

The Canadian Form of Government: Reconciling Parliamentary Sovereignty and Executive Dominance under a System of Constitutional Supremacy

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Abstract: **La forma di governo canadese: Riconciliare sovranità del Parlamento e la preminenza dell'Esecutivo in un sistema a supremazia costituzionale** – The paper addresses more specific and concrete issues which are of common concern from a comparative perspective. After analysing the Canadian constitutional model, some more concrete issues directly linked with the form of government will be approached, such as the centrality of the Prime Minister; the supremacy of the Government over the legislature; the role of the judiciary in the light of its relation with other constitutional branches; the nature and function of parliamentary bodies, from the perspective of the due balance between accountability and representativeness; finally, the role of “guarantee” bodies (the Crown, Governor General and the Supreme Court) within a constitutional distribution of powers which is increasingly subject to the influence of the political will of the majority.

Keywords: Canada, Form of government, Canadian Supreme Court, constitutional supremacy, Dialogue theory.

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1. The Canadian form of government: From parliamentary to constitutional supremacy

The present paper will address the main lines of evolution of the Canadian institutional organisation, with a view to highlighting useful constitutional and legal tools that can also be implemented in other national legal orders. Instead of providing a comprehensive analysis of the general characteristics of the Canadian form of government, the aim here is to select some of the most significant features of the current dynamics which characterise the relationship between the different branches of government. The goal is to understand whether, apart from a general diversity of legal, cultural and historical background, it is possible to detect similarities with the legal and constitutional trends present within the European legal context. All this, in a twofold perspective: to understand whether crucial questions in terms of separation of powers are common to legal orders which do not belong to the same traditional legal family, on the one hand; to derive from the Canadian institutional and constitutional experience useful tools in order to

tackle common issues, by exploiting the traditional ability of the Canadian system to anticipate and even drive comparative trends¹, on the other hand.

Accordingly, these goals will be achieved firstly from a more theoretical perspective, before addressing more specific and concrete issues which are of common concern from a comparative perspective. Therefore, the specificity of the Canadian constitutional model will be taken into account, by referring to the well-known “New Commonwealth Model of Constitutionalism” (NCCMC)², which has a clear relevance from the perspective of the form of government as this approach aims to make compatible both legislative and constitutional supremacy³. After analysing this constitutional model, some more concrete issues directly linked with the form of government will be approached, such as the centrality of the Prime Minister; the supremacy of the Government over the legislature; the role of the judiciary in the light of its relation with other constitutional branches; the nature and function of parliamentary bodies, from the perspective of the due balance between accountability and representativeness; finally, the role of “guarantee” bodies (the Crown, Governor General and the Supreme Court) within a constitutional distribution of powers which is increasingly subject to the influence of the political will of the majority.

Canada has been constantly considered a “constitutional laboratory” by both Italian and foreign scholars⁴, as it represents a fruitful terrain of analysis for understanding – from a comparative perspective – phenomena and solutions which have appeared first in the Canadian system. If we consider the Canadian constitutional system in the light of the traditional constitutional models, it has been qualified as a “hybridization” between different legal cultures (common law vs. civil law⁵) through a process of cultural, political and legal evolution which has seen the 1982 Constitution Act – establishing the Canadian Charter of Rights and Freedoms – as an effective turning point in emphasising the distinctive features of the Canadian Constitution⁶.

In very succinct terms, Canadian “exceptionalism” stems from the integration between what has been recently defined as the «British connection»⁷, in designing the institutional distribution of powers among different branches of government, characterised, as is widely known, by the entrenched principle of parliamentary sovereignty; and features which are typical of the US system, such as the judicial review of legislation, constitutional protection of fundamental rights

¹ G. Rolla, *Il fascino discreto di una Costituzione*, in G. Rolla (ed.), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Milano, 2008, I ff.

² S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, in *The American Journal of Comparative Law*, 49, 2001, 707 ff.

³ Ivi, 708.

⁴ S. Gambino, C. Amirante (a cura di), *Il Canada. Un laboratorio costituzionale. Federalismo, Diritti, Corti*, Padova, 2000.

⁵ G. Rolla, *Il fascino discreto di una Costituzione*, cit., XI.

⁶ P. Oliver, P. Macklem, N. Der Rosiers, *Introduction*, in P. Oliver, P. Macklem, N. Der Rosiers (eds.), *The Oxford Handbook of Canadian Constitution*, Oxford, 2017, 2; see also J. Lovell, *Parliamentary Sovereignty in Canada*, in P. Oliver, P. Macklem, N. Der Rosiers (eds.), *The Oxford Handbook of Canadian Constitution*, cit., 195-196.

