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In Judiciary We Trust. The Reflective Judiciary in Canada

by Eleonora Ceccherini
Professore associato di Diritto costituzionale
Università degli Studi di Genova

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1. Territorial organization of Canada between territorial and multinational federalism

The study of the Canadian legal system has always awakened legal scholars' interests, both in the field of public and private law, for its significant peculiarities which appear at the institutional, political, social and economic level. Canada has a federal organisation and two legal systems coexist in its institutional framework: civil law, and common law; likewise, there are two official languages: French and English. Despite being an independent state with its own flag and its own constitutional system, the British monarch continues to be the Head of the State and the Queen is portrayed on Canadian dollars. From an economic perspective, there is a strong divergence between the Western Provinces, strongly exploiting natural resources, and the Eastern ones – specifically Ontario and Quebec – with a strong industrial vocation[1]. It is necessary to add some further remarks, symptomatic of the Canadian "duality": first, Aboriginal communities, occupying the territory before the arrival of European colonists, were recognized the status of Founding Peoples; second, the population is conspicuously composed of people who migrated in Canada more recently.

The choice of a federal asset is linked to the idea of keeping the Provinces autonomous, in order to limit the trend of decentralization resulting in the problematic coexistence of former French colonies and the Anglophone Dominion. The former French colonies are characterized by a civil law system, French as a

* Peer reviewed. I would like to give special thanks to Chiara Graziani, PhD. Student in the University of Genoa for her inspiring comments and linguistic review. Any mistakes are, of course, my own.

[1] P. Foucher, *La double dualité du Canada et ses consequences juridiques*, in P. Thibault, B. Pelletier, L. Perret (eds.), *Les melanges Gérald –A. Beaudoin. Les défis du constitutionalisme*, Yvon Blais, Cowansville, 2002, 163 ff.; G. Martinico, *La genesi "mista" dell'asimmetria canadese*, in G. Delledonne, G. Martinico, L. Pierdominici (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione. Riflessioni comparatistiche*, Pisa University Press, Pisa, 2017, 15 ff.

common language and catholic religion, often invoked for nationalist purposes[2]; whereas the Anglophone Dominion is characterized by a system of common law, English as a common language, and Protestant origins. The causes of this coexistence depend on historical reasons: a part of the Canadian territory which was colonized by the French, has been surrendered to the British Crown with the Treaty of Paris in 1763. The attempt to anglicise those territories (i.e. The Provinces of Quebec and New Brunswick) immediately failed. Consequently the British Crown accepted and recognised the civil law system through the Quebec Act of 1774. This Act provided that the former could regulate civil and property rights according to civil law, while they had to conform to, the common law system for criminal law and all other matters[3]. Keeping the former civil law system implies using the language related to that system. With the approval of 1774 Act, a process of biculturalism and bijuralism was triggered. Such dualism would strongly influence the Canadian legal asset. Accepting two Founding Peoples and being aware of the impossibility to reduce to a one-single-reality the dualistic legal nature Canadian political establishment to allow Provinces to regulate relationships between individual, as well as to let Quebec to adopt civil law. This was officialised by the British North America Act (BNA) of 1867, which would give birth to the Dominion[4].

[2] In the territories occupied by the French Crown, the civil law system is adopted: *la Compagnie des cents associés* – founded in Quebec – officially imported Paris custom in 1627, and from 1667 onwards – when the *Compagnie* is dissolved – local right gets directly borrowed as French law main source. In 1710, the British conquered the French colony of Acadia and deported the French, starting a process of Anglicization of this area. In this situation, apart from the French *enclave*, common law got imposed in the rest of Canada. The two colonizing processes are very different: the French had settled with commercial interests, and for this reason they had climbed up Saint Lawrence river with fur smugglers and missionaries, looking for new routes of communication; the British, instead, wanted to occupy lands for agricultural purposes and this is the reason why they were in a continuous spread. The Seven Years War (1756-1763) – whose core events took place in Europe – sees France and United Kingdom at odds, fighting for their colonial possessions. The results of the conflict were not favorable for France, which, with the Treaty of Paris of 1763, was forced to surrender the territory that, nowadays, corresponds to New France. Firstly, the United Kingdom tried to start a process of Anglicization, through Royal Proclamation, in 1763. Although this act recognized the self-government of colonies, it imposed the British law to all former French territories. However, this project was not carried out and French or Natives parties were allowed, through an act, to apply French law. In cases of legal controversies, a mixed composition of juries was required, depending on the linguistic affiliation of the involved parties. L. Bruti Liberati, L. Codignola, *Storia del Canada. Dal primo contatto fra Europei e indiani alle nuove influenze nel pensiero politico mondiale*, Bompiani, Milano-Firenze, 2018, *passim*; F. Toriello, *La circolazione del modello inglese in Canada e il rapporto con la tradizione di* civil law. *Un contributo alla ricostruzione*, in G. Rolla (ed.), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Giuffré, Milano 2008, 81 ff., M. Morin, *Les Débats concernant le droit français et le droit anglais antérieurment à l'adoption de l'Acte de Quebec de 1774*, in *R.S.U.S.*, 44, 2014, 259 ff.

[3] The same Act allowed the use of French language, the right to practice Catholicism and the equal right to get access to public charges both for Anglophone and Francophone. A. Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils*, Éditions de l'Université d'Ottawa, Ottawa, 1967, 27 ff.

[4] In 1841, the Act of Union came into effect: the two Provinces, the Lower Canada (Quebec) and the Upper Canada (Ontario) were merged to form a single Province; nonetheless, this Act did not achieve political stability and paved the way for the approval of British North America Act. Thereafter, in 1869, the Bay Hudson Company

However this is not the end of frictions between Quebec and the Rest of Canada. Rather, they were even sharpened because the Provinces wanted to establish a federal system based on the equality among Provinces on one side, and on the other side, on the recognition of the status of distinct society to the French community. This dualism played a key role in shaping the history of Canada, as on the one hand the organization of public powers is justified by a *foedus*, which gathers all the territories for a question of efficiency of the system, and on the other hand such structure aims to maintain and guarantee the recognition of national identities[5]. Therefore, the Francophone nationalism is a recurring element in the political debate, and it cyclically remerges in different occasions throughout Canadian history, fostering a divide from an ethnic and linguistic (and no longer religious) point of view.

A crucial milestone, which turns the tension between the Francophone and Anglophone souls of Canada into a permanent feature of the system, is the so-called "Quiet Revolution". This term refers to a series of events that took place in the period between the '60s and '70s, which is also characterised by some political, institutional and social reforms promoted by the Liberal Party of Quebec[6]. The renewed feeling of community spreading among the Francophone part of the population contributed to the federal government's decision to establish the Royal Commission on Bilingualism and Biculturalism in 1963 with the task: «to inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races[7], taking into account the contribution made by the other ethnic groups to the Cultural enrichment of Canada and the measures that should be taken to safeguard that contribution»[8].

surrendered all the administrated territories (which would form, in the future, the Provinces of Manitoba, 1870, Alberta and Saskatchewan, 1905) to Dominion; in 1871, British Columbia joined Canada and in 1873, Prince Edward Island; in 1949, the Province of Newfoundland and Labrador joined the Federation. In 1975, Yukon and North-West Territories joined too; the third Territory, Nunavut, was founded in 1999.

[5] Ph. Resnick, *Towards a Multinational Federalism: Asymmetrical and Confederal Alternatives*, in F. Leslie Seidle (ed.), *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options*, Institute for Research on Public Policy, Montréal, 1994. About this topic, under a comparative point of view: E. Fossas, *National Plurality and Equality*, in F. Requejo (ed.), *Democracy and National Pluralism*, Routledge, London, New York, 2001, 63; G. La Forest, *What Canadian Federalism Means in Québec*, in *Rev. const. st.,* 15, 2010, 1 ff.

[6] M. Rubboli, *Un federalismo imperfetto*, Giunti, Firenze, 1992, 103; J. Woehrling, *La constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours*, in *Rev. fran. dr. const*., 1992, 195 ff.; F. Rocher, *The Quebec-Canada Dynamic or the Negation of the Ideal of Federalism*, in A.-G. Gagnon (ed.), *Contemporary Canadian Federalism,* University of Toronto Press, Toronto, 2006, 81 s.; R. Louvin, *Legami federativi e declino della sovranità*, Giappichelli, Torino, 2001, 45 ff.

[7] General Introduction to "Report of the Royal Commission on Bilingualism and Biculturalism", 1967---1970, xxi.

[8] Another consequence of the report of the Commission was the increased importance and visibility to Francophone in the Federal Government, goals achieved by Pearson government which, in 1965 included three prominent figures: Jean Marchand, Gérard Pelletier and Pierre Elliott Trudeau.

In this context, the figure of Pierre Elliot Trudeau emerged on the political horizon. Trudeau promoted the political project to integrate all the identities which made up the country, which at this point were no longer limited to the traditional Francophone and Anglophone components.

To pursue the goal of integration, the Premier adopted the Multiculturalism Policy of Canada (1971) aimed at recognizing the cultural pluralism of the country; nonetheless the approval of the Charter of Rights and Freedoms in 1982 put a full stop to the "duopoly" held by the Francophone and Anglophone components. The political goal of the Charter of Rights and Freedoms was to foster the unity of Canada and build a national identity. The cultural pluralism of the Canadian society induced to codify rights into a written constitutional text, since many citizens, who did not share the same cultural origins of the Founding Peoples, did not feel safeguarded enough by a legal system of European origin. In their vision, the equal protection of everyone's rights should have been the fundamental feature of the Canadian citizenship. Trudeau's vision entailing a pan-Canadian federal nationalism was opposed to the Francophone's one, which in turn had been exacerbated after the Quiet Revolution. Under an electoral point of view, the pan-Canadian nationalism was regarded positively by one third of the citizens who did not have British or French origins. However, the Canadian Premier's politics did not meet the favour of Quebec, which showed its distance from the political project by calling the direct democracy in 1980. On 20th May 1980, during the last stages of the approval of the Constitution Act, a popular consultation was called in order to legitimize the francophone Province government to negotiate its full sovereignty with the possibility to maintain economic and commercial relations with the Federation[9]. Quebec voters (representing 59.6% of the votes) were able to reject this hypothesis but there was no chance to concretely stop the Prime Minister's project, since he wanted to proceed unilaterally to the enactment of the Constitution Act, without the consent of the Provinces. Three of these, Quebec, Manitoba and New Foundland, first referred the issue to their Courts of Appeal for an advisory opinion and then to the Supreme Court. The latter expressed the existence of a constitutional convention, implying the duty to negotiate and obtain a substantial degree of provincial consent without the obligation to reach a unanimous decision. After this opinion, Premier Trudeau started again the negotiation process for Patriation. The consensus on his project grew with the exception of Quebec, which asked once again an advisory opinion to the Supreme Court on whether a unanimity decision was needed for any law affecting the responsibilities of Provinces and the right to veto by the Francophone party. The reference was only delivered after the definitive approval of the Constitution Act and held that, according to constitutional

[9] As known, the results was not favorable to the secessionist claims but the francophone political élite called a another referendum in 1995 with the same purpose.

conventions Quebec was not empowered to block the process amending the British North America Act[10].

In 1982, the Patriation resulted in a significant political success for Premier Trudeau and represented one of the most relevant achievements for Canadian constitutional law. Unfortunately, the constitutional process was not able to incorporate the francophone community, whose attempts to be recognized as a distinct society were frustrated[11]. Then, two further proposals of constitutional reform were issued: the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992. They were meant to introduce some clauses recognising the *québécoise* speciality, but they were not finalised[12].

These further failures ended up reinforcing the nationalist ambitions of Quebec and in 1995, once again, the Provincial Government called a referendum for the secession of the Province. Votes in favour of keeping part of the Federation slightly prevailed (49.42% yes, 50.58% no); hence the central government asked the Supreme Court for an advisory opinion concerning the legitimacy of a possible unilateral secession of Quebec. The court answered that firstly, the territorial and political separation would only be legitimate through an agreement between the Federation and Province (in other words, a unilaterally decision was not admissible), and, secondly, supreme principles of the Canadian system had to be respected. Such principles consisted of the rule of law, constitutionalism, federalism, democracy and protection of minorities[13].

The legislative follow-up to the advisory opinion was set forth in the Clarity Act, 2000: "An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference". The Federal Act requires that Parliament preliminary states if the requires that the Parliament preliminary states if the question that people are asked to answer through the

[10] Renvoi: opposition à une resolution pour modifier la Constitution (1982) 2 RCS, 793. J. Robillard, *Constitutional Conventions: The Canadian Supreme Court's Views Reviewed*, in *Public Law*, 1981, 183 f.;. J.F. Gaudreault-Des Biens, *The "Principle of Federalism" and the Legacy of the Patriation and Quebec Veto References*, in *Supreme Court L. Rev.*, 54, 2011, 77 ff. More generally, see: N. Olivetti Rason, *Manutenzione costituzionale: l'esperienza canadese*, in S. Gambino, G. D'Ignazio (eds.), *La revisione costituzionale e i suoi limiti*, Giuffrè, Milano, 2007, 339 ff.; G. Gerbasi, *Il Canada e l'Unione europea: esperienze giuridiche a confronto tra procedure emendative e la peculiare nozione di rigidità dei rispettivi atti normativi fondamentali*, *ibidem*, 651 ff.; A. Scerbo, *La costituzione canadese tra principio federale, potere di revisione e spinte alla disgregazione, ibidem*, 851 ff.

