

Constitutional Renewal: Comparative Lessons for Canada

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Arguably the most significant development in contemporary comparative constitutionalism is the global spread of constitutional courts, judicial review and bills of rights as the cynosures of the comparative constitutional universe.¹ No single country's constitutional landscape exemplifies this transformation more vividly than Canada, which offers a paradigmatic illustration of the focus and preoccupations of contemporary comparative constitutionalism. Canada entered the twentieth century embodying the deferential, British-style constitutional tradition and emerged out of it with a robust constitutional culture featuring active judicial review, an acclaimed constitutional bill of rights—the *Canadian Charter of Rights and Freedoms*²—pervasive rights discourse and one of the most frequently cited high courts in the world.³ As the Chief Justice of the Supreme Court of Canada, Beverly McLachlin, recently observed: “Canadian decisions are routinely cited by courts in South Africa, New Zealand, Israel, the United Kingdom, Australia and India, and by the European Court of Human Rights.”⁴ Likewise, Aharon Barak, former Chief Justice of the Supreme Court of Israel and a member of honour

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1. See generally Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014).

2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3. See e.g. James Allan, Grant Huscroft & Nessa Lynch, “The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?” (2007) 11:3 *Otago L Rev* 433 at 455 (showing that Canadian decisions in civil rights cases are far more cited in New Zealand than those of any other nation).

4. “The Canadian Charter of Rights and Freedoms’ First 30 Years: A Good Beginning” in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés*, 5th ed (Markham, Ont: LexisNexis, 2013) 25 at 41.

in the emerging global epistemic community of judges, has praised the Supreme Court of Canada for being “particularly noteworthy for its frequent and fruitful use of comparative law. As such, Canadian law serves as a source of inspiration for many countries around the world.”⁵

This is a stunning change considering that it was not until the late 1940s, when appeals to the Judicial Committee of the Privy Council were abolished, that the Supreme Court of Canada became the top court of the land. Furthermore, as part of the 1982 constitutional revolution, innovations such as explicit constitutional commitment to bilingualism, multiculturalism, Aboriginal peoples’ rights, proportionality (via section 1 of the *Charter*—the “limitations clause”)⁶ and potential political override of certain rights provisions (via section 33’s “override clause”)⁷ were introduced in Canada, and later analyzed and emulated abroad. The so-called “dialogue” thesis, as well as “weak-form” and “commonwealth” models of judicial review were subsequently developed.⁸ Landmark rulings such as *Reference re Secession of Quebec*⁹ have been commonly invoked in comparative constitutional design discourse and in international legal discourse of secession and self-determination; other Supreme Court of Canada decisions—such as *R v Oakes*¹⁰—now feature in many comparative constitutional law textbooks. Meanwhile, the *Charter* revolution has served as a key case study in comparative social science accounts of the political origins and consequences of constitutional transformation.¹¹ Even harsh criticisms from left and right, of the newly formed Canadian

5. Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006) at 203.

6. *Supra* note 2.

7. *Ibid.*

8. See e.g. Peter W Hogg & Allison A Bushell, “The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (2005) 35:1 Osgoode Hall LJ 75; Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49:4 Am J Comp L 707; Mark Tushnet, “Weak-Form Judicial Review and ‘Core’ Civil Liberties” (2006) 41:1 Harv CR-CLL Rev 1.

9. [1998] 2 SCR 217, 161 DLR (4th) 385.

10. [1986] 1 SCR 103, 26 DLR (4th) 200.

11. See e.g. Charles R Epp, “Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms” (1996) 90:4 Am Pol Sc Rev 765; Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass: Harvard University Press, 2004).

constitutional setting, have inspired similar-in-nature critical accounts elsewhere.¹² In short, constitutional thought of every variety is now one of Canada's main intellectual exports.¹³

Although the astounding turn in Canadian constitutionalism can be traced to the adoption of the *Constitution Act, 1982*,¹⁴ explaining the *Charter's* specific innovations requires a broader context. For example, an account of the weak-form judicial review mechanisms established in section 33 must consider Canada's Westminster parliamentary tradition and the concrete circumstances that catalyzed the 1982 constitutional overhaul. In this sense, a fuller understanding of how Canada has emerged from a humble former British colony into its current role as comparative constitutional powerhouse necessitates a broader look at the social and ideational transformation—specifically the profound multicultural and cosmopolitan shift in the national meta-narrative—that Canada has witnessed for more than half a century.