⁷ Ivi, 2, see the reference in the Constitution Act, 1867 to «a Constitution similar in Principle to that of the United Kingdom».

and constitutional amendment formula. It is worth briefly detailing the distinctiveness of the way in which the Canadian legal order has metabolised constitutional characteristics coming from different legal and cultural traditions by implementing a new “hybrid” constitutional model, as it is going to affect – in a potentially virtuous and comparatively relevant way – also the organisation of the form of government.

1.1. The New Commonwealth Model of Constitutionalism (NCCM): How to reconcile legislative and constitutional supremacy through the judicial review of legislation

According to Gardbaum, Canada has contributed to the inception of an intermediate constitutional model, by taking advantage of the main distinctive features of its own constitutional system⁸. This is an alternative model that, according to its theorist, rejects the dichotomy between legislative and constitutional supremacy, typical respectively of the American model of constitutionalism and of its reception within the Western European legal environment. This intermediate model of constitutionalism is situated «in between a fully constitutionalized bill of rights and full legislative supremacy»⁹. The effects for the separation of powers and the relation between branches of government are significant, even if only considering the traditional issue of the impact of the judicial review of legislation developed by centralised or decentralised courts on the centrality of parliamentary will in implementing, together with the executive within a rationalised parliamentary system, constitutional principles and goals. The more the balance among powers favours the judiciary, the more concerns related to the lack of democratic legitimacy or the excessive limitation of political discretion of Parliament (and the Executive) arise.

By providing innovative constitutional tools¹⁰, the Canadian system tends to –if not totally overcome, then at least temper— such concerns, in a way that has been attractive for many national legal systems involved in constitution-making processes¹¹. In terms relevant from the perspective of the assessment of the concrete balance among powers, it is worth mentioning that Gardbaum outlines that the main feature of the constitutional model is «to provide a new solution to the old problem of the incompatibility of legislative supremacy and the effective (that is, judicial) protection of fundamental rights»¹². Through the lens of the protection of fundamental rights, which is traditionally considered together with the separation of power the essential core of a constitutional State¹³, it is

⁸ S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, cit., 708.

⁹ Ivi, 719.

¹⁰ Such as the so-called “notwithstanding clause”, section 33 of the 1982 Canadian Charter, see further below.

¹¹ P. Oliver, P. Macklem, N. Der Rosiers, *Introduction*, cit., 5, with regard to New Zealand, South Africa and Israel.

¹² S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, cit., 741.

¹³ See art. 16 of the Declaration of the Rights of Man and of the Citizen (1789), according to which «any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution».

possible to highlight the complexity of guaranteeing a sustainable balance among different branches of government, with a specific focus on the relation between the legislature and the judiciary.

In more general terms, this model seems to be able to achieve one of the most challenging goals of contemporary constitutionalism: a reasonable and constitutionally consistent balance between the recognition and effective protection of certain fundamental rights and a proper distribution of power between courts and the elected branches of government¹⁴.

As will be detailed further below, the Canadian system of government can be considered a laboratory also in this context, as in 1982 a set of constitutional tools was introduced to make more easily achievable the goal of a more feasible and compatible system of government: , according to Gardbaum, section 33 of the Charter, together with section 1, is «the distinctive structural feature of Canadian constitutionalism»¹⁵. Although the object of strong concern among Canadian legal scholars, by giving the “last word” to Parliament on what the law of the land concretely is (or must be), this approach may favour a more balanced inter-institutional dialogue¹⁶. Moving from a “watertight compartment” to a “communicating vessel” approach with regard to the relation between branches of government is one of the main goals of contemporary constitutionalism, when (and whether) the supremacy of constitutional sovereignty over the parliamentary one is accepted. Focussing especially on the executive-legislative relation, and claiming the inconsistency of the orthodox interpretation of the concrete absence of separation of powers due to the fusion of and the rigid compartmentalization between powers¹⁷, Baker argues that a «pure» separation is no more than an ideal-type that has rarely been put into practice¹⁸, while «the vast bulk of separation-of-powers theory and practice has not only permitted functions to be mixed across the branches to some degree but has also seen such mixing as essential to maintaining inter-institutional balance and generating the desirable checks and balances that healthy liberal-democratic government requires»¹⁹. According to Justice Brian Dickson, with the entry into force of the Charter, Canada has developed from a system of parliamentary supremacy to one of constitutional supremacy²⁰.

From a European constitutional perspective, this represents a necessary step towards a fully established constitutional legal order, in which constitutional legitimacy – especially through the judicial review of legislation mechanism (already known within the Canadian legal system) and the reinforced amendment formula – comprises and in a certain degree limits parliamentary legality. In the Canadian Supreme Court’s words, «with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of

¹⁴ S. Gardbaum, *Reassessing the new Commonwealth model of constitutionalism*, in *International Journal of Constitutional Law*, 8, 2, 2010, 171.