[11] F. Lanchester, *La* «Patriation» *della Costituzione canadese: verso un nuovo federalismo?,* in *Riv. trim. dir. pubbl.*, 1, 83, 337 ff.; T. Groppi, *Federalismo e Costituzione*. Giuffrè, Milano, 2001, 187 ff.; F. Astengo, *Il Quebec: storia di una specialità negata*, in G. Rolla (ed.), *Regimi giuridici speciali di autonomia delle comunità territoriali*, Giuffrè, Milano, 2013, 143 ff.

[12] M. Bastarache, *L'Accord constitutionnel de 1987 et la protection des minorités francophones hors Québec*, in *McGill L. J.*, 34, 1, 1988-1989, 119 ff.

[13] G. Rolla, *Il referendum sulla sovranità del Quebec ed il futuro del Canada. Alcuni paradossi costituzionali*, in *Giur. cost.*, 5, 1996, 3269 ff.

referendum is clear enough. After the referendum, the Parliament also has to assess whether the popular consultation resulted in a clear manifestation of will and whether there is an evident majority.

In the same year, in response to the Federal Act, the National Assembly of Quebec passed another act named: "An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State". This law states that Quebec can exercise its right to choose its political regime, including sovereignty, and that in a referendum the option obtaining is whichever obtains 50% + 1 of the votes must prevail[14].

However, the francophone speciality has never received any formal recognition, apart from a small exception, i.e. a Parliamentary resolution of 22 November 2006 on proposal of Harper government stating that: «(…) que cette Chambre reconnaisse que les Québécoises et les Québécois forment une nation au sein d'un Canada uni»[15].

The brief analysis presented above shows how Canada is a system seeking the balance between two cultures: specifically the one considered as a minority aims at having a specific identity recognition at constitutional level within the Federation, and this could undermine reciprocal ties. Indeed, two additional cleavages emerge: the former depends on the presence of First Nations, the latter is related to the numerous communities of immigrants.

2. The multifaceted composition of Canada population

As highlighted above, the institutional history of Canada is defined through the Francophone and Anglophone dichotomy. However, restricting the debate solely to this dualism would be a superficial simplification and would not take into account the social pluralism that characterise the country. First the census of 2011 showed that in Canada there are 1,400,685 individuals belonging to the autochthonous communities; they are 4.3% of the entire population[16] and their ancestors used to live in those lands before the arrival of the colonizers. First Nations suffered a massive colonization, both by the French and by the British, and for a long time they have had an inferior *status civitatis*, compared to that of white

[14] P. Passaglia, *La Corte suprema del Canada definisce le regole mediante cui procedure alla secessione*, in *Foro it.,* 1999, 271 ff.

[15] Resolution of November 27th, 2017 2006 par 265 Debats de la Chambre des communes, 39° parl, 1 re sess, vol. 141, n° 84 on November 22nd, 2006 5197. About the relationship between the Premier Harper and Quebec, please see: G. Laforest, *Trust and Mistrust Between Harper and Québec*, in A. López-Basaguren, L. Escajedo San Epifanio(eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, vol. II, Springer-Verlag, Berlin-Heidelberg, 2013, 341 ff.

[16] http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm. This figure points outan increment of this component in recent years. There was an increased from 2,8% in 1996 to 3,3% in 2001, and 3,8% in 2006, confirming an increment of 20,1% from 2006 to 2011, compared to 5,2% of the aboriginal population.

settlers; moreover, they suffered from the implications of a sort of tutelage[17] and of aggressive policies oriented towards cultural assimilation[18]. In 1876, the *Indian Act* was passed, implementing sec. 91(24) of BNA, which granted to the Federation the competence on «Indians and Lands Reserved for the Indians». The purpose of this legislative act was to sterilize and remove Indian cultures through a corpus of regulations which legitimized discriminatory practices, sometimes openly oppressive [19].

The condition of First Nations radically changed when the Charter of Rights and Freedoms was enacted in 1982. The Charter contains some express provisions about the condition of the Natives. In fact, the text article 25 of the Charter clearly states that «The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired».

Sec. 35 (1) of the Constitution Act, 1982 reads as follows «The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed»; while Sec. 35 (2) includes Indians, Inuit and Métis as aboriginal peoples of Canada[20].

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[17] For this expression please see: N. Dyck, *What is the Indian Problem?*, Institute for Social & Economic research, St John's, 1991, 24 ff., stating: «a forms of restraint or care exercised by one party over another as well as the condition of being subjected such protection or guardianship…The tutelage that Canadian Indians have experienced has been based (…) upon the power of one side to regulate the behavior of the other in accordance with a set of unilaterally selected purposes». R. Motta, Maîtres chez eux. *Sovranità domestica e diritti ancestrali delle prime nazioni in Nuova Francia e Canada*, in *Materiali per una storia della cultura giuridica*, 1, 2001, 211 f.

[18] By way of example, it's important to remember that the right to vote has been recognized to them only in 1960 and for a long- time politics of subjugation had took place, which consisted in the obligation of living in the reserves, in the prohibition of celebrating their rituals, and culminated in the realization of residential schools, where the indigenous' children used to be imprisoned, in order to be educated according to the "civil" lifestyle. These schools became places of sexual and physical abuses, so that the government finally recognized huge compensations to the survivors and publicly apologized on behalf of Canada, on June 11, 2008, for all the vexations. N. Funk-Unran, *The Canadian Apology to Indigenous Residential School Survivors: A Case Study of Renegotiation of Social Relations*, in M. Mihai, M. Thaler (eds.), *On the Uses and Abuses of Political Apologies*, Palgrave Macmillan, Basingstoke, 2014, 138 ff.; K. Roach, *Blaming Victim: Canadian Law, Constitution and Residential Schools*, in *University of Toronto L. J.*, 41, 2014, 566 ff.; A. Pelletier, M. Morden, *Exploring the Social Elite Accommodation: Recognition and Civil Society Integration in Divided Societies*, in A. López-Basaguren, L. Escajedo San Epifanio (eds.), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, vol. II, Springer-Verlag, Berlin-Heidelberg, 2013, 630 ff.

[19] The Indian Act is still in force even though it has been amended throughout history. Such amendments have depleted the act from its contents that were detrimental to the equality principle. J. F. Leslie, *The Indian Act: An Historical Perspective*, in *Canadian Parl. Rev.*, 2002, 23 ff.; S. Imai, *The 2016 Annotated Indian Act and Aboriginal Constitutional Provisions*, Carswell, Scarborough, Ont., 2016; K. Coates, *The Indian Act and the Future of Aboriginal Governance in Canada*, Research Paper for the National Centre for First Nations Governance, May 2008.

[20] P. W. Hogg, *Constitutional Law of Canada*, Carswell, Scarborough, 1992, s. 3.5; L. Mandell, L. Hall Pinder, *Tracking Justice: The Constitution Express to s. 35 and Beyond*, in L. Harder, S. Patten (eds.), *Patriation and Its Consequences*, University of British Columbia Press, Vancouver-Toronto, 2015, 180 f.; G. Otis, *Constitutional Recognition of*

The recognition of the aboriginal communities' rights is particularly relevant, because the autochthonous component is extended to the framers. This gives birth to a new *pactum societatis* that unlike the one which dated back to the British North America Act of 1867, aimed at overcoming the historical dualism between the Francophone and Anglophone communities.

After the constitutionalization of First Nations' rights, a series of claims from the communities, wishing to administer territories where they had historically settled, took place[21]. They claimed the recognition of aboriginal self-government, which was considered an inherent right, protected by the Constitutional text[22]. The consequences led to the approval of a series of agreements between federal and provincial governments on the one side and aboriginal representatives, on the other side. Once that the agreements are ratified as laws, the institutions of autochthonous self-government are responsible for the regulation of important matters related to the tutelage and exploitation of the territory, over education and social

Aboriginal and Treaty Rights: A New Framework for Managing Legal Pluralism in Canada, in *J. Legal Pluralism and Unofficial Law*, 2014, 320 ff.; C. Alcantara, *To Treaty or not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada*, in *Publius*, 38, 2, 2008, 343 ff.; D. Newman, *Aboriginal 'Rights' as Powers: Section 35 and Federalism Theory*, in M. Graeme et al (eds.), *A Living Tree: The Legacy of 1982 in Canada's Political Evolution*, Toronto, LexisNexis, 2007, 527 ff.; M. Aparicio Wilhelmi, *Breve Aproximación al reconocimiento constitucional de los derechos de los pueblos autóctonos,* in E. Mitjans, J. Mª Castellà Andreu (eds.), *Derechos y libertades en Canadá*, Atelier, Barcelona, 2005, 227 ff.

[21] *P. Macklem, D. Sanderson (eds.), From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights,* University of Toronto Press, Toronto, 2016; J. Borrows, *Freedom and Indigenous Constitutionalism*, University of Toronto Press, Toronto, 2016; M. Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and respect for Difference*, University of British Columbia Press, Vancouver, 1997.

[22] It's necessary to remember that the Charlottetown Accord related to a constitutional reform project which tried to introduce the right of self-government of aborigines. In particular, there were plans to add an additional subsection to art. 35 which would have read as follows: «It's provided that the enjoyment of the right identified at c. 1, would cause the power, for the legislative bodies constituted by the autochthone peoples, each in their field of responsibility: a) to preserve and develop their languages, cultures, economies, identities, institutions and traditions; b) to develop, maintain and enforce the relationship with their lands, their waters and their environment, so that these Peoples may manage and rule their development as a People, in base of their principles and their priorities, and ensure the integrity of their society». Moreover, the accord contained a provision in which the judiciary power was asked to interpret the Constitution Act according to the fact the autochthone communities should be allowed to preserve their cultures and to constitute one of three levels of government. Moreover, it empowered the aborigine institutions to adopt provisions protecting and promoting the autochthone languages and cultures. Basically, the Charter of Rights and Freedom had not to be interpreted so as to prevent the enactment of provisions aimed at safeguarding and promoting the autochthone cultures. However, as well-known, the Accord of Charlottetown were not approved and so the codification about the aborigine populations has remained unvaried. J. Morin, J. Woehrling, *Les Constitutions du Canada et du Québec du règime français à nos jours*, Editions Thémis, Montréal, 1994, 441 ff.; O. Mercredi, M. E. Turpel, *In the Rapids: Navigating the Future of First Nations*, Viking, Toronto, 1993; M. E. Turpel, *The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change*, in K. McRoberts, P. J. Monahan (eds.), *The Charlottetown Accord, the Referendum, and the Future of Canada*, University of Toronto Press, Toronto, 1993, 117 ff.; P. T. Hall, *What are we? Chopped Liver? Aboriginal Affairs in the Constitutional Politics of Canada in the 1980's*, in M. Behiels (ed.), *The Meech Lake Primer: Conflicting Views*, University of Ottawa Press, Ottawa, 1990; P.J. Monahan, *Meech Lake: The Inside Story*, University of Toronto, Toronto, 1991.

services[23]. The Treaties have a variety of contents, depending on the signing tribe, but as far as we are concerned, some acts provide either the application of customary rules by provincial courts or the establishment of aboriginal courts.

The Canadian social stratification has not only been enriched by the autochthonous component, but by a plurality of communities too, constituted by new comers, who participate to the definition of the Canadian mosaic[24]. According to the 2011 census data, there are 6,775,800 foreigners living in the country, which is the 20.6% of the population and the highest percentage among G8 Countries[25]. Between 2006 and 2011, around 1,162,900 people have immigrated to Canada and they make up the 3.5% of the population; according to government data 19,932,300 of Canadian citizens descend from foreign forefathers. An increment of the visible minorities has been recorded: in 1981, 68.5% of immigrants came from extra-European countries, in 1991 the percentage increased to 78.3% and 2006 the census pointed out that 83.9% of immigrants who arrived in Canada between 2001 and 2006 did not come from Europe. The territorial area of origin is mostly Asia (58.3% of immigrants), while only 16% comes from Europe[26].

According to 2006 data, for the first time one fifth of the population is allophone (20,1%), which means that the mother tongue of these people is neither French nor English; 200 different mother tongues have been recognized among the Canadian population[27]. According to the 2011 census data, 57% of the population is English mother tongue, while 22% is French; 19.8% instead speak another vehicular language[28].

Under a constitutional point of view, this demographical phenomenon has been made visible by the formulation of sec. 27 of the Charter of Rights and Freedoms which states: «This Charter shall be interpreted in manner consistent with the preservation and enhancement of the multicultural heritage of Canadians». This clause imposes judges to interpret the catalogue of rights in a manner consistent with

[23] M. Papillon, *Adapting Federalism: Indigenous Multilevel Governance in Canada and in the United States,* in *Publius*, 42, 2, 2012, 289 ff.; C. Alcantara, J. Nelles, *Indigenous Peoples and the State in Settler Societies: Toward a More Robust Definition of Multilevel Governance*, *ivi*, 44,1, 2014, 183 ff.

[24] All data reported are available at http://www.statcan.gc.ca/daily-quotidien/071204/dq071204a-eng.htm

[25] https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm#a6

[26] The inversion of trend took place in 1971 when European immigrants amounted to 61,6%.

[27] Chinese is the third most common mother tongue – immediately behind English and French – it follows Italian, German, Punjabi, Spanish, Arabian, Tagalog and Portuguese. About the linguistic pluralism, please see: P.L. Petrillo, *Multiculturalismo e diritti linguistici in Canada*, in E. Ceccherini (ed.), *I diritti al tempo delle crisi. Nuove tecniche di ponderazione*, Editoriale scientifica, Napoli, 2018, forthcoming.

