andrea Buratti

Between Judicial Activism and Political Cooperation:  
The Case of the Canadian Supreme Court

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