¹⁵ *Ivi*, 170.

¹⁶ S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, cit., 745.

¹⁷ D. Baker, *Not Quite Supreme* Montreal, 2010, 86.

¹⁸ *Ibid.*, 89, quoting Vile.

¹⁹ *Ibid.*, 88-89.

²⁰ See subsection 51.1 of Constitution Act, 1982.

Parliamentary supremacy to one of constitutional supremacy»²¹. Also among Italian scholars, the attempt to achieve a compromise between Parliamentary and constitutional supremacy represents one of the most original characteristics of Canadian constitutionalism²².

2. The Constitution Act, 1982: A turning point within the constitutionalizing process of the Canadian legal system

By introducing a written constitution which has integrated the more British-oriented one based on conventions²³, the Canadian system of government seems to have accepted this perspective, while contributing actively to the advancement of constitutionalism by introducing new tools and theories. In the Federal Court of Appeal's words, «both before and after 1982 our system was and is one of parliamentary sovereignty exercisable within the limits of a written constitution»²⁴. Notwithstanding, it has been also clarified that, before 1982, there was no idea of limiting or constraining Parliament's power, as the Constitution Act, 1867, was essentially aimed at distributing legislative power to constitute a federal system²⁵.

Traditional powers and public functions shall be fully integrated within the constitutional dimension, one of the essential goals of which is to set a limit to political power. From the Canadian perspective, it seems that one of the most significant "clues" to such integration – political and constitutional supremacy – is to accept a comprehensive – albeit weak, according to some scholars – judicial review as a newly introduced connotative element of the established convention of responsible government²⁶. Accordingly, constitutional conventions and constitutional written rules must be interpreted in a comprehensive way, having in mind the ultimate goal within a truly constitutional system, that is the effective fulfilment of constitutional goals through the integrated and balanced action of different branches of government, which are bound to find a sustainable bi- (or even tri-) directional line of dialogue²⁷.

This seems to be the path indicated also by the Federal Court of Appeal, which stressed – significantly referring to the relation between parliamentary supremacy and constitutional principles – that «while the parameters of the

²¹ Reference re Secession of Quebec, [1998] 2 S.C.R., 217, per curiam, para. 72, see W. J. Newman, *The Rule of Law, the Separation of Powers and Judicial Independence in Canada*, in *Oxford Handbook of Canadian Constitution*, cit., 1033.

²² S. Benvenuti, *Corte Suprema, supremazia del Parlamento e judicial review nel pensiero costituzionalistico canadese contemporaneo*, in *Nomos*, 3, 2006, 167.

²³ To be distinguished from unwritten constitutional principles that the Supreme Court is used to deriving from the Constitution, see J. Lovell, *Parliamentary Sovereignty in Canada*, cit., 194.

²⁴ See J. Lovell, *Parliamentary Sovereignty in Canada*, cit., 196; see also J Strayer in Singh v Canada (Attorney General) [2000], 2 FCR 185(FCA).

²⁵ D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, Toronto, 2017, 25.

²⁶ A. Hutchinson, *The Politics of Constitutional Law: A Critical Approach*, in *Oxford Handbook of Canadian Constitution*, cit., 991.

²⁷ See the distinction between legal constitutionalism and political constitutionalism, which is reflected in the respect for constitutional conventions, the breach of which entails political rather than legal sanctions; see W. J. Newman, *The Rule of Law, the Separation of Powers and Judicial Independence in Canada*, cit., 1033.

unwritten principles of the Constitution remain undefined, they must be balanced against the concept of Parliamentary sovereignty which is also a component of the rule of law»²⁸. Similarly, the Supreme Court in the decision *Babcock v Canada (A.G.)* (2002) recalled the duty of finding a balance between all constitutional principles entrenched within and outside the written Constitution, in which also Parliamentary supremacy must be included and given adequate recognition and protection²⁹. This approach, in recognising room for even a draconian exercise of the legislative power within the limits deriving from the balance among different branches of government (see the decision above), seems to recall the restraints that national Constitutional Courts are faced with within the European legal environment when assessing the legitimacy of Parliament's political choices. One example can be derived from the Italian legal order, where the law provides that judicial review of legislation excludes any political assessment on statutory law, as well as any scrutiny on the exercise of discretionary power made by Parliament³⁰.