[28] http://www.12.statcan.gc.ca/census-recensement /2011/dp-pd/index-eng.cfm

the Canadian cultural heritage, which is not ascribable only to francophone or Anglophone citizens, but is polysemous and equally founding of the Canadian society[29].

The choice to introduce a provision *ad hoc* related to the matter of multiculturalism confirms the will to implement a policy of integration and sharing of the new constituent accord of 1982 for the immigrants' communities who, perhaps, have been resident for more generations in the country but did not want to abandon their original culture[30]. This is an innovative and characterizing provision of the Canadian catalogue of rights from a comparative point of view. Unlike the other provisions, whose text has been edited many times – both by parliamentary committees and constitutional conventions – the content of sec. 27 constitutes a sort of *coup de théâtre* within the joint parliamentary committee in charge of the auditions that took place between November 7 1980 and February 2 1981. The establishment of the Ministry of Multiculturalism in 1971 showed that the issue of multiculturalism was not something new in the Canadian legal system. Nonetheless, during the constituent debate this profile had not been analyzed thoroughly. There had been only a slight indirect reference during the Federal–Provincial Conference of First Ministers on the Constitution, which took place in Toronto from 14 to 18 July 1980. In this context, the final report on the contents of the Charter's Preamble suggested to put the following formulation: «we, the diverse people of Canada» in the *incipit*, and to explicitly refer to the diversity of the country, of its people and its cultures. However, the focus of the debate was mostly on the anglo-francophone dualism, and not about the heterogeneity of the Canadian society components.

It was only during the Joint Committee hearings that the need to highlight cultural diversity as a fundamental and characterizing element of the Canadian social structure emerged. Many associations kept lobbying in favour of including that reference in the Preamble, however, both the Government and the commissioners were convinced that the multicultural perspective should have been introduced in the Founding Act in order not to limit to the French and English Canadians. It is for this reason that it was

[29] About the relevance of Art. 27 of the Charter, T. Modood, *Multiculturalism. A Civic Idea*, Polity, Cambridge, 2007; D. Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups*, Hart Publishing, Oxford, 2011; G. Rolla, *The Two Souls of the Canadian Charter of Rights and Freedoms*, in *Int'l J. Canadian St.*, 36, 2007, 317 ff.; N. Olivetti Rason, *Il patrimonio culturale dei canadesi. Profili costituzionali*, in G. Rolla (ed.), *L'apporto della Corte suprema*, cit., 119 ff.; T. Groppi, *Il multiculturalismo come strumento per la costruzione dell'identità nazionale: l'esperienza del Canada,* in D. Amirante, V. Pepe (eds.), *Stato democratico e società multiculturale. Dalla tutela delle minoranze al riconoscimento delle diversità culturali*, Giappichelli, Torino, 2011, 17 ff.; V. Uberoi, *Multiculturalism and the Canadian Charter of Rights and Freedoms*, in *Pol. St.*, 57, 2009, 805 ff.; J. E. Magnet, *Interpreting Multiculturalism*, in Canadian Human Rights Foundation (ed.), *Multiculturalism and the Charter*, Carswell, Scarbourough, Ont., 1987, 145 ff.; K. Swinton, *Multiculturalism and the Canadian Diversity*, in H. P. Glenn, M. Ouellette (eds.), *La culture, la justice et le droit*, Thémis, Montréal,1994, 76 ff.; F. Raimondo *Il multiculturalismo canadese e il "caleidoscopio" della diversità religiosa*, G. Delledonne, G. Martinico, L. Pierdominici (a cura di), *Il costituzionalismo canadese a 150 anni dalla Confederazione,* cit., 179 ff.

[30] A. Cairns, *The Constitutional World We Have Lost*, in D.E. Williams (ed.) *Reconfigurations: Canadian Citizenship and Constitutional Change*, McClelland& Stewart, Toronto, 1995, 97.

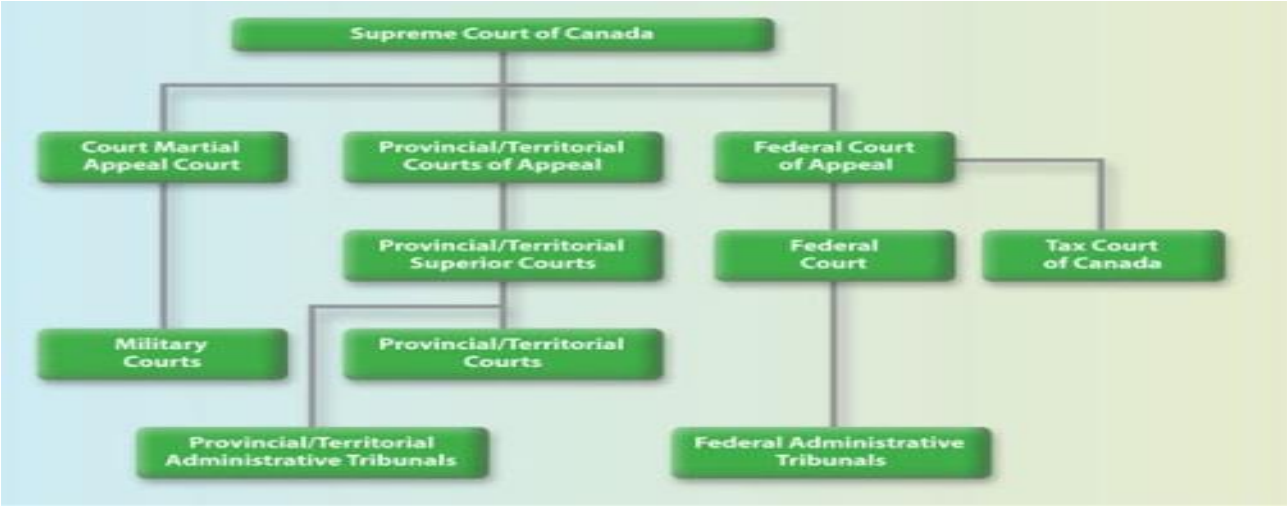
introduced as an additional provision which states: «This Charter shall be interpreted in manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.». The proposal was accepted and the version voted on the Committee was the one eventually enacted (62).

3. The judiciary organization in Canada: is there room for a reflective judiciary?

In order to examine whether or not the exercise The matter regarding whether the exercise of the judicial function in Canada may reflect the socio-cultural composition of the people, a brief inquiry on the judiciary and on the access to the judicial function[31].

Despite being a Federal State, Canada did not choose a two-tier jurisdiction. The judiciary is national but it is organized at a provincial level. The unitary choice is the result of a precise orientation carried out at the moment of the adoption of the BNA, because the Founding Fathers explicitly refused the United States two-tier model, considering it detrimental to correct and impartial application of justice. At the highest Canadian jurisdiction there is the Supreme Court, which, besides being a court of last instance, in 1982 also became a body carrying out judicial review of legislation.

The Canadian judiciary is structured at a Provincial and Territorial level. Jurisdiction, both civil and criminal, is divided into three areas: Provincial or Territorial Court, Superior Court and Court of Appeal. Provincial/Territorial Courts have limited jurisdictional functions, they rely on the Provinces or on the Territories both for the organization and for the appointments, and can be functionally divided into Youth Courts, Family Courts and small claims Courts; the other two courts (Superior Courts and Courts of appeals) are federal, albeit they are located in provincial territories.



[31] P.H. Russell, *The Judiciary in Canada: The Third Branch of Government*, McGraw-Hill Ryerson, Toronto, 1987.

Pursuant to sec. 101 of the BNA, the Federal Parliament could establish additional Federal Courts and Federal Courts of Appeal, in order to ensure a correct application of the law. The Federal Courts hear cases involving intellectual property proceedings, immigrates and refugees matters, maritime law, interprovincial and federal-provincial disputes, and civil claims against the Federal Government. The Federal Courts of Appeal hear appeals from the Federal Courts, Tax Courts, and judicial review of several federal tribunals listed in the Federal Courts Act. Finally, there is a dedicated military jurisdiction consisting of Military Courts and Court Martial Appeal Court. Also administrative tribunals are part of this framework. They deal with disputes over the application of laws and regulations regarding human rights, refugee claims, disability benefits, and employment insurance claims. Their decisions may be appealed before ordinary courts of provincial and federal level respectively.

According to sec. 101 of the Constitution Act of 1867, judges of the Supreme Court, Federal courts and Tax Courts are appointed by the General Governor, after being proposed by the Government; sec. 96 points out the same procedure of appointment for judges of the provincial superior courts, even though their establishment and organization is up to each Province. Impartiality of the function is ensured by a mandatory limit of retirement fixed at the age of 75 for federal judges (sec. 99 c. 2, Constitution Act, 1867) whilst for the other judges the retirement age is fixed by statute at either 70 or 75 depending on the court and by the substantial immovability granted to the judge, who can be removed only by the General Governor on address of both the Houses and only if the judge didn't hold office with good behaviour (sec. 99 c.1, Constitution Act, 1867)[32] . By request of the Minister of Justice, inquires on the behaviour of the judges are made by the Canadian Judicial Council, which is chaired by the Chief Justice of Canada and composed of the chief justices and associate chief justices of Canada's superior courts, the senior judges of the territorial courts, and the Chief Justice of the Court Martial Appeal Court[33].

The requirements to access the Superior and Appeal Courts both provincial and federal, are generally defined by sec. 97 of the Constitution Act, 1867, which states the requirement for judges to belong to the Provincial bars, and more specifically, by the Judges Act, 1985, which requires the candidates to have been barristers or advocatesw for at least ten years standing at the bar of any province. Alternatively, they should have exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a Province. The conditions for accessing the judiciary of provincial courts are defined, instead, by single provincial or territorial statutes.

[32] This part replicates the Act of Settlement, 1701.
[33] Judges Act and Interpretation Act, R.S.C. 1985.

Although the Canadian judiciary is a unitary national *corpus*, it is a matter of fact that traditionally governmental appointments are not put forth unilaterally by the executive branch. Actually the *iter* is only accomplished after the consultation with the provincial judicial councils. More specifically in 1988, thanks to the reform achieved by the Minister of Justice Ray Hnatyshyn of Government Mulroney, Judicial Advisory Committees were established in every Territory and Province. They are made up of five representatives of the practice law, the judiciary and the civil society, and they comment on the eligibility of the candidates[34]. In 1991 two additional components, chosen by the Minister of Justice[35], in order to create committees that better reflected the diversity of the society were added. An additional reform in 1999[36] empowered the Independent Judicial Advisory Committee of a Province or Territory to perform a preliminary screening of the applications submitted by the candidates[37].

Nowadays, each committee is composed of seven members including: a nominee from provincial or territorial law society, a nominee from provincial or territorial branch of the Canadian Bar Association, a judge appointed by the Chief Justice of the Province or by the senior judge of territory; a nominee of the Provincial Attorney General or territorial Minister of Justice; three nominees of the Government representing the "general public"[38]. The body at issue is also integrated by the Commissioner for Federal Judicial Affairs of the Federal Government, which does not have a right to vote and carries out secretarial functions, i.e. giving data and documents useful for the application screening.

This pre-selective stage may be integrated by interviews with the candidates and ends up with the evaluation of each of them as "highly recommended", "recommended" or "unable to be recommended"[39]. The list is then sent to the Government which has to make its definitive choice. If the

[34] P.H. Russell, J. Ziegel, *Federal Judicial Appointment: An Appraisal of the First Mulroney Government's Appointment and the New Judicial Advisory Committees*, in *University of Toronto L. J.*, 41, 1991, 33 ff.; S. Lawrence, *Reflections: On Judicial Diversity and Judicial Independence*, Articles & Book Chapters, Paper 369, 2010, in http://digitalcommons.osgoode.yorku.ca/scholarly_works/369; M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, Ottawa, 1995.

[35] M.L. Friedland, *Appointment, Discipline and Removal of Judges in Canada*, in H.P. Lee (ed.), *Judiciaries in Comparative Perspective*, Cambridge University Press, Cambridge, 2011, 53; P.H. Russell, *Constitutional Reform of the Judicial Branch*, in *Canadian J. Pol. Sc.*, 1984, 227 f.

[36] The reform was approved in 1998 but entered in force in 1999.

[37] Every Province and Territory has its own committee with the exception of Ontario which has three and Quebec which has two.

[38] In 2007, the Harper Government integrated committees with another member from the law enforcement community. R. Knopff, *The Politics of Reforming Judicial Appointments*, in *UNB L. J.*, 58, 2008, 45 ff.

[39] A. S. Millar, *The "New" Federal Judicial Appointments Process: The First Ten Years*, in *Alta. L. Rev.*, 2000, 38, 616 ff.; F. Gélinas, *Judicial Independence in Canada. A Critical Overview*, in A. Seibrt-Fohr (ed.), *Judicial Independence in Transition,* Springer, Heidelberg 2012, 575.

list of names does not satisfy the Government, a second evaluation is requested[40]. Once the appointment is fulfilled, the judges have to follow vocational training organized at a federal level by the National Judicial Institute, the Canadian Institute for the Administration of Justice, the Canadian Judiciary Council and the Office of the Commissioner for Federal Judicial Affairs[41].