Students of Canadian politics are familiar with how the Quebec question has dominated modern-day Canadian politics. The “Quiet Revolution” and the emergence of cultural nationalism and secessionist sentiments in Quebec in the early 1960s triggered a series of attempts to amend the constitution in order to address Quebec's claims. As a result, over a period of twenty-five years, from the mid-1960s to the early 1990s, Canada experienced a continuous state of constitutional flux. During that period alone, five major constitutional overhauls were attempted; all but one—the “patriation round” of 1982—failed. No other established democracy has ever been through so many grandiose attempts at constitutional reform within such a short period. The challenge of acknowledging difference, and recognizing linguistic, religious and

12. See e.g. Michael Mandel, *The Charter of Rights and The Legalization of Politics in Canada* (Toronto: Thompson, 1989); FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000).

13. See e.g. Adam Dodek, “Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism” (2007) 36 SCLR (2d) 309; Sujit Choudhry, “The Globalization of the Canadian Constitution” (2012) *The Trudeau Foundation Papers* 91 at 98–104; David S Law & Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87:3 NYUL Rev 762 at 809–23; Mark Tushnet, “The Charter's Influence Around the World” (2013) 50:3 Osgoode Hall LJ 527.

14. *Supra* note 2.

cultural diversity within a framework of national unity lay at the heart of all these attempts.

Concurrently, the dynamics of Canadian immigration changed in the second half of the twentieth century. Highly sought immigrants from the British Isles received preferential treatment until the 1960s, while others were “non-preferred” or excluded. In 1967, ethnicity and race ceased to be key determinants of admission under Canada’s immigration policy, which became distinctly more universal through the introduction of criteria such as educational attainment, language competency and employment potential.¹⁵ By 1977, immigrants from Asia, Latin America and Africa made up over fifty percent of annual flows.¹⁶ As a result, the demographics of the Canadian body politic have transformed in an unprecedented way. When compared with other countries such as the United States, the United Kingdom, the Netherlands, Germany and Spain, Canada has the highest percentage of foreign-born residents in overall population. According to the 2011 national census, over twenty percent of Canada’s population is foreign born.¹⁷ In Toronto—Canada’s largest city and the fourth largest urban center in North America—over forty-eight percent of the population is foreign born.¹⁸ Relative openness to the world therefore has become an essential part of public life.

In tandem with these immigration changes, an official policy of multiculturalism was introduced in the early 1970s: “In the face of this

15. See Triadafilos Triadafilopoulos, “Dismantling White Canada: Race, Rights, and the Origins of the Points System” in Triadafilos Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (New York: Springer, 2013) 15 at 16.

16. See Monica Boyd & Naomi Alboim, “Managing International Migration: The Canadian Case” in Dan Rodríguez-García, ed, *Managing Immigration and Diversity in Canada: A Transatlantic Dialogue in the New Age of Migration* (Montreal & Kingston: McGill-Queen’s University Press, 2012) 123. See generally, Triadafilos Triadafilopoulos, *Becoming Multicultural: Immigration and the Politics of Membership in Canada and Germany* (Vancouver: UBC Press, 2012).

17. Statistics Canada, “2011 National Household Survey”, Catalogue No 99-004-XWE (Ottawa, Statistics Canada, 11 September 2013) (20.6% of Canada’s population was born outside the country). According to OECD Migration Data 2013, comparable figures are 13.1% in the United States; 12.3% in the United Kingdom; 11.6% in the Netherlands; 12.8% in Germany; and 13.4% in Spain. See OECD, *Foreign Born Population* (2015), online: <data.oecd.org/migration/foreign-born-population.htm#indicator-chart>.

18. Statistics Canada, *supra* note 17 (48.6% of the population of Toronto was foreign born).

[country's] cultural plurality there can be no official Canadian culture or cultures", stated the 1972 Special Joint Committee of the Senate and House of Commons on the Constitution of Canada.¹⁹ Instead, a new vision was crafted of a "pluralistic mosaic", promoting "equal respect for the many origins, creeds and cultures" that comprise Canadian society.²⁰ This vision was given constitutional recognition in 1982 under section 27 of the *Charter*, according to which the *Charter* is to be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".²¹ The adoption of the *Canadian Multiculturalism Act* further reflects a concerted focus by federal institutions to build awareness of multiculturalism and promote inclusiveness and accommodation of diversity.²² The scholarly response to these changes was immediate; Canadian political science underwent a considerable "comparative turn".²³ Charles Taylor, Will Kymlicka, James Tully and other Canadian philosophers are often considered among the most prominent theorists of multiculturalism, citizenship and the constitutional accommodation of difference. Unlike Canada's neighbour to the south, the practice of foreign citation by the Supreme Court is met with considerably less resistance and has seldom been seriously contested within Canada's legal academia, let alone in the popular media or the broader political sphere. During the 1990s, Supreme Court of Canada Justice Claire L'Heureux-Dubé emerged as an international champion of interjurisdictional constitutional cross-fertilization and helped to entrench this trend within the Canadian judiciary.