2.1. The Charter dialogue theory: A Canadian exception and a possible tool for empowering a “balanced” constitutionalism

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In the light of reconciling judicial review and responsible government within a system based on a temperate constitutional supremacy, it is worth mentioning the «dialogue theory», which defines the role of judicial review within the relation between courts and the legislature³¹. It is essentially founded on one of the most outstanding peculiarities of the Canadian constitutional system: that the legislature is entitled – through a set of specific features³² – to overcome courts' judgments and “have the last word” on what the law of the land must be.

Even though the ability of this theory to explain the effective relation between courts and legislature under the judicial review mechanism has been repeatedly debated and put in doubt among Canadian legal scholars³³, it is worth mentioning that the authors in their seminal paper highlight the essential function of the theory: to bring judicial review back to its constitutional function, under the scope of the separation of power and the rule of (constitutional) law, being «the beginning of a dialogue as to how best to reconcile the individualistic values of the Charter with the accomplishment of social and economic policies for the benefit of the community as a whole»³⁴. In other words, under this line of reasoning judicial review is one of the (most widespread) expressions of the prevalence of

²⁸ See J. Lovell, *Parliamentary Sovereignty in Canada*, cit., 198.

²⁹ W. J. Newman, *The Rule of Law, the Separation of Powers and Judicial Independence in Canada*, cit., 1034.

³⁰ Sec. 28, Law n. 87/1953.

³¹ P. W. Hogg, A. A. Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)*, in *Osgoode Hall Law Review*, 35, 1, 1997.

³² *Ibidem*.

³³ Recently G. Huscroft, *Rationalizing Judicial Power: The Mischief of Dialogue Theory*, in J. B. Kelly, C. P. Manfredi (eds.), *Contested Constitutionalism. Reflections on the Canadian Charter of Rights and Freedoms*, 2009, 62 ff.

³⁴ P. W. Hogg, A. A. Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)*, cit., 105.

constitutional over parliamentary democracy³⁵: the peculiarity of the Canadian constitutional order is, thus, the presence of “safety valves” that allow constitutional supremacy to be mitigated in order to be accommodated with parliamentary supremacy, which accordingly – in a two-way relation and fully within the constitutional meaning of the principle of separation of powers – must express itself within the limits drawn in a dynamic and flexible way by the Constitution. In this framework, the role of courts can be viewed as an essential element of a renewed, in a more dynamic understanding, “constitutionally consistent” theory of separation of powers.

Therefore, the Canadian system of government, when considered within the context of the “constitutionalisation” process which has seen the 1982 reform as a pivotal turning point, expresses the main normative and institutional resources and threats which characterise the global discourse on constitutionalism: the legitimate scope of constitutional constraints to democratically legitimated Parliamentary power; the appropriate balance between courts and other branches of government; the real nature and function of the core principle of the separation of powers; the need to trace back to a dynamic (and even unwritten) constitutional framework the exercise of powers, such as the legislative and the executive, while guaranteeing their historical heritage and the effective implementation of their functions within the State’s machinery.

Facing these challenges, which are consubstantial with contemporary constitutionalism and shared at least among the countries belonging to the Western legal tradition, the Canadian system may provide useful tools which were introduced (especially in 1982) in order to integrate two apparently opposite objectives: on the one hand, to complete the process begun with the Constitution Act, 1867, towards the implementation of a comprehensive constitutional framework grounded not only in constitutional conventions but also on the guarantees traditionally linked with a written constitution (Bill of Rights; judicial review of legislation; constitutional amendment process); on the other hand, to preserve institutional and political specificities which, directly entrenched in its history and culture as well as in written constitutional text, characterise the Canadian legal culture, such as the convention of responsible government, the role of the Crown and the Governor General, the principle of Parliamentary supremacy, federalism³⁶.

One of the most innovative and debated tools that have been provided to accommodate these compelling goals is undoubtedly the so-called “notwithstanding clause”³⁷. Its aim – the effective fulfilment of which is a very

³⁵ P. W. Hogg, *Charter Dialogue Revisited: Or “Much Ado About Metaphors”*, in *Osgoode Hall Law Journal*, 45, 1, 2007, 31.

³⁶ See S. Benvenuti, *Corte Suprema, supremazia del Parlamento e judicial review nel pensiero costituzionalistico canadese contemporaneo*, cit., 168, quoting F. L. Morton, *Dialogue or Monologue?*, in *Policy Options*, 1999, 712, who considers that the Canadian solution for the relation between judicial review and Parliamentary supremacy is the most adequate in adapting itself to the ethnic and cultural diversity and political pluralism which characterise today’s Canada.

³⁷ Section 33 of the Canadian Charter.

controversial issue among Canadian scholars³⁸ – is precisely to reconcile the need to guarantee constitutional supremacy on parliamentary law through the judicial review with the prominent role of a democratically legitimated institution – the Parliament – in having the last word on what the Law of the Land should be, within the limits of the Constitution.