The appointment of judges of the Provincial Courts is up to the Provincial Government, which is supported by the collaboration of provincial judicial councils, established by the provincial law, which act along the same lines as federal committees[42].

The choice of the selection process of judges, whose appointment is up to the executive, is the consequence of the British motherland's will considering it as an eligible mechanism to remove the judicial function from the influences of social communities in which the judicial bodies were located. During the debate on the BNA, no criticisms related to this option emerged, in the word of Sir Hector-Louis Langevin, who said in 1865: «by leaving these appointments to the Central Government, we are satisfied that the selection will be made from men of the highest order of qualifications, that the external and local pressure will not be so great, and the Government will be in a position to act more freely»[43].

However, the evolution of the system with the implementation of Federal Judicial Advisory Committees mitigated this option, going towards a stronger connection between the judicial activity and the territory where it would take place, because a pre-selection was carried out at the Provincial level, which selects its own jurisdictional body. On the other side, it must be considered that the advisory provincial step reduces the exclusive power of appointment of the Government, adding elements aimed at ensuring a certain balance of powers. Needless to say, there are still perplexities about the real independence of the function, in particular, because because judges, before taking their office, often held political offices; hence, their

[40] This system, introduced in 1988 had already been adopted in Quebec since 1979, when a selection committee was established. They were in charge of receiving applications and making proposal to the federal government. Regulation Respecting the Procedure for the Selection of Persons Apt for Appointment as Judges, R. Q. c T-16 r. 5, § 15.

[41] For additional information, see www.nji.ca/njii/index.

[42] Since 1979, in Quebec, the Government has benefited from the help of a selection committee Regulation Respecting the Procedure for the Selection of Persons Apt for Appointment as Judges, R. Q. c T-16 r. 5, § 15. Since 1988 Ontario has provided for the Ontario Judicial Appointments Advisory Committee, which, on 28 February 1995, through the Courts of Justices Act (1994), joined the Ontario judiciary. In order to know more about the appointment procedures on a provincial level: R. Devlin, A. W. MacKay, N. Kim, *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple"P Judiciary*, in *Alta. L. Rev.*, 38, 2000, 754 ff.; L. Sossin, *Judicial Appointment Democratic Aspiration and the Culture of Accountability*, in *UNB L. J.*, 58, 2008, 11.

[43] Sir Hector-Louis Langevin, in Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 8th Prov. Parl. Of Canada, 3d Seff. (16 February 1865) 387, quoted by C. Forcese, A. Freeman, *The Laws of Government. The Legal Foundation of Canadian Democracy*, Irwin Law, Toronto, 2011, 249.

appointment is very likely to be influence by their political belonging[44]. Therefore, some amending bills have been proposed, regarding the composition of the Advisory Committees and their functions[45]

4. Provincial and Legal Cultures Representation in the Supreme Court

A different analysis must be carried out in relation to the Supreme Court, a judicial body that underwent considerable transformation during the years.

In fact, looking at the legislative history of the British North America Act (BNA), it is possible to notice that the Founding Fathers were inclined to assign to a judicial body the task to solve the conflicts of competence between Federation and Provinces. On the one side, the U.S. model of the Supreme Court was very influential, on the other side Canadian Provinces, and especially Quebec, were reluctant to establish the Supreme Court given the representatives assemblies' loss of influence in respect of the judicial branch[46].

At the beginning, the BNA stated that conflict between Federation and Provinces would have been solved through the power of disallowance. However this choice made the central government the real hub of the system. For this reason Provinces pushed in order to pass an act introducing a court of appeal pursuant to sec. 101 BNA[47]. The Parliament was favourable to this solution, otherwise only the provincial judicial branch would have been the arbiter of the allocation of competences between Federation and Provinces. In this way the introduction of the court was interpreted like a pro-federation choice.

Therefore, the Supreme and Exchequer Act, 1875 was passed. It gave birth to the court of last resort in Canada[48]. The Bill was the result of a political bargain oriented to maintain the unity of the country and at the same time to recognize the differences between the two prevailing cultures. The body was made up of six judges, (five puisne judges and one chief justice) of whom two judges coming from Quebec. According to a custom three of them must come from Ontario and two from Maritimes Provinces. Thanks to the Act to Amend the Supreme Court Act, 1949, the court became the judge of last instance for Canada and acquired the current configuration. Its members are nine judges, including the chief

[44] P.H. Russell, *The Judiciary in Canada*, cit., 114; T. Morton (ed.), *Law, Politics and the Judicial Process in Canada*, Calgary University Press, Calgary, 2002, 121 ff.; C. Forcese, A. Freeman, *The Laws of Government. The Legal Foundation of Canadian Democracy*, Irwin Law, Toronto 2011, 251; F.C. DeCoste, *Political Corruption, Judicial Selection, and the Rule of Law*, in *Alta L. Rev.*, 38, 2000, 654 ff.

[45] For an overview of the proposals: C. Forcese, A. Freeman, *The Laws of Government*, cit., 271.

[46] J. Smith, *The Origins of Judicial Review in Canada*, in T. Morton (ed.), *Law, Politics, and the Judicial Process*, cit., 433 ff.

[47] Sec. 101 BNA: «The Parliament of Canada may, notwithstanding in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada (…)».

[48] I. Bushnell, *Captive Court*, McGill University Press, Montréal, 1992, 4 ff. Until 1949, Privy Council will be the last judicial instance for the Canadian Dominion, P.W. Hogg, *Canada: From Privy Council to Supreme Court,* in J. Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford University Press, New York, 2006, 55 ff.

justice, three of whom are entitled to Quebec; whilst a customary source provides that three of them have to come from Ontario, the other two judges from Atlantic Provinces and eventually two from Western Provinces. The appointments are made by the Governor General on behalf of the Minister of Justice, while the Chief Justice is appointed by the Prime Minister and according to the same custom he or she must be alternatively Anglophone or Francophone.

Differently from the appointment of members of other judicial bodies, the system of appointment to the Supreme Court still 4raises some criticism in relation to its effective capacity to help the government to select the most suitable candidates to this remarkable function. In fact, this method was criticized by legal scholars and politicians who claimed that also other state authorities should be vested with the power to appoint the Supreme Court judges[49].

The ongoing practice did not give birth to a common custom. Indeed, several solutions were followed. There have been not only unilateral appointments, but also designations that involved *ad hoc* parliamentary committees which included members of opposition parties who heard the candidate selected by the Government or who enlisted proper candidates presented to the Minister of Justice after consultation of judicial branch and of advocates of the interested Province[50].

According to several pressure groups it would be advantageous to pass a bill which provides the popular election rather than governmental appointment[51]. For this purpose, a Standing Committee on Justice to Study the Process by which the Judges are appointed to courts of appeal and the Supreme Court of Canada was established in 2003. In the Committee's report, the majoritarian Liberal Party excluded the

[49] A. M. Dodeck, *Reforming the Supreme Court Appointment Process, 2004-2014: A Ten Year Democratic Audit*, in *Supreme Court L. Rev.*, 2014, 112 ff.

[50] M.A. Simonelli, Does judicial appointment process matter? *Il caso della Corte suprema canadese*, in *federalismi.it*, 5, 2016; R. Cairns Way, *Deliberate Disregard: Judicial Appointments under the Harper Government*, in *Supreme Court L. Rev.*, 67, 2014, 43 ff.; N. Vizioli, *Le nomine dei giudici della Corte suprema del Canada*, in M. Calamo Specchia (ed.), *Le Corti costituzionali: composizione, indipendenza, legittimazione*, Giappichelli, Torino, 2011, 155 ff.; J. Ziegel, *Séléction au merite et democratisation des nominations à la Cour Supreme du Canada*, in *Choix*, 5, 2, 1999, 6; D. Songer, *The Transformation of the Supreme Court of Canada*, University of Toronto Press, Toronto, 2008, 14 f.; D. White, *Political Accountability in Appointments to the Supreme Court of Canada*, in *Constitutional Forum Const.*, 25, 3, 2016, 109 ff.; G. Delledonne, *La designazione dei giudici della Corte suprema: osservazioni comparatistiche*, in G. Delledonne, G. Martinico, L. Pierdominici (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione,* cit., 125 ff. On July 14 2017, in order to substitute the Chief Justice Beverly MacLachlin, the Premier Trudeau announced the constitution of an independent and non-partisan Advisory Board, which will have the task of identifying suitable candidates, submitting a short list of three to five individuals for consideration by the Prime Minister. This special system of appointment is based on openness, transparency and accountability. On December 18, 2017, the Prime Minister announced the appointment of the Honourable Sheilah Martin to the Supreme Court of Canada .

[51] In 2002, Environics pool reported two-thirds of Canadians favour the popular election of the Supreme Court Justices: F. L. Morton, *Judicial Appointments in Post-Charter Canada: A System in Transition,* in K. Malleson, P.H. Russell (eds.), *Appointing Judges in an Age of Judicial Power*, University of Toronto Press Incorporated, Toronto- Buffalo-London, 2006, 56.

hypothesis of parliamentary hearings like in the U.S.A. or public interviews like in South Africa or parliamentary elections. It showed a certain favour for the obligation of the Minister of Justice to present himself to the Houses in order to justify and to defend his appointments and for the creation of a committee with the task to select a list made up of three to five candidates among whom the Minister would have had to choose one. After the selection, the Minister and the committee must be would heard in the House of Commons. The committee had to represent as many interests as possible and to include federal and provincial government ministers, members of the judicial branch, advocates and people from civil society.

In contrast, the Bloc Quebecois aspired to the provincial appointment. On the contrary, the Conservative Party opted for a parliamentary election whilst the New Democrats were favourable to parliamentary hearing of the Minister of Justice but before the final appointment.

The aim was to reduce the overwhelming power of government in the appointment process in order to avoid the danger of appointments made on the basis of political affinity with the government in charge rather than due to professional skills, thus impinging on autonomy and impartiality of judges[52].

In order to reduce the relationship between governmental majority and judicial branch – as noted above – proposals are oriented to a greater involvement of the elective bodies. However, it is clear that a counter-majoritarian role can be assured only if the vote regarding the individual designation, either *ante* or *post*, is assumed through qualified majority so as to involve the opposition parties. Otherwise an absolute or relative majority could propose again the political orientation of the majority, without increasing the legitimacy of the Supreme Court.

Shifting the appointment process within the parliamentarian context could be a reply to the critiques about the lack of legitimization, which sometimes are raised against the Supreme Court. Moreover, such a choice could better safeguard the principle of sovereignty of Parliament which constitutes a fundamental principle of the Canadian legal system. This issue became very relevant after the enactment of sec. 52 of the Constitution Act, 1982 that poses the Act at the top of the system of sources of law, while converting the Supreme Court into a constitutional judge. As noted above, legal scholars and politicians were sceptical about the prospect of creating an authority deprived of democratic legitimization which could strike down act of Parliaments, so to give rise to an era of judicial activism rather far from traditional Canadian history[53].

[52] The prejudice was fired by the fact that before 1949, more than 50% of judges had served as member of legislative assemblies.

[53] F.L. Morton, R. Knopff, *Charter Politics*, Nelson Canada, Scarborough, 1992; Id., *The Charter Revolution and the Court Party*, Broadview Press, Peterborough, 2000, 149; C.P. Manfredi, *Judicial Power and the Charter: Canada and the*

That is a very debated topic among Canadian legal scholars who believe that the judicial function can limit the autonomy of elected bodies. At the time of the enactment of the Charter of Rights and Freedoms, especially the Provinces argued that the codification of rights in a constitutional document and consequently its configuration as a parameter of constitutional review were inconsistent with the parliamentary system[54]. The proceedings of the Joint Parliamentary Committee, which have taken place before the final enactment of the Charter of Rights and Freedoms, shed light on the risk that the function of Parliament and so of the supremacy of its acts, that is to say of statutory law, could be eroded by the judicial power.

The words of Sterling Lyon – Manitoba Prime Minister are a very good and striking example in this sense. He underlined that the guarantee of rights could be achieved more successfully through the elected assemblies rather than by «men albeit learned in the law, who are not necessary aware of everyday concerns of Canadians»[55]. In sum, the introduction of judicial review was perceived as undemocratic[56], apart from the fact that the adoption of the Charter of Rights and Freedoms was an advancement in the protection of minorities, that wouldn't have reached easily the majority in the elected assemblies[57].

A scholar underlined that □all of these victories for underprivileged individuals and groups enhance, rather than undermine, the democratic character of our society. The fact that they were won in the courts rather than in the legislative arena does not make them less democratic»[58].

Paradox of Liberal Constitutionalism, 2d edition, Oxford University Press, Toronto, 2001; N. Olivetti Rason, *La giurisprudenza della Corte suprema del Canada*, in *Giur. cost.*, 2003, 3238 ff.; J.B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*, University of British Columbia, Vancouver, 2005; B.L. Strayer, *The Canadian Constitution and the Courts*, Butterworths, Toronto, 1983, 35 ff.

54 I. Cotler, *Can the Center Hold? Federalism and Rights in Canada*, in E. Katz, G.A. Tarr (eds.), *Federalism and Rights*, Rothwan and Littlefield Publishers Inc., Lanham, 1996, 174; F.L. Morton, R. Knopff, *The Charter Revolution*, cit., 149.

55 Several Provincial Premiers showed their hostility towards the proposal of change of the Supreme Court in a judicial review court: A. Blakeney, the Premier of Saskatchewan and member of the New Democratic Party was worried about the possibility that social laws enacted could be quashed by the Supreme Court. E. McWhinney, *Dilemmas of Judicial Law-Making*, in P. Thibault, B. Pellettier, L. Perret (eds.), *Essays in Honour of Gérald A. Beaudoin*, cit., 326, ft. 47.