Canada has since become known to a younger generation of productive scholars as a setting conducive for the comparative study of constitutional law and courts. While cosmopolitanism does face some internal opposition, national pride in Canada's "cultural mosaic" and the country's openness toward the foreign and different remains distinctive, especially

19. Parliament, *Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada Final Report* (1972) at 2.

20. See Ayelet Shachar, "Interpretation Sections (27 & 28) of the Canadian Charter" in Mendes & Beaulac, *supra* note 4, 147 at 147.

21. *Supra* note 2.

22. RSC 1985, c 24 (4th Supp). See Howard Kislowicz, "Freedom of Religion and Canada's Commitments to Multiculturalism" (2012) 31:1 NJCL 1.

23. Linda White et al, eds, *The Comparative Turn in Canadian Political Science* (Vancouver: UBC Press, 2008).

when compared to the intoxicating debates in the United States. Beyond Canada's constitutional transformation per se, Canada's endorsement of, and considerable contributions to, comparative constitutionalism should be understood in relation to this profound shift in Canada's national meta-narrative and self-perception about its place and role in the world.

When we look more closely at the scope of the comparative turn in Canadian constitutional thought, its boundaries become vividly revealed. Despite the fact that Canada's stature as an exporter of comparative constitutional thought has unprecedentedly surged over the past few decades, expectations that this comparative turn might impact some of Canada's own burning constitutional shortcomings—through importation of, or consultation with, comparative constitutional thought—have been disappointed.

Whereas some would like to see even more engagement with comparative jurisprudence, or note that the practice has not really burgeoned as one might expect, the Supreme Court of Canada continues to take an open-minded approach to the matter—both in theory and in practice.²⁴ A recent survey of the Supreme Court's foreign citation patterns in constitutional cases reports a total of 1,826 such citations from 1982 to 2010. Of this total, 1,144 (approximately 62.5%) were American cases, 502 (27.5%) were United Kingdom cases, and about 10% were rulings from other jurisdictions such as Australia, New Zealand and the European Court of Human Rights.²⁵ The majority of references to American court rulings were made in the first fifteen years of the *Charter*, while the late 1990s saw a considerable decline in citation of American sources,²⁶

24. For studies of the practice, see Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation" (2004) 62:2 UT Fac L Rev 99; Adam Dodek, "Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities" (2009) 47 SCLR (2d) 445; Peter McCormick, "Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations" (2009–2010) 41:2 Ottawa L Rev 209; CL Ostberg, Matthew E Wetstein & Craig R Ducat, "Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada" (2001) 34:2 Can J Pol Sc 377.

25. See Gianluca Gentili, "Canada: Protecting Rights in a 'Worldwide Rights Culture': An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada" in Tania Groppi & Marie-Claire Ponthoreau, eds, *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013) 39.

26. *Ibid.*

reflecting both the declining relevance of United States' jurisprudence as persuasive authority, and, at the same time, the increasing confidence of the Supreme Court of Canada.²⁷

The Court's willingness to engage with foreign rulings and constitutional concepts in the area of rights and liberties often masks the fact that the comparative turn has not, by and large, penetrated the discourse concerning some of Canada's organic constitutional failings. Tellingly, in its two recent landmark rulings on rights issues—the right to die with dignity (*Carter v Canada*) and the right to strike (*Saskatchewan Federation of Labour v Saskatchewan*)—the Supreme Court of Canada referred to 5 and 6 foreign rulings, respectively.²⁸ In its two recent landmark rulings on structural matters—judicial appointments (*Reference re Supreme Court Act, ss 5 and 6*) and Senate reform (*Reference re Senate Reform*)—the Supreme Court did not cite a single foreign ruling and based its entire opinion on Canadian precedents.²⁹ Anecdotal as this observation may be, it supports the proposition that there are areas of constitutional jurisprudence—most notably the interpretation of rights—where cross-jurisdictional reference is more likely to occur than in other areas, such as the more aspirational or organic (e.g., federalism, separation of powers and amending procedures) features of the constitution, where national idiosyncrasies and contingencies are more prevalent.³⁰ Either way, when we turn our gaze to the structural features of the Canadian constitution, there is some room for growth as far as Canadian engagement with the constitutional experience overseas is concerned.

Some of the challenges have been widely acknowledged: loose constitutional definitions of Canada's executive branch; an appointed Upper House (Senate) that is marred with considerable shortcomings

27. See Adam Liptak, "US Court is Now Guiding Fewer Nations", *The New York Times* (17 September 2008), online: <www.nytimes.com>. See also Gentili, *supra* note 25; Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study" (2009) 47:1 Osgoode Hall LJ 83; The Honourable Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34:1 Tulsa LJ 15 at 29.

28. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

29. *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

30. See generally Vicki C Jackson, "Comparative Constitutional Federalism and Transnational Judicial Discourse" (2004) 2:1 Intl J Constitutional L 91.

with regard to both popular representation and institutional efficacy; a federal electoral system that many see as perpetuating democracy deficits; and judicial appointment processes, in particular to the Supreme Court, that are largely controlled by the prime minister's office. Other challenges are equally pressing, if somewhat less frequently discussed, such as the constitutional powerlessness of megacities—a modern phenomenon unanticipated by the framers of the *Constitution Act, 1867*,³¹ a rigid constitutional amending formula that makes formal constitutional change near impossible; the inexplicable gap between Canada's long-standing commitment to a relatively generous version of the Keynesian welfare state model; and the outright exclusion of subsistence social rights from the purview of rights provisions; the apparent tension—or at least uneasy relationship—between Canada's constitutional commitment to English-French bilingualism and its commitments to multiculturalism and Aboriginal peoples' rights; or the plain demographic fact that Canada is one of the most significant immigrant-receiving polities in the world and has an increasing number of citizens and residents whose first language is neither English nor French. In any and all of these challenges, a close look at the constitutional experiences of comparable jurisdictions overseas may enrich the constitutional discourse and provide ample guidance and food for thought. Unfortunately, the comparative constitutional renaissance, so prevalent in conversations about rights or judicial interpretive methods, is yet to feature prominently in public discourse concerning these more structural or organic deficiencies of Canada's constitutional order.

The five articles in this well-timed symposium begin to address this gap. They adopt a comparative perspective in order to reflect on some of the weak spots of the Canadian constitution in an attempt to discern what academics, jurists and policy makers interested in the Canadian constitutional landscape may learn by engaging the relevant constitutional laws and practices of other polities.

The United Kingdom's effervescent constitutional scene of the last couple of decades provides the backdrop for two articles: Paul Daly looks to the Supreme Court of Canada to understand the evolving position of the newly established United Kingdom Supreme Court and its place in the United Kingdom's constitutional order. He suggests, in

31. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

a nutshell, that although the adoption of the *Human Rights Act 1998*³² (incorporating the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms³³ into British law) has contributed to the United Kingdom high court's centrality, the Canadian apex court remains much clearer about its constitutional function and has proactively asserted its central role as a neutral and effective arbiter of disputes relating to federalism and human rights. The comparison allows Daly to consider how the United Kingdom Supreme Court might interpret its role in the years to come in order to constitutionally entrench itself as a significant actor in the evolving United Kingdom constitutional order. Stephen Tierney compares the United Kingdom and the Canadian experience with respect to referenda at the sub-national and national levels. Both settings, he claims, are mutually instructive as they highlight various aspects of constituent powers and participatory democracy in shaping the polity's constitutional future. Erin Crandall analyzes attempts to reform the judicial selection and appointment processes at the High Court of Australia and the Supreme Court of Canada, and moves on to speculate about possible implications to those areas of the Supreme Court's landmark ruling in *Reference re Supreme Court Act, ss 5 and 6*.³⁴ Hoi Kong reflects on the tension between aggregative conceptions of democracy and deliberative democratic theories by asking whether constitutional amendment processes should be viewed primarily through the lens of power allocation or that of power constraint, and consequently whether the political branches engaged in constitutional amendment should or should not be subject to judicial oversight. To that end he compares constitutional amendment processes in Switzerland and Canada. Richard Albert focuses on the theory and doctrine of "unconstitutional" constitutional amendments. He probes the applicability of the increasingly substantial comparative experiences of high court invalidation of constitutional amendments to explain how that practice may apply to the contemporary Canadian constitutional order, and the conditions under which the Supreme Court of Canada may exercise extraordinary residual constitutional authority to invalidate a constitutional amendment.

32. (UK), c 42.

33. 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

34. *Supra* note 29.

Beyond the specific subject matter of each respective contribution, all five authors aim to expand the scope of engagement with comparative constitutional experiences beyond flashy rights issues to help address some “hard-wired” structural elements of the Canadian constitution. This collection’s common intellectual agenda is to draw on the promise of comparative constitutional inquiry to advance sophisticated, well-informed discourse about constitutional renewal in Canada. Taken as a whole, it extends a timely invitation to Canadian constitutional scholars, jurists, policy makers and the Canadian citizenry at large to engage more closely with the world of new constitutionalism, not merely as producers and exporters of innovative constitutional thought, but also as curious observers who study the constitutional experiences of other polities to engender self-reflection through analogy, distinction and contrast, as well as to identify “best practices” and effective solutions to some of Canada’s unresolved constitutional shortcomings.