Without entering into details with regard to the debate among legal scholars, it is worth mentioning that, at least in terms of constitutional design, the clause set forth by section 33 may favour a separation of powers effectively oriented towards the implementation of constitutional content and duties within a framework of checks and balances, in which traditional powers (executive, legislative, judiciary) may be called to exercise different functions within the comprehensive goal to make the constitutional project effective. Within this line of reasoning, therefore, the notwithstanding clause shall be considered as the «democratic safety valve ensuring that neither the judiciary nor parliamentarians would have the last word on difficult decisions relating to the metes and bounds of constitutionally protected rights»³⁹. At the same time, it has been argued that this clause is aimed at preserving the essential element of Parliamentary sovereignty⁴⁰, while at the same time allowing that judicial monologue is replaced by an inter-institutional dialogue between courts and legislatures that would improve the quality and dimensions of the constitutional analysis on the meaning and scope of constitutional rights⁴¹.

Another two distinctive features of Canadian constitutionalism - and therefore of the Canadian form of government - are the possibility for the Supreme Court to suspend the efficacy of a declaration of incompatibility, to give the Parliament the chance to intervene by reforming the law declared illegitimate; and the advisory function of the Supreme Court. The former is especially relevant from the perspective of the relation between powers within a constitutional architecture, as it seems to perform a re-balancing function between powers, even more effective than the one provided by section 33, which has remained silent during decades (at least at the federal level). Can the suspended declaration of invalidity⁴² be an effective tool in accommodating constitutional and Parliamentary supremacy, while guaranteeing also a “*trialogue*” which involves also the executive, if we consider the strict link which binds together the latter and the Parliament? Very recently, the continuation of the case *Carter v Canada* (2015) can be particularly paradigmatic in showing how this instrument can

³⁸ Among others, R. Knopff, R. Evans, D. Baker, D. Snow, *Dialogue; Clarified and Reconsidered*, in *Osgoode Hall Law Journal*, 54, 2, 2017, 620 ff.

³⁹ P. H. Russel, *The Charter and Canadian Democracy*, in J. B. Kelly, C. P. Manfredi (eds.), *Contested Constitutionalism. Reflections on the Canadian Charter of Rights and Freedom*, cit., 304-305.

⁴⁰ S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, cit., 722.

⁴¹ Ivi, 746.

⁴² It is not unique to the Canadian constitutional regime, as it is known also within the South American context, for instance in Colombia, as well as in Germany.

contribute to expressing the correct role for each branch of government within the Canadian system of government⁴³.

The suspension of the effects of the declaration of unconstitutionality is a tool that is known also within the European legal framework, even it can assume different concrete tools⁴⁴. One potential functional equivalent, although very different in nature and scope of courts' action as it can be considered a mitigating way to exercise the function of judicial review, are those cases in which courts, when they consider the issue at stake highly controversial or sensitive from a political, social or even ethical standpoint, do not declare void a law, even when there might be grounds to declare it, thus limiting themselves to merely sending a "warning" to legislature calling for its intervention at the legislative level. Differently from the Canadian context, in the latter case the declaration does not have any legal efficacy, leaving legislature completely free to decide the "whether", the "when" and the "how" of its hypothetical exercise of discretionary power, without fearing any legal consequence or sanction.

The Italian Constitutional Court had implemented this technique by means of the so-called "warning" judgments (*sentenze "monito"*), which are technically judgments in which the Court rejects a constitutional challenge against a law, which therefore remains fully in force. In this case, the Court, even when it considers the challenge unfounded, and given the political or social importance of the issue at stake⁴⁵, explicitly calls the legislature to its duty to intervene in order to guarantee adequate protection for specific fundamental rights which lack legislative recognition. This is the way – weak in strictly legal terms even if it might put very stringent political pressure on the Parliament – the Court has tried to balance the need to restore constitutional supremacy over statutory law, on the one hand, and the opportunity to acknowledge the centrality of Parliament's discretionary power, on the other hand⁴⁶.

⁴³ See P. Hogg, R. Amarnath, *Understanding Dialogue Theory*, in *Oxford Handbook*, cit., 1053 and 1067-1068.

⁴⁴ For an analysis of different tools in some European legal systems, see V. Barsotti, P. G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford, 2015, 87 ff.

⁴⁵ For instance, the lack of protection for specific groups of individuals, as happened in the case of the legal recognition of unmarried couples, see judgment n. 404/1988, and in the case of same-sex couples, see judgment 138/2010.