56 F. L. Morton, R. Knopff, *The Charter Revolution*, cit., 150; Id. (ed.), *Law, Politics and the Judicial Process*, cit., 571 f.; S. Gambino, *Federalismo, diritti, corti. Riflessioni introduttive a partire dall'esperienza canadese*, in S. Gambino, C. Amirante (eds.), *Il Canada. Un laboratorio costituzionale*, Cedam, Padova, 2000, 33 ff.; R. Sharpe, *Judicial Activism: The Debate in Canada*, in C. Casonato (ed.), *The Protection of Fundamental Rights in Europe: Lessons from Canada*, Università di Trento, Trento, 2004, 11 ff.; C. Casonato, *Judges and Rights: Activism, Restraints, and Legitimacy*, in Id. (ed.), *The Protection of Fundamental rights*, cit., 27 ff.

57 P.W. Hogg, *The Charter Revolution: Is It Undemocratic?*, in *Constitutional Forum*, 12, 2001-2002, 2.

58 R. Sigurdson, *Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics*, in C. Leuprecht, P.H. Russell (eds.), *Essential Readings in Canadian Constitutional Politics*, University of Toronto Press, Toronto, 2011, 402.

Concerns seem to be diminished – albeit not disappeared – for several reasons. Firstly, prominent authors have introduced the idea of a dialogue between courts and legislature[59], by building a collaborative relationship rather than a conflicting one. Secondly the Supreme Court have showed deference to the Legislative power, acting with self-restraint and and modulating the retroactivity of decision invalidating laws concerning very delicate matters[60]. Lastly the judicial body has acquired legitimization from the public opinion[61].

6. The judicial power as reflection of pluralism of Canadian society

The reflective judiciary does not necessarily imply a proportional representation of the ethnic, religious, racial and social groups of the Canadian community but it is aimed at promoting their participation to the judicial activity.

This aspiration to manifest the diversity in judicial bodies is spreading. We can notice that sec. 2.13 of the Universal Declaration on the independence of judiciary power of Montréal in 1983 provides that: «the process and standards of judicial selection shall give due consideration to ensuring a fair reflection of the judiciary of the society in all its aspects»[62]. In the same wake, the International Bar Association Code on Minimum Standards of Judicial Independence states that «The process and standards of judicial selection must insure fair representation of all social classes, ethnic and religious groups, ideological inclinations and where appropriate, geographical regions. The representation should be fit and not numerically or accurately proportional[63]».

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[59] The reference is to: P.W. Hogg. A.A. Bushell, *The Charter Dialogue between Court and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All*), in *Osgoode Hall L. J.*, 35, 1997, 75 ff.; P.W. Hogg, A.A. Bushell, W.K. Wright, *Charter Dialogue Revisited – or "Much Ado About Metaphors"*, *ivi*, 45, 1, 2007, 1 ff.

[60] A case in point can be the decision Carter v. Canada (Attorney General), [2015] 1 S.C.R. 331, 2015 SCC 5 about the prohibition against physician-assisted dying, where the Court suspended its ruling for 12 months. See U. Adamo, *Costituzione e fine vita*, Cedam, Padova, 181 ff.; E. Stefanelli, *La Corte suprema del Canada, il suicidio assistito, l'uso dei precedenti. Brevi note a margine del caso* Carter v. Canada (Attorney General), 2015 SCC, in *federalismi.it*, 3 luglio 2015; C. Casonato, M. Tomasi, *Constitutional Dialogues in Canada. Corte Suprema e parlamento sulle questioni di fine vita*, in C. Murgia (ed.), *Scritti in onore di Sara Volterra*, Giappichelli, Torino, 2017, 191 ff.; S. Rodriquez, *Tecniche di bilanciamento tra diritto alla vita e libertà personale: l'attivismo della Corte canadese e il dialogo con i giudici di Strasburgo*, in E. Ceccherini (ed.), *I diritti al tempo delle crisi.*,cit.

[61] The data of Angus Reid Institute show that 74% of Canadians declares their satisfaction for the decisions of the Supreme Court and that 61% of Canadians trust in the Supreme Court in parallel only 28% of the citizens trusts in the Parliament, see www.angusreid.org (15 August 2015).

[62] S. Shetreet, *The Doctrinal Reasoning for More Women Judges: The Principle of Reflective Judiciary*, in Id (ed.), *Women in Law*, Kluwer, London, Cambridge, 1998, 190; Id., *The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration*, in S. Shetreet, J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate*, Martinus Nijhoff Publishers, Dordrecht, 1985, 393 ff. The statement was strongly supported by African delegation where the topic of ethnic and tribal belonging is very relevant.

[63] S. Shetreet, *The Doctrinal Reasoning*, cit., 189.

In the framework of the OCSE either the Declaration of Copenaghen (1990) or of Lund (1992) put the attention to the issue of participation of minorities in the administration of justice. Sec. 30 of the first one rules that: «The participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary». At the same time the latter points out, in the chapter related to the participation in decision-making (point six), that: «States should ensure that opportunities exist for minorities to have an effective voice at the level of the central government, including through special arrangements as necessary. These may include, depending upon the circumstances: special representation of national minorities, for example, (…) formal or informal understandings for allocating to members of national minorities (…) seats on the supreme or constitutional court or lower courts».

From this perspective, Canada has been a forerunner legal system. In fact, from the entry into force of the Supreme Court Act, 1875 onwards a legal quota for francophone judges has been reserved, leaving to the customary law the indication of the other seats which are reserved to the Provinces.

However, a greater attention towards the diversity in the judicial branch has moved to the lower courts, becoming a meaningful issue at political level. In 2016, the Minister of Justice declared that: «We know that our country is stronger, and our judicial system more effective, when our judges reflect Canada's diversity. As promised, we have filled the urgent judicial vacancies by drawing on a list of recommended candidates who are of the highest calibre and who are as diverse as Canada»[64].

It's obvious that the purpose of creating the judiciary as a mirror of the socio-cultural diversity is one of the most relevant aim of the Government, since pluralism existing in the society has considered as a *quid pluris* to be enhanced, even in a field in which the function is exercised in the general interest of the community and not in accordance with a specific group interest. The extension of the mirror representation to all level of judiciary power is encompassed also in the guidelines of the Provincial Judicial Advisory Committees for the proposals of the judicial appointments[65].

[64] The Honourable Jody Wilson-Raybould Minister of Justice and Attorney General of Canada http://news.gc.ca/web/article-en.do?nid=1086309 22th of July 2016.

[65] «Along with this assessment of professional competence and overall merit, Committees must strive to create a pool of candidates that is gender-balanced and reflective of the diversity of each jurisdiction, including Indigenous peoples, persons with disabilities, and members of linguistic, ethnic and other minority communities, including those whose members' gender identity or sexual orientation differs from that of the majority. In doing so, Committees should give due consideration to all legal experience, including that outside of mainstream legal practice. Broad consultations by the Committees, and community involvement through these consultations are essential elements of the process». http://www.fja-cmf.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html

The attention to this debate has increased in the last years and from a chronological point of view has involved the gender matter. It is worth to remember that only a strong pressure held by the National Action Committee on the Status of Women brought to the result of the appointment of Bertha Wilson, in 1982, as the first woman in the Supreme Court, after having been appointed as the first woman of the Court of Appeal of Ontario in 1975.

In relation to the gender issue, an increase of female appointments in the federal courts can be seen as well: in the '80s, only 3% of judges were women, in 1990 the percentage increased to 10% and became 25% in 2002. The Premier Brian Mulroney, in his first mandate between 1984 and 1988, appointed 17% of women. Among all, the appointments in the Supreme Court of Claire L'Hereux Dubé in 1987 and Beverly McLachlin 1988 (who were appointed Chief Justice by Jean Chretien in 2000) must be included. Jean Chretien has appointed the first justice in the Supreme Court of Ukrainian origins, John Sopinka and the first of Italian descendent, Frank Iacobucci too[66].

At the Supreme Court level, it seems that a customary norm exists, providing that there have to be three women among its members, while on the contrary the representation of the other social components is weaker. However several signals show a shift. Indeed, Justice Larry La Forme was appointed as the first aboriginal people to the Court of Appeal of Ontario in 2004. Justice Maurice Charles has been the first black judge called to the Provincial Court of Ontario in 1969 and Justice Michael Tulloch was appointed to the Court of Appeal of Ontario in 2012.

At the Provincial level, the Ontario Judicial Appointments Advisory Committee, which was established in 1989, has promoted the appointments of women in its first six years of function, thus increasing the amount from 3% to 22% and selecting three justices belonging to First Nations, ten to visible minorities and even eight to French Canadians; Ontario was the first Province to appoint the first aboriginal, the first Eastern Asian and the first black woman judge[67].

Therefore, we can conclude that there is an increasing trend towards the incorporation, in the judiciary power of members identified on the basis of socio-cultural and ethnic origins. This is a trend that is confirmed at the comparative level[68]. Nevertheless it is necessary to give the right weight to the specific groups in the Canadian mosaic. Furthermore, it seems important to understand whether *ad hoc* judges carry out their function of legitimacy of the judicial body or if they influence the body.

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66 L. Morton, *Judicial Appointments in Post-Charter Canada*, cit., 59 f.

67 L. Morton, *Judicial Appointments in Post-Charter Canada*, cit., 70.

68 K. Nobbs, *International Benchmarks a Review of Minority Participation in the Judiciary*, in M. Weller (ed.), *Political Participation of Minorities*, OUP, Oxford, 2010, 589 ff.

Starting from the first point, it is undisputable that the Canadian legal system relies upon a historic diarchy composed of Anglophone and Francophone communities. We have already explained the underlying reason of this union, given that, from the one side the Quebeckers claimed the recognition of the status of distinct society and, from the other side, the Anglophones made efforts to incorporate them into the institutional structure. The position of French origin citizens can not be assimilated to the condition of an ordinary linguistic minority, because Canadian history and law recognize to Quebeckers the *status* of Founding People to the same extent as the Anglophone community. Quebec constitutes the core of the Canadian Federation. This is an undeniable element from the ancient time of its foundation. The debate for the approval of the British North America Act showed this point clearly.

We could mention the words of Hector Langevin who stated in Parliament that French Canadians were "separate people" and was afraid of the withdraw of French customs, uses and law. He was not the only deputy who even if favourable to the federation project expressed his concern about the possible assimilation of French Canadians to the predominant Anglophone culture.

The strong integrational compact explains the reasons for the creation of a unique and united Federation, which characterizes the institutional architecture of Canada, and has been reiterated throughout times by the Supreme Court. Very often the latter behaves as a guarantor of the francophone peculiarity in the Federation both in Quebec and outside of its borders.

In an important leading case which dates back to the '30s, the Court ruled: «Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies»[69].

The guarantee of francophone culture in Canada has been recently restated in the reference for the Senate[70] where about the question concerning the removal of the real property requirement according to

[69] *re The Regulation and Control of Aeronautics* (1932) A. C. 54 at 70. On this point, M. D. Behiels, *Canada's Francophone Minority Communities. Constitutional Renewal and the Winning of School Governance*, McGill-Queen's Press, Montréal, 2004, X.

[70] Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.C.R. 704. On this reference see: P. E. Mendes, *Constitutional Options after the Supreme Court's Decision in Reference Re Senate Reform: Restoring Trust and Credibility through Senate Reform*, in *NJCL*, 35, 1, 2015, 85 ff.; J. I. Colón-Ríos, A. C. Hutchinson, *Constitutionalizing the Senate: A Modest Democratic Proposal*, in *McGill L. J.*, 60, 4, 2014, 599 ff.; A. Dodeck, *The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism*, *ibidem*, 623 ff.; R. Albert, *Constitutional Amendment by Stealth*, *ibidem*, 673 ff.; Y. Danwood,

which Senators should own land worth at least $ 4000 in the Province for which they are appointed. This requirement would violate sec. 23(3) Constitution Act, 1987 which allows Quebec senators not to reside in the electoral divisions for which they have been appointed. This provision constitutes an exception to the general rule applied to Quebec senators exclusively, who must have property in Quebec, albeit without being compelled to have their residence in the Province. On this issue, the Court pointed out the special arrangement reserved to Quebeckers and ruled that the full repeal of the property requirement embodied in sec. 23(3) requires the consent of legislative assembly of Quebec, under the special arrangements procedure. This amending formula recognizes Quebec's veto power of and the privileged position of the Province in the constitutional framework.

The relevance of the Quebec position in the constitutional compact which gave the birth to the Federation was addressed in another reference of 2014 concerning the eligibility requirements for Quebec appointments[71]. The reference is subdivided into two questions: the first one affects the fact whether a person who was at any time an advocate of at least ten years standing at the Barreau du Quebec was qualified for appointment under sec. 6 of the Supreme Court Act, 1985 given that the selection should be made «from among the advocates of that Province»; the second one refers to the possibility for the Parliament to enact ordinary statutes in order to interpret the requirement of sec. 6 of the Supreme Court Act, 1875.

The Court's majority opinion excluded that the general requirements encompassed in sec. 5 - which reserved the appointment to current judges of a superior court of a province, including the court of appeal, to former judges of such a court, to current barristers or advocates standing at the bar of the Province for at least 10 years - and to former barristers or advocates standing at least 10 years can be extended to the judges coming from Quebec.

The Senate Reference. Constitutional Change and Democracy, *ibidem*, 737 ff.; C. Mathieu, P. Taillon, *Le fédéralisme comme principe matriciel dans l'interpretation de la procedure de modification constitutionnelle*, *ibidem*, 763 ff.; N. Karazivan, *De la structure constitutionnelle dans le Renvoi relative au Sénat: vers une gestalt constitutionnelle?, ibidem*, 793 ff.; K. Glover, *The Supreme Court in a Pluralistic World: Four Readings of a Reference*, *ibidem*, 839 ff.; E. Macfarlane, *Unsteady Architecture: Ambiguity, the Senate Reference, and the Future of Constitutional Amendment in Canada*, *ibidem*, 883 ff.; C. Cornell, "*Reference re Senate Reform and the Supreme Court of Canada's Clarification of the Constitutional Procedure for Reforming the Canadian Parliament's Upper House*, in *Law & Bus. Rev. Am.*, 20, 2014, 451; E. Arban, *Current trends in Canadian federalism. Centripetal and centrifugal forces in Canadian division of powers*, in http://www.amministrazioneincammino.luiff.it/app/uploads/2010/08/Current-trends-in-Canadian-federalism1.pdf

[71] Reference re Supreme Court Act, ff. 5 and 6, 2014 SCC 21, [2014] 1 S.C.R. 433. The reference was motivated by the appointment of Justice Nadon, a supernumerary judge of the Federal Court of Appeal and formerly, but not at the time of this appointment, a member of the Quebec bar of more ten years standings. His appointment was challenged before the Federal Court of Canada.

The reason is included in sec. 6 of the same Act, which in its English version provided that at least three of the judges must be appointed among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or among the advocates of that Province. Sec. 6 narrows the array from four kinds of people who are eligible under sec. 5 to two groups who are eligible under sec. 6. The explanation of this differentiation is based on the need to assure to the Court the presence of civil law experts and to represent legal tradition and social values from Quebec in order to maintain Quebec's confidence in the supreme judicial body.

A distinct regulation is the result of the historic bargain which gave birth to the Act regulating the institution of the Supreme Court[72]. It enshrines a symbolic significance and not only a technical one; it assures the permanent linkage between the judges and the French-Canadian society.

In the reference, the legislative history of the Act demonstrates that the provision of *ad hoc* seats for judges coming from Quebec was aimed at implementing the trust in the new judicial body by Quebeckers. The analysis of the Act helps understand that Quebec representation is not only linked to the necessity to have civil law skills but also constitutes a fundamental milestone of the constituent compromise that has led to the adoption of the British North America Act, which reshaped the Canadian dominion, so to turning it into a federal state.

The conclusions of the majority opinion were reached by adopting a literal and purposive analysis. The literal meaning was taken into account because the text of sec. 6 expressly requires the current membership of the Barreau du Quebec or of the Court of Appeal or of the Superior Court of Quebec while derogating from sec. 5 of the Act. The purpose of the provision was considered as well, because this piece of legislation represents the historic compromise that *brought* to Federation. It provides a French-Canadian quota of justices so as the court could have civil law training and could be trusted from by Quebec citizens, while recognizing the special status of their Province. The enactment of an *ad ho*c provision for Quebeckers permitted to overcome all the criticism coming from provincial representatives and to increase the confidence in the new body.

In respect of the second question affecting the possibility for an ordinary statute to extend the general requirements embodied in sec. 5 and in sec. 6 of the Act, the court deemed that issues related to the Supreme Court, after the Patriation, have been attracted in the domain of constitutional sources of law specifically in Part V of the Constitution Act, 1982. Therefore any law amending the Supreme Court Act, 1875 must have constitutional rank although the Act regulating the composition and function of the

[72] P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Information Canada, Ottawa, 1969.

Supreme Court was an ordinary statute. At the moment the judicial authority is a constitutional body and it said that its regulation was upgraded to constitutional level.

Even in this case, the genesis and context of the Act explains the characteristic of the accommodation between the two founding peoples who want to maintain the bijuralism of the Federation. This goal was present also in previous agreements reached before the enactment of the Constitution Act, 1982. For instance, in the April Accord, 1981, in which there is a confirmation of the intention to limit Parliament's unilateral authority to reform the Supreme Court so as to make it more difficult to modify the court's composition. Indeed, the amending formula for this part requires the unanimity and so the Quebec's representation was given special constitutional protection.

The reference of the court *de facto* renders unalterable the constituent covenant that has institutionalized the diarchy between Anglophones and Francophones. Such agreement implies the duty to allocate *ad hoc* seats for Quebec in order to strengthen the link between *societas* of the Province and the federal institution. In fact, the primary goal does not seem to be the need to defend the interests of Quebec through the Francophone representation but rather to legitimate the judgments of the court from Quebec, due to its specific representation. In other words, the outcomes of decisions less characterized by a pro-provincial approach (*rectius* pro-Quebec) would be legitimated because the judicial body incorporates a francophone representation and for this reason these decisions can be more easily endorsed[73].

Moreover, indicating the current professional activity - as a requirement for the appointment to the Supreme Court - guarantees the presence of skills in civil law, which is a fundamental feature of the Quebec identity. In this regard, the Honourable Justice Piere-Basile Mignaut said: «for the people of Quebec, our civil law is our most precious asset after our religion and language. It is a legacy we have received from our fathers, to be maintained and passed on to future generations. It is our duty and responsibility to honour and preserve our civil law, to ensure the purity of its doctrine and keep it safe from any influence that would prevent it from being what it should be»[74].

This framework downscales the strength of the view according to which the francophone representation carries out its function of adjudication in a partial way and uncritically pro-Quebec. This conclusion could

[73] R. Schertzer, *Quebec Justices as Quebec Representatives: National Minority Representation and the Supreme Court*, in *Publius*, 46, 4, 2016, 539 ff.; P. Patenaude, *Le Québec et la Cour suprême*, in *Alta L. Rev.*, 14, 1976, 138 ff.

[74] P.-B. Mignault, *L'avenir de notre droit civil*, in *Revue de droit*, 56, 1922, 116, the quotation comes from S. Morin, *Quebec: First Impressions Can Be Misleading*, in S. Farranm, E. Örücü, S.P. Donlan (eds.), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended*, Ashgate, Dorchester, 2014, 169 always concerning the same topic: S. Normand, *Un thème dominant de la pensée juridique traditionnelle au Québec: la sauvegarde de l'integrité du droit civil*, in *McGill L. J.*, 32, 1987, 559 ff.; Id., *Le code civil et l'identité*, in S. Lorie, N. Kasirer, J.-G. Belley (eds.), *Du Code Civil du Québec: contribution à l'histoire immédiate d'une recodification réussie*, Editions Themis, Montréal, 2005, 619 ff.; W. Tettley, *Mixed Jurisdictions. Common Law vs. Civil Law (codified and Uncodified),* in *Louisiana Law Review*, 60, 2000, 677 ff.

affect all of the other components of the court who, in any case, represent other provinces. In other terms, a francophone "faction" is not present in the Supreme Court and few dissenting opinions were delivered by the three French Canadian Justices in juxtaposition with the Anglophone majority.

Three exceptions to this general statement can be mentioned concerning cases that involve relevant matters: Public Service Board v. Dionne[75] and Capital Cities Communications Inc. v. Canadian Radio Television Commission[76] relating culture and communication and Quebec A.G. v. Canada[77]. The first two decisions were delivered by the Supreme Court in 1978 and reaffirmed the full federal competence in the matter of television broadcasting either cable or wireless, leaving apart the legislative intervention of Provincial Legislatures.

These decisions are meaningful due to all of the three French Canadians justices, whose opinions were strongly contrary to the majority opinion, stating that the cable tv matter was reserved to the Provinces. The dissenting judges did not agree with the idea according to which since wireless broadcasting is a competence of the Federation, then, due to some attractive *vis* even the cable communication should be regulated by federal level. In the dissenting opinions, this interpretation was deemed to be in contrast with the sec. 92 of BNA[78], which would cover this kind of communication because it involves the landline telephone communication. The access of the Province to this competence - beyond the economic interest - would have a strategic importance to build and maintain the distinctive values of francophone culture in a perspective of cultural protectionism[79]. In consideration of the relevance of the issue, harsh comments were addressed against the opinion of the court, which was blamed of ignoring claims and requests made by Provinces. This event compelled Chief Justice Bora Laskin to say that: «Judges are completely independent of any influences in their decisions (…) the source of our appointment in no way qualifies our independence. We have no duty to governments, no duty to litigants, except to apply the law according to our ability. I do not represent the federal government nor do I represent Ontario which is my home province I represent no one but myself. (…) I know of no better way to subvert our

[75] Public Service Board et al. v. Dionne et al., [1978] 2 S.C.R. 191.
[76] Capital Cities Communications Inc. v. Canadian Radio Television Commission [1978] 2 S.C.R. 141.
[77] Quebec A.G. v. Canada, [2015] 1 S.C.R. 693, 2015 SCC 14.
[78] Sec. 92 (10) Local Works and Undertakings other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Roads, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.
[79] On the topic of building a national identity through medias, see P.K. Kresl, *Come formare una cultura nazionale in un mondo senza confini*, in G. Rolla (ed.), *Lo sviluppo dei diritti fondamentali in Canada*, Giuffrè, Milano, 2000, 277 ff.; K. Ross, P. Playdon (eds.), *Black Marks: Ethnic Minority and Media*, Ashgate, London, 2001, 33 ff.; B. Larsen, T. Tufte, *Is There a Ritual Going On? Exploring the Social Uses of the Media*, in I. Bandebjerg, H.K. Hastrup (eds.), *Sekvens, Yearbook 1999*: *Intertextuality and Visual Media*, University of Copenaghen, Copenaghen, 1999, 181 f.

judicial system, no better way to destroy it than to give currency to the view that the Judiciary must be a representative agency»[80].

Nevertheless, friction factors relying upon provincial claims have decreased within the Supreme Court especially after the enactment of the Charter of Rights and Freedoms in 1982. Many commentators agree that the shift of function of the Supreme Court has changed its approach to legal reasoning too, in the sense that it aims at enhancing a cooperative federalism, rather than a conflicting one[81]. In addition, data show that a centripetal movement of Canadian federalism is taking place[82] and that there is a reinforcement of collegial decision held at the unanimity[83]. This statement is supported by an element: in cases in which matters that are very relevant to Quebec are debated, French Canadians justices did not adopt francophone sectarianism or embrace positions very close to separatist attitudes. On the contrary, opinions were delivered at unanimity and they witnessed that the judicial body generally showed unitary opinions lacking of nationalistic or partisan shades. Given this, bijuralism and territorial cleavages of the court do not hinder the creation of the κοινή which has been sometimes challenged by political institutions and civil society.

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[80] The Ottawa journal 23 1978 in https://www.newspapers.com/title_1188/the_ottawa_journal/

[81] E. Brouillet, *The Supreme Court of Canada: The Concept of Cooperative Federalism and its Effects on the Balance of Power,* in N. Ayrones, J. Kincaid (eds.), *Courts in Federal Countries: Federalists or Unitarists*, University of Toronto Press, Toronto, 2017; C. Mathieu, P. Taillon, *Le fédéralisme comme principe matriciel*, cit., 763 ff.; J. Leclair, *The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity*, in J.-F- Gaudreault-Des Biens, F. Gélinas (eds.), *Le fédéralisme dans tous les États. Gouvernance, identité et methodologie*, Bruylant-Éditions Yvon Blais, Bruxelles-Cowansville, 2005, 383 f.; G.-A. Beaudoin, *La Cour suprême et le fédéralisme canadien*, in E. Orban (ed.), *Fédéralisme et cours suprêmes*, Bruylant-Presses de l'Université de Montréal, Bruxelles-Montréal, 1991, 81 ff.; G. Delledonne, *L'omogeneità costituzionale negli ordinamenti composti*, Editoriale scientifica, Napoli, 2017, 152 ff. The web site of the Supreme Court regarding 2006-2016 data proves this statement.

[81] J.B. Kelly, *Judging the Judges; The Decline of Dissent in the Supreme Court's Charter Decisions*, in F.L. Morton (ed.), *Law, Politics*, cit., 560 ff.; D. Songer, *The Transformation of the Supreme Court*, cit., 203 f.; C. L'Hereux-Dubé, *The Dissenting Opinion: Voice of the Future*, in *Osgoode Hall L. J.*, 2000, 496 ff.

[82] F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms*, in *Can. J. Pol. Sc.*, 20, 1987, 44; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Wall and Thompson, Toronto,1989, 36; E. Richez, *Losing Relevance: Quebec and the Constitutional Politics of Language*, in *Osgoode Hall L. J.*, 52, 1, 2014, 191 ff.; E. Brouillet, *The Supreme Court of Canada*:, cit., 142; J. Woehrling, The *Canadian Charter of Rights and Freedoms and Its Consequences for Political and Democratic Life and the Federal System,* in A.-G. Gagnon (ed.), *Contemporary Federalism*, University of Toronto Press, Toronto, 2009, 235; A. Lajoie, *Garantir l'intégration des valeurs minoritaires dans le droit: une entreprise irréalisable par la voie structurelle*, in J.-F- Gaudreault-Des Biens, F. Gélinas (eds.), *Le fédéralisme dans tous les États.*, cit., 377 f.; B. Pellettier, *El impacto de la Carta canadiense de derechos y libertades sobre la particularidad quebequesa*, in E. Mitjans, J. Mª Castellà Andreu (eds.), *Derechos y libertades en Canadá*, Atelier, Barcelona, 2005, 69 ff.