⁴⁶ Recently, the Italian Constitutional Court seems to have empowered its capacity to promote this balancing. By making direct reference to the abovementioned 'Carter case', the Court detected the incompatibility of the existing rules on assisted suicide with the Constitution; at the same time, it acknowledged that where the assessment of the Court involves the intersection of values of primary importance, whose comprehensive balance presupposes, directly and immediately, choices that the legislature is authorized to carry out first of all. In this case, the Court must – in a spirit of loyal and dialectical institutional collaboration – to allow Parliament to perform all appropriate initiatives, so as to avoid, on one side, that, in the aforementioned terms, a provision continues to produce effects deemed constitutionally incompatible, but at the same time avert potential gaps in the protection of values, also fully relevant on the constitutional level (see *ordinanza* n. 207/2018). See S. Prisco, *Il caso Cappato tra Corte Costituzionale, Parlamento e dibattito pubblico. Un breve appunto per una discussione da avviare*, in *BioLaw Journal-Rivista di BioDiritto*, 3, 2018, 153-170.

2.2. The integration between the ‘executive-legislative’ and ‘judiciary-legislative’ axes: physiology or pathology within a constitutional system?

It has chosen to tackle the issue of the form of government by focussing on the impact that the constitutional changes occurred in 1982 have had and are still having on the traditional framework based on responsible government and Parliamentary sovereignty. This choice has inevitably shifted the focus from the ‘executive-legislative’ axis to the one which runs along the dynamic interaction between the judiciary, especially when exercising the judicial review function, and the legislative. This may be a useful perspective for detecting and understanding the effective dynamics between different branches of government, if we consider that many Canadian scholars – quite often in very critical terms – have highlighted the shift in the balance of powers caused by judicial activism following the entry into force of the Constitution Act, 1982, and the Charter⁴⁷. As already suggested by some Italian scholars, after Patriation the judiciary – and especially the Supreme Court – has become an “agent” of the determination of the “political direction” (*indirizzo politico*) within a context of dialogue with both the executive and the legislative⁴⁸. Among the Canadian scholarship, the centrality of the Supreme Court within the form of government has been critically understood as if the Court «functions more like a de facto third Chamber of the legislature than a court»⁴⁹.

From this perspective, therefore, alongside the traditional executive-legislative “duo”, which runs along the concepts of fusion of powers, executive supremacy on the Parliament and responsible government, a new “duo” has been established, composed by the judiciary and the legislative, which paradigmatically expresses a further constitutional dimension for Canada: a Parliamentary sovereignty exercised within the limits of a written constitution, which is guaranteed by the judiciary, and under the dynamic relation (of power) with the executive branch of government⁵⁰. Two interconnected axes – executive-legislative *vis a vis* legislative-judiciary – which must find their centre of gravity in the “living” Canadian Constitution.

The dynamic integration – within the limits of the Constitution – more than a static separation of powers will be the perspective from which more concrete issues related to the functioning of the Canadian government machinery will be further assessed.

⁴⁷ F. L. Morton, R. Knopff, *The Charter Revolution and the Court Party*, Toronto, 2000. J. B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent*, British Columbia, 2014, 31 ff., provides an in-depth account of different lines of analysis and criticism among Canadian scholars on Supreme Court’s activism.

⁴⁸ N. Olivetti Rason, P. L. Petrillo, *La presidenzializzazione dei governi nelle democrazie contemporanee: tendenze e contro tendenze nell’esperienza del Canada*, in A. Di Giovine, A. Mastromarino (eds.), *La presidenzializzazione degli esecutivi nelle democrazie contemporanee*, Torino, 2007, 268.

⁴⁹ P. Russell, F. Rocher, D. Thompson, A. Bittner (eds.), *Essential Readings in Canadian Government and Politics*, II Toronto, 2016, 372.

⁵⁰ According to J. B. Kelly, *Legislative Activism and Parliamentary Bills of Rights: Institutional Lessons from Canada*, in J. B. Kelly, C. P. Manfredi (eds.), *Contested Constitutionalism. Reflections on the Canadian Charter of Rights and Freedom*, cit., 100, the Cabinet is the centre of the Charter dialogue.

3. The supremacy of the Government over the Legislature: legal constitutionalism vs political constitutionalism?

More than 20 years ago, Bognetti theorised that the rise of the democratic-social interventionist State (welfare state) caused the transformation of the forms of government, with a corresponding new division of powers⁵¹. To the three traditional powers typical of the liberal state, two more powers are added within the democratic and social state: public administration and constitutional court as ultimate guarantor of the Constitution⁵². The function of “political direction” (*indirizzo politico*), conceived as the establishment and concrete implementation of the fundamental directions of development of a national order, belongs to the executive in the figure of the Prime Minister, within the parliamentary form of government, or the President, in the presidential one. According to Bognetti, «within the well-functioning states only exceptionally the political direction chosen by the executive (*Potere governante*, governing Power) is rectified or integrated or even “paralysed” by the other “political” Power of the state, the legislature»⁵³.