[83] E. Mac Farlane, *Consensus and Unanimity at the Supreme Court of Canada*, in *Supreme Court L. Rev.*, 52, 2010, 379 ff.; D. Songer, J. Siripurapu, *The Unanimous Cases of the Supreme Court of Canada as Test of Attitudinal Model*, in *Can. J. Pol. Sc.*, 42, 2009, 87 ff.; McCormick, *Bias, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada*, in *Osgoode Hall L. J.*, 42, 2004,107 ff.; Id., *The Choral Court: Separate Concurrence and the McLachlin Court 2000-2004,* in *Ottawa L. Rev.*, 37, 1, 2005, 37; C. L'Hereux-Dubé, *The Length and Plurality of Supreme Court of Canada Decisions*, in *Alta L. Rev.*, 28, 3, 1990, 586 ff.

In recent years, it has not been possible to single out a francophone block which counterposes against the rest of Canada representatives with the exception of the cease abovementioned: Quebec A. G. v. Canada. In fact, some reflections arise from a recent case where three justices from Quebec delivered a dissenting opinion, jointly with Justice Abella. The Province of Quebec challenged the constitutionality of sec. 29 of the Ending Long Gun Register, which imposed the destruction of all records hosted in a data base, which contained all the certificates for every arm acquired, transferred or possessed in Canada. Such database had been created by all Provinces effort. The Federal Act had been enacted by relying on the Federation's competence on criminal jurisdiction but Quebec objected it had the right to obtain the data regarding the territory of Quebec. The Attorney General of Quebec pointed out that the evolution of Canadian federalism is favorable to a flexible approach on the division of competences and the case should be solved through the principle of cooperative federalism. In addition, the federal act can affect a specific provincial matter, which is property and civil rights. Therefore a joint decision about this matter would be preferable[84].

It is not easy determine if this case will be able to open a new phase in the relationship between Quebec and the rest of Canada, but, anyway, this judgment alone cannot frustrate the initial hypothesis about the impartiality and autonomy of the bench in a context of reflective judiciary at least in Canada. This statement is based on the analysis of the dissenting opinions. When they were delivered by three Québécois justices, they would reveal a strong disagreement with the rest of the Anglophone-oriented judicial body, giving credit to the hypothesis of the existence of a "Francophone Justice party"; on the contrary the inexistence of a shared vision among the three French-Canadian Justices can be detected. It does not emerge, in fact, any "functional" and cultural bond of the Francophone Justices to the referring Province, rather a professional contribute to *ius dicere* of the court. Therefore their territorial provenience has the prevailing purpose to legitimize the jurisdictional activity of the whole court. In this context, pluralism of the Supreme Court reflects the heterogeneity of the Canadian society, but does not foster conflicts. The court is a neutral body that promotes a cooperative federalism. In fact, inspired by several cases related to meaningful topics such as the cultural and linguistic ones, the court did not hesitate to deliver solutions that were "not Quebec-oriented". An interesting case that may be mentioned is Ford v. Quebec[85], which is relevant not only for issues related to language but also for the applicability of the

[84] P. Daly, *Dismantling Regulatory Structures: Canada's Long-Gun Registry as Case Study*, in *NJCL*, 33, 2, 2014, 169 ff.
[85] Ford v. Quebec [1988] 2 S.C.R. 712. On this topic, see also the case The King v. Dubois [1935] S.C.R. 378.

notwithstanding clause of sec. 33 of Charter of Rights and Freedoms, that is the means by which Premier Pierre Elliot Trudeau achieved the consent to the Patriation process[86].

Firstly, the decision in the Ford case was delivered at unanimity and so no ethnic-linguistic rift was arisen, although the matter was crucial for Quebec people. Secondly, the judgment is very important with respect to the applicability of sec. 33. The application of the clause to the Bill 101, which avoids the judicial review of legislation, is consistent with the purpose of the Charter. However, the court struck down sec. 58 and 69 of the Charter of French Language, which banned commercial signs written in language other than French, because these provisions were not consistent with the limitation clause of sec. 1 of the Charter of Rights and Freedoms. The evidences produced in the court about material facts did not justify the limitation to freedom of expression imposed by ss. 58 and 69 of the Charter of the French Language. Despite the fact that the Quebec Government had the purpose to enhance the status of French language, the legislative intervention was not necessary or proportional. Yet the motivation of Quebec Government of Bill 101 made reference to the need of protecting the "*visage linguistique*". Therefore the override clause represented the tool aimed at recognizing Quebec speciality.

The idea that francophone justices in the court do not "represent" Quebec claims has emerged also in other significant cases. The 1998 Secession Reference was a case of high political relevance and the outcomes could be very detrimental for the federal pattern. The court unanimously that the secession of a portion of territory is legal, in theory, but must not be carried out unilaterally; a secession can happen only at the end of a negotiated path with the Federation and the other Provinces and after a popular consultation with a strong majority in favour of the project. Unilateral secession can be justified only in

[86] Section 33: (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4). P. Kaye, *The Notwithstanding Clause (Sec. 33 of the Charter of Rights and Freedoms*), Ontario Legislative Library, Legislative Research, Toronto, 1992, 31 f.; M.R. Radiciotti, *Protezione dei diritti fondamentali,* judicial review *e* notwithstanding clause *in Canada*, in G. Rolla (ed.), *L'apporto della Corte suprema*, cit., 195 ff.; P.H. Russell, *Standing Up for Notwithstanding*, in *Alta L. Rev.*, 29, 1991, 293 ff.; T. Kahana, *What Makes for a Good Use of the Notwithstanding Mechanism*, in *Supreme Court L. Rev.*, 23, 2004, 191 ff.; L. Weinrib, *Learning to live with the override*, in *McGill L. J.*, 35, 1990, 542 ff.; K. Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, in *Int'l J. Const. L.*, 4, 2, 2006, 347-370; J. Cameron, *The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?,* in *Supreme Court L. Rev.*, 23, 2004, 135 ff.; J. L. Hiebert, *Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?, ibidem,* 169 ff.; F. De Montalvo Jääskeläinen, *Las cláusula notwithstanding y override del constitucionalismo canadiense*, in *Teoría y realidad constitucional*, 30, 2012, 387 ff.; S. Gardbaum *The New Commonwealth Model of Constitutionalism*, Cambridge University Press, Cambridge, 2013, 97 ff.; R. Albert, *The Desuetude of the Notwithstanding Clause - and How to Revive It*, in *Boston College Law School Research paper* 425, 2016.

case of infringement of citizens' rights and if democratic rules are violated. The court took a firm stance on this point, behaving again as a federal institution oriented towards the unity of the state. Judges stated that the federation is the most suitable institution to safeguard the cultural and ethnic minorities which form the majority within a specific province. In this way, the Supreme Court enhanced the protection of cultural diversity in a federal form of state[87].

In the examined cases, the Supreme Court acts as the protector of Federation and of the competence of the Provinces, including Quebec, whose historic and cultural diversity is considered but not overexposed. The francophone justices deliver opinions in which the *Quebecois* peculiarity is highlighted and stressed but it is not used instrumentally against the Federation. In other words, Quebec is not recognised a special position. The Province does not have a veto power as argued in the Quebec veto Reference, where the all members of the court stated that Quebec can not enjoy a special treatment because the Federation is based on the equality of all its components. The Supreme Court reveals a neutral, or pan-canadian approach and data show the same attitude: looking at the judgments from 1982 to 2002 concerning the conflict between Federation and Provinces, 58.6% of its decisions have been in favour of Government of Ottawa and among these 75% involved Quebec.

Summing up the representation of Quebec in the court does not perform in favour of the Province. Its attitude seems to be aimed at building a connection between Federation and Quebec. They do not feel constrained by a constituent community and do not represent a particular part in the judicial decision-making process. They seem to have inclusive, and not adversarial, purposes.

This approach is not exempt from critics, especially by legal scholars who would be more favourable to a judicial activism pro-Quebec, promoting a more decentralized system of government[88].

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[87] D. Haljan, *Constitutionalising Secession*, Hart Publishing, Portland (Or), 2014, 325 ff.; S. Alvstad, *The Québec Secession Issue, with an Emphasis on the "Cultural" Side of Equation*, in *Temple ICLJ*, 18, 2004, 89 ff.; M. Dawson, *Reflections on the Opinion of the Supreme Court of Canada in the Québec Secession Reference*, in *NJCL*, 11, 1999, 5; P. Monahan, *The Public Policy Role of the Supreme Court of Canada in Secession Reference*, *ibidem*, 65 ff.; C. Ford, *In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Québec Secession Reference*, in *Alta L. Rev.*, 2001, 511 f.; J. Leclair, *The Secession Reference. A Ruling in Search of a Nation*, in *RJT*, 34, 2000, 885; A. Bayefsky (ed.), *Self-determination in International Law: Québec and Lessons Learned*, Kluwer, Deventer, 2000; P. Dumberry, *The Secession Question in Quebec*, in *DPCE*, 2, 2015, 357 ff.; K. Basta, *The State between Minority and Majority Nationalism: Decentralization, Symbolic Recognition and Secessionist Crises in Spain and in Canada*, in *Publius*, 48, 1, 2017 51 ff.; J.-F. Gaudreault-Des Biens, *Secession Blues: Some Legal and Political Challenges Facing the Independence Movement in Quebec*, in *Percorsi costituzionali*, 2014, 765 ff.

[88] S. Ishiyama Smithey, *The Effect of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada*, in *Publius*, 26, 2, 1996, 83 ff.; J.B. Kelly, M. Murphy, *Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor*, *ivi*, 35, 2, 2005, 217 f.

6. "To be judged by their peers"

The social, cultural and linguistic pluralism of Canada is particularly salient and as noted before, the administration of justice tries to reflect this diversity. From a constitutional point of view, the representation of Quebec in the Supreme Court is casted in the stone of the Constitution and the presence of members of the other Provinces is based on conventional sources. In the lower courts, sources of soft law orientate the appointments in order to foster the pluralism even though the trend *currently* seems to be weak.

As far as this issue is concerned, it is noteworthy to single out a specific feature of the administration of justice, which affects the opportunity of incorporating part of the social and ethnic pluralism in the jury trials. The procedural history of Canada has been characterized by explicit exclusions of several groups such as women, religious, ethnic and racial minorities from enrolment in the juries[89] but in current times serving on juries is banned only for specific professional categories (see below).

However, the rule according to which every person can be eligible for jury service only formally. Indeed, from a substantive point of view, there are sections of the society whose exclusion is a matter of fact. This is not the consequence of a specific bias, but of a series of circumstances. A specific case deals with the representation of First Nations in the juries. A renewed importance has been given to this topic especially after a recent judgment of the Supreme Court: R. v. Kokopenace[90], where the court was called upon to decide whether a jury was supposed to be representative of the community.

Albeit this decision, according to previous judgments, reaffirmed that the State does not have a specific duty to include specific subset of the population, it is worth considering some aspects of the case, especially by analysing the dissenting opinion.

The appeal was brought by Ontario Court of Appeal against the respondent, Mr Kokopenace, an Aboriginal man from Grassy Narrows reserve in Kenora (Ontario) charged with second degree murder for stabbing his friend to death during a fight. Before the Court of Appeal, Mr Kokopenace alleged that his jury had been selected from a jury roll which did not include an adequate representation of aboriginal

[89]« No person may be disqualified, exempted or excused from serving as a juror in criminal proceedings on the grounds of his or her sex» [(Criminal Code, R.S.C. 1985, c. C-46, s. 626(2)]. This section was introduced by the Criminal Law Amendment Act, 1972, S.C. 1972, c. 13, s. 46; C. Petersen, *Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process*, in *McGill L. J.*, 38, 1993, 147 ff.; D.M. Tanovich, D.M. Paciocco, S. Skurka, *Jury Selection in Criminal Trials: Skills, Science and the* Law, Irwin, Toronto, 1997; E. Morton *Two Conceptions of Representativeness*, in *University of Toronto Faculty of Law Rev.*, 61, 2003, 105 f.; M. Comiskey, *A Tale of Two Countries' Engagement with the Fair Cross Section Right: Aboriginal Underrepresentation on Ontario Juries and the Boston Marathon Bomber's Jury Wheel Challenge*, in *Chi-Kent L. Rev.,* 90, 2015, 1001 ff.

[90] R. v. Kokopenace, 2015 SCC 28 [2015] 2 S.C.R. 398.

on-reserve residents. Given this fact, he argued that this circumstance violated sec. 11(d) and (f)[91] and 15[92] of the Charter of Rights and Freedoms.

The appeal focused on the significance of the statement «independent and impartial tribunal», which should have reflected the pluralism of the society. The shortage of representativeness would have constituted a *vulnus* to fair trial which would have been caused by the incapability of the public powers to compile the jury roll in an adequate way. In other words, the infringement of sec. 11 of the Charter would stem from failing all the efforts aimed at creating a jury roll that fully represents the numerous characteristics existing in modern societies.