If we move from the ‘legislature-judiciary’ to the ‘legislative-executive’ axis, it is worth noting that legal scholarship in Canada – as well as other countries – observe the trend towards the consolidation of executive power over the legislature. Whether such dominance is *de facto* (political) or *de iure* (legal), it has been the subject of insightful and deep analysis, highlighting the threat such a phenomenon poses for the democratic principle and the convention of responsible government.

Such warnings have become a “mantra” standard among scholars in many national jurisdictions. In Canada, the concern is that «Parliament is unacceptably weak and the political executive unduly strong»⁵⁴. Baker⁵⁵ underlines the discrepancy between the design and the effective functioning of the separation of powers in Canada: «the “reality” is that the conventions of responsible government have the effect of centralizing power almost completely in the hands of the executive», especially due to the phenomenon of «party discipline»⁵⁶ and the advising power of the Prime Minister to the Governor General with regard to the prorogation and dissolution of the Parliament. According to Baker, there would be a recurrent ambivalence in powers relationship between Canadian institutions, as broad informal powers are matched with formal but often rarely exercised checks⁵⁷. The Canadian Supreme Court has recognised the issue, noting that the «Court should not be blind to the reality of Canadian governance that (...) the executive frequently and de facto controls the legislative»⁵⁸.

⁵¹ G. Bognetti, *La divisione dei poteri: saggio di diritto comparato*, II ed., Milano, 2001, 75.

⁵² *Ivi*, 76.

⁵³ *Ivi*, 78.

⁵⁴ D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 138.

⁵⁵ D. Baker, *Not Quite Supreme*, cit., 103.

⁵⁶ At least in the situation of a majority government; party politics as an essential element of the form of government: see P. L. Petrillo, *Le istituzioni delle libertà*, Padova, 2012, 72.

⁵⁷ D. Baker, *Not Quite Supreme*, cit., 129.

⁵⁸ *Wells v Newfound Land*, 1999.

Therefore, the image that the Canadian system of responsible government conveys is one characterised by the «executive domination of Parliament», which shows itself especially with regard to the control over the law-making process⁵⁹. Accordingly, scholars seem to agree in asserting that «Parliament's principal role is not as much to legislate as to hold the government to account»⁶⁰. This seems to be a common line of development of the dynamics of government at the comparative level, if we consider that in theorising a new division of power, Boggetti in 2001 stated that the real, typical, function of the legislature is to control government's action more than the traditional assumed law-making function⁶¹. Moreover, Boggetti considers further that the essential core of the new division of powers is expressed by the formula: «Executive's centrality» as the owner of the function of political direction of a welfare State⁶².

4. Party discipline and the Crown as an independent (?) variable of the balance among powers

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As stressed above, and outlined by Boggetti as one of the distinctive features of the new division of powers within welfare state legal systems⁶³, the role of political parties in orienting the relation of confidence between Parliament and the executive is often decisive: it represents the essential variable within this relationship, which is characterised – as stressed above – by strong party discipline⁶⁴.

It means that, in the concrete enforcement of constitutional conventions (responsible government and Parliament's confidence), «a Cabinet is assured the confidence of the Commons if its party members are a majority»⁶⁵. Accordingly, «Party dynamics are necessarily part of the reason for the executive's dominance of the Commons»⁶⁶. Some authors went even further, by theorising that «The party replaces parliament as the central non-executive political institution and locus of power»⁶⁷. If this phenomenon is typical of a two-party system, also in multiparty systems it develops a decisive function⁶⁸.

⁵⁹ J. Webber, *Constitution of Canada. Contextual Analysis*, 2015, 77; see also P. Aucoin, M. Jarvis, L. Turnbull, *Democratizing the Constitution: Reforming Responsible Government*, Toronto, 2011, where the authors highlight two problems within the Canadian system of government: a constitutional one, that is the capacity of the Prime Minister to abuse his or her powers to summon, prorogue and dissolve the House of Commons to advance partisan interests of the governing party; and a parliamentary one, which consists in the ability of the Prime Minister to abuse the parliamentary rules and procedures that are meant to allow government to manage the business of the House in an orderly way (*Ivi*, 4).

⁶⁰ *Ivi*, 79.

⁶¹ G. Boggetti, *La divisione dei poteri: saggio di diritto comparato*, cit., 81.

⁶² *Ibid.*, 91.

⁶³ *Ibid.*, 79.