In order to understand the features of the judgment adequately, first of all it is worth mentioning the stages of jury selection. The Juries Act of Ontario states that in order to be eligible to serve as a juror, individuals must be Canadian citizens, reside in Ontario and to be at least 18 years of age. Moreover, some specific professions or prior criminal records can be reason of exclusion[93]. The selection process is divided into three parts: the preparation of the jury roll; the selection of names from it to make up the jury panels for court sittings; the selection, from the jury panel, of the trial jury that will serve on a criminal trial. The first two stages are provided by a provincial law: the Juries Act, whilst the third stage is governed by the federal criminal code.

Mr. Kokopenace challenged the constitutionality of the administrative practice in execution of the Provincial Law: the jury roll must be prepared by provincial officials each year and the candidates are chosen randomly from the Municipal Property Assessment Corporation but for aboriginal peoples the

[91] Sec. 11: «Any person charged with an offence has the right (...) (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.»

[92] Sec. 15(1): « Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.»

[93] **Juries Act, R.S.O. 1990, c. J3, s. 3: Ineligible occupations3. (1) The following persons are ineligible to serve as jurors:1. Every member of the Privy Council of Canada or the Executive Council of Ontario.2. Every member of the Senate, the House of Commons of Canada or the Assembly.3. Every judge and every justice of the peace.4. Every barrister and solicitor and every student-at-law.5. Every legally qualified medical practitioner and veterinary surgeon who is actively engaged in practice and every coroner.6. Every person engaged in the enforcement of law including, without restricting the generality of the foregoing, sheriffs, wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters who are regularly employed by a fire department for the purposes of subsection 41 (1) of the Fire Protection and Prevention Act, 1997, and officers of a court of justice. R.S.O. 1990, c. J.3, s. 3 (1); 1994, c. 27, s. 48 (1); 1997, c. 4, s. 82.**

names of inhabitants of reserves are obtained from any record available. Following this selection, the sheriff is requested to send questionnaires to the recipients. When the forms are filled, and sent back, the sheriff is able to compile the jury roll. The accused maintained that there is an underrepresentation of Aboriginal on-reserve residents in the jury system because the jury roll includes a limited number of First Nations representatives. This happens because the public officers encounter many difficulties in finding the names of inhabitants of reserves and indeed there is a low rate of responses to questionnaires.

The Supreme Court delivered three different opinions: a majority opinion, a partially concurring reason and a dissenting opinion. The majority opinion held that the sec. 11 of the Charter doesn't imply a protected right to be judged by a jury which represents all the diverse groups of the society; the jury must not reflect a cross-section of the community, or its different characteristics. The low representation of Aboriginal peoples does not depend on the process of selection of jurors, who are selected from a random sample of eligible people in the district. The underrepresentation is determined by the difficulty to source the names of Aboriginal on-reserve residents and by the low return rate of notices for on-reserve residents: in 2007 the percentage of response was 10.72% compared to an off-reserve response rate of 56%. Given this fact, it is undisputable that there is not any or discrimination towards First Nations members by public officials rather than disaffection of these latter with the criminal justice system. In this case the State did not act intentionally to exclude a set of population; public powers provide a fair opportunity for a broad cross-section of society to participate in the jury process and so unintentional exclusion of a segment of population does not amount to a constitutional defect. In absence of an explicit *voluntas excludendi*, there is not invalidity of the administrative acts and Mr. Kokopenace does not have the right to have a new trial. The reason why Aboriginal People are not encompassed in the jury roll, albeit having reference to the historical and systematic subordination and marginalization perpetrated by white settlers, does not authorize an active and promotional action of the public authorities oriented to increase the number of Aboriginal jurors. The representativeness of the jury is guaranteed by using a fair and random selection process which is not aimed at excluding specific categories of people. In this respect, the legislative and administrative applications of sec. 11(d) and (f) are fair and the Province of Ontario has made all the reasonable efforts at each step, in order to include Aboriginal People in the jury roll. Thus, the focus of the opinion is based on the process of selection and not on its effect.

Moreover there is no infringement of sec. 15 of the Charter (principle of equality) and no indirect discrimination has taken place since Mr Kokopenace could not prove to have suffered a disadvantage due to the low numbers of aboriginal jurors from reserve; on the contrary he could have had potentially conflicting interests from those potential jurors.

Of course, the reason of the dissenting opinion ruled by Justice Cromwell, concurring the Chief Justice McLachlin, is totally different. Firstly, much more attention is paid to empirical and factual data. In fact, 46 First Nations live in the district of Kenora and the adult on-reserve inhabitants are estimated between 21% and 32% of the population. In 1993, the rate of response of notices sent by the sheriff amounted to 33% for aboriginal peoples and between 60% and 70% for the rest of population; in 2002, the percentage of notices coming from reserves fell down to 15.8% and, in 2008, even to 10%. For these reasons, the presence of autochthonous people in the jury trial suffers from an underestimation of 30%. This situation draws to the conclusion that there is a permanent and ongoing exclusion of a significant segment of the First Nations in the jury roll based on the ground of race. Although sec. 11(f) does not authorize affirmative actions in this extent or reserved quotas, this cannot justify the retention of a *status quo* which *de facto* pushes Aboriginal people away from the administration of justice. The fact that public powers do not intentionally act in order to exclude on-reserve inhabitants, and these latter do not show interest in being involved due to socio-cultural causes, is not sufficient to declare legitimate the administrative procedure. Indeed, the dissenting justices single out the defective process which shows how its stages are unfair and unsuitable to reach the goal to involve the Natives in a conspicuous way.[94] According to the dissenting justices, the Ontario authorities have not been active in seeking the most adequate means to involve First Nations not considering the peculiarity of the district of Kenora, where the most part of Natives live in very distant, hard-to-reach reserves. Moreover the postal service was not able to check the effective deliveries of the questionnaires and indeed the sheriff was not capable of updating the registers of residents. These shortcomings provoked the absence of representativeness in the jury trial of Mr. Kokopenace.

The majority opinion pointed out that the Aboriginal people were responsible for their delimited presence in the jury trial due to their negligence. This explanation is not satisfactory for dissenting justices. These latter shed light on the same aspect but with a different approach: the disaffection constitutes the result of the process of domination occurred by white settlers, that caused a high rate of Aborigines in prisons and their distrust in the criminal justice system. The aim of the dissenting justices is not to introduce quotas for Native jurors, but to increase the numbers of Aboriginal Peoples in the array from which pinpointing the jurors through specific and targeted actions.

[94] In the judgment, the justices expressed doubts about how the sheriff had sent the notices to the inhabitants of the reserve which are often located in isolated areas and about the outdate of the records for Natives.

It is noteworthy that Justices pay attention to the role and meaning of the jury trial in the common law system: among them it stands out one - which would contribute to strengthen the supporters of reflective judiciary - to increase the public confidence in justice[95].

Anglophone scholars have demonstrated the relevance and the sensitivity of the issue concerning the jury selection, since biases and prejudices can drive verdicts in one sense or the other. The heterogeneous composition can help the jury to be permeated by different perceptions which can be fruitful in order to achieve a fair verdict.

In the end, we cannot forget to give the right importance to the debate occurred in other legal systems such as the U.S.'one, where the representation of the different set of population in the jury trial has contributed to improve and legitimize the criminal justice system, which otherwise would have been overlapped with the predominantly white, male, middle-aged and middle-class group[96]. In this framework, many studies trace the performing outcomes of juries which involve a certain level of diversity in composition[97]. The lack of representativeness can promote the mistrust of Aboriginal People in the justice especially because the jury trial is considered a standard of freedom and a means to contain the powers of government. In fact, Tocqueville stated that the jury lays the foundations for the legitimization of the authority of the people who appoint themselves as judges and so the author underlines the democratic function of the jury[98].

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95 E. Morton, *Two Conceptions of Representativeness in the Canadian Jury Selection Process: A Case Comment on R. v. Gayle*, in *Univ. Toronto Fac. Law Rev.*, 61, 2003, 105 ff.

96 Concerning the topic of composition of juries in the United States but with conclusions applicable to the Canadian system, see S. Volterra, *Gruppi minoritari ed emarginati davanti alla Corte suprema tra il 1874 e il 1910*, in Ead.(ed.), *Corte suprema e assetti sociali negli Stati Uniti d'America (1874-1910),* Giappichelli, Torino, 2003, 44 f.; B.A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, in *U. Cin. L. Rev.*, 61, 1993, 1129; R.M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury,* in *Yale L. J.*, 116, 2007, 1568; B. D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, in *Colum. L. Rev.*, 92, 1992, 725 ff.; R. Schuller, N. Vidmar, *The Canadian Criminal Jury*, in *Chi.-Kent L. Rev.*, 86, 2011, 497 ff.; J. Elster, *Securities Against Misrule: Juries, Assemblies*, in *Elections*, 2013, 136-37.

97 S.R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, in *Soc. Issues & Pol'y Rev.* 2, 2008, 65; Id., *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, in *J. Personality & Soc. Psychol.* 90, 2006, 597 ff.; S.R. Sommers, P. C. Ellsworth, *How Much Do We Really Know About Race and Juries: A Review of Social Science Theory and Research*, in *Chi-Kent L. Rev.*, 78, 2003, 997 ff.; A. W. Alschuler, *Racial Quotas and the Jury*, in *Duke L. J.*, 44, 1995, 704 ff.; D. Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, in *U. Chi. Leg. F.*, 1998, 161 ff.; (suggesting that parties be given a fixed number of affirmative choices as to who is included on the final jury), W.J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, in *U. Pa. J. Const. L.,* 3, 2001, 171; W. J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White,* in *DePaul L. Rev.*, 53, 2004, 1497 ff.

98 A. Tocqueville, *La Democrazia in America*, Rizzoli, Milano, 2002, 274 f.

Lastly, another aspect was faced the case, which had strongly emerged in the report, whose name is First Nations Representations on Ontario Juries, held by the former puisne justice, Frank Iacobucci, in February 2013[99]. The outcomes of the report showed how the lack of interest - or even - the open hostility to criminal justice system were linked on the one side, to the high rates of aboriginal inmates in the correctional system and, on the other side, to the different approach to the administration of justice between First Nations and Western legal tradition[100]. First Nations have a different view about the substantive content of justice and the process of achieving it, which is more oriented to restorative justice rather than retributive justice.

However, a greater involvement of First Nations in the jury trials could be a useful tool in order to reconcile and to hail past discrimination and as consequence to improve the trust in justice. "Reflective jury" could be a suitable instrument to implement the process of reconciliation to which the Canadian Government has committed itself in the last years.

7. Conclusion

In this chapter, we discussed the attempt of the Canadian constitutional system to incorporate the cultural and linguistic diversities in the judiciary power.

Our primary aim has been to describe the issue. The starting point was the role of French Canadian justices in the Supreme Court. After exploring the jurisprudence of the court, we can affirm that the Francophone Justices perform their task with commitment and loyalty to the *ius dicere* rather than to their cultural and linguistic belonging. Nevertheless, their presence in the body has doubtless contributed to the nation-building process which sometimes is put to the test by political challenges.

The entrenchment of Justices coming from the Provinces in the Supreme Court has not hindered the capacity of the judicial body to deliver impartial and reasonable decisions. As a consequence, the trust and the credibility in the Supreme Court have increased, producing an undeniable benefit for the whole legal system.

Diversity can increase judicial legitimization and reduce criticism about the lack of non-democratic origin of the judges. Cases involving delicate issue can be met with more public approval, and divisiveness can reach more easily an accommodation.

[99]https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html

[100] S. Zimmerman, "*The Revolving Door of Despair": Aboriginal Involvement in the Criminal Justice System*, in *U.B.C. L. Rev.*, 1992, 367 ff.

For this reason, both the 1987 Meech Lake Accord and the 1992 Charlottetown Accord advocated a reform in respect to appointments to the Supreme Court in the direction of reinforcing the Provincial and aboriginal representation within the body.

One more relevant point seems to be that there is an increasing interest in promoting the diversity in the judicial recruitment, and in this sense, we may remind the guidelines of the Provincial Advisory Committees.

The survey showed that there is a perception of the existence of a *quid pluris* in the multifaceted composition of the judiciary. Firstly, there is a strengthen of the social cohesion and indirectly of democracy, which is distinguished rather by a project of inclusion than for one of alienation. By the way, how could the different groups trust in a judicial system which is not able to include the diversity of the population?[101]

After all, if it is true that we are living in "judgeocracy" era, a realistic counterweight can be the full and active participation of minorities in the judicial function.

The admission to judicial career of members of communities who have been excluded in the past may only make the function of judging more plausible, which might enshrine distinct perspectives, and not solely those of prevalent class.

This feature is particularly relevant in the case of jury trials. We mentioned the issue, underlining how some justices assessed that the plural composition of the array of jury panel could be helpful to achieve a fair and impartial trial.

Moreover, it is indisputable that the inclusion of members of underrepresented groups in the jury could help overcome past and present discrimination. In fact, if seen in light of this mutual relations, affirmative actions or special measures could strengthen the participation of minorities in judging-decisions and the sense of inclusiveness.

We cannot deny that the issue of reflective judiciary is controversial because it may collide with a milestone of democratic system which connects itself to the constitutional traditions of judicial impartiality and independence. These outlines seem to be barriers to the implementation of diversities in the judiciary, but they can not be an excuse for a failure to implement measures to enhance diversity, or at least, to prevent practises that reduce representativeness.

In conclusion, the goal should be: making the difference without distinctions[102].

[101] J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, 1971.

[102] These words are inspired by J. Brockman, *A Difference without a Distinction*, in *Can. J. L. & Soc.*, 8, 1993, 149 ff.