⁶⁴ P. Lagassé, *The Crown and Prime Minister Power*, in *Canadian Parliamentary Review*, 2016, 18; see also D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 114.

⁶⁵ P. Lagassé, *The Crown and Prime Minister Power*, cit., 18.

⁶⁶ D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 114.

⁶⁷ S. Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)*, in *The American Journal of Comparative Law*, 62, 2014, 634.

⁶⁸ *Ibid.*, 634-635.

Party discipline, which finds a very solid reason in the “capture effect” over Parliamentary Members produced by the Prime Minister’s wide power of appointment⁶⁹, is the main reason of the phenomenon of «reversal in the logic of responsible government»⁷⁰, which legally and historically expresses the hierarchical relationship between the Parliament and the executive⁷¹: therefore, as a matter of fact, even if «[t]he theory of responsible government suggests that the balance of powers rests with the legislative branch(...) in practice, power is heavily concentrated in the hands of the Prime Minister and a number of close advisors»⁷². A side issue of the link between the role of political party and the balance between different branches of government is the role played by the electoral system and the selection of candidates, as well as their direct relationship with the party leader.

If we can agree that «constitutional conventions that provide checks on the power of the Executive can be ignored easily, and so the Constitution becomes whatever the Prime Minister can get away with»⁷³, one could wonder whether the guarantees and re-balancing mechanisms set forth by the written constitution regime can play an effective role in rationalizing this dynamic: in other words, whether the factual dynamics between powers can be re-oriented by implementing more effectively existing legal and constitutional constraints. It is a matter of finding a reasonable balance between the formal design and concrete functioning of the theory of responsible government: on the one hand, concentration of power in the executive facilitates an efficient government of the institutional and political machinery; on the other hand, the existence of a «functional legislative branch» must be guaranteed⁷⁴.

This is in line with a constitutionalised interpretation of the separation of power⁷⁵, where the compelling need to guarantee the stability and governability of the institutional machinery must be achieved through political and legal tools which are able to guarantee at the same time a sustainable and appropriate constitutional equilibrium amongst powers.

It remains to be seen whether the expected reforms announced by the Trudeau government in 2015 in order to re-balance the relation between the executive and the legislative will find effective implementation and will be useful in achieving the expected goal: it looks like the “incentive” for one of the main “mainstream” reforms (the electoral reform towards a more proportional system)

⁶⁹ See L. Turnbull, *Political institutions in Canada in a new era*, in *Oxford Handbook of Canadian Constitution*, cit., 174, referring to a «carrot and stick» approach.

⁷⁰ *Ibid.*, 174.

⁷¹ See C. Forcese, *The Executive, the Royal Prerogative, and the Constitution*, in *Oxford Handbook of Canadian Constitution*, cit., 154.

⁷² L. Turnbull, *Political institutions in Canada in a new era*, cit., 174.

⁷³ *Ibidem.*

⁷⁴ *Ibidem.*, 175.

⁷⁵ In Canada it becomes a “hybrid” version of the UK and US separation of powers theories; see W. J. Newman, *The Rule of Law, the Separation of Powers and Judicial Independence in Canada*, cit., 1043.

has diminished after the 2015 election results⁷⁶, while it is worth mentioning those aimed to reduce the Prime Minister's power of appointment, with special regard to appointing Senators⁷⁷.

As mentioned above, another reason for the dominance over the Parliament can be recognised in the role of the Crown as part of the latter. As the Crown (by means of the Governor General) has the power to summon, prorogue and dissolve the Parliament and to pass the Bill, under the (compulsory) advice of the Prime Minister or the Cabinet, it means that the Prime Minister will benefit from the Crown's coequality and codependence within the Commons⁷⁸. In other words, the Prime Minister is the dominant actor in Parliament because he/she controls powers of the strongest part of the legislature, the Crown. This is a specific characteristic of the Westminster model. It has been said very effectively that the Crown is the «indispensable armature of government»⁷⁹. Therefore, more important than its symbolic function is the practical contribution of the Crown to the primary future of Canadian government: Executive dominance⁸⁰. One of the most debated cases by Canadian legal scholars has been the 2008 Prorogation of the Parliament, called for by then Prime Minister Harper and declared by the Governor General in charge.

One could argue, especially if coming from a different legal culture, that also the interpretation of confidence convention as a «form of confirmation or endorsement» rather than granting the House of Commons «a direct role in choosing and removing the government»⁸¹ is a direct consequence of the predominance of the Executive over the Parliament, together with the strong party discipline that – especially when combined with a majority government – characterises Canadian politics. When compared with Italian parliamentary dynamics, the apparent automatism in the concrete enforcement of confidence convention stands out, as confidence procedure in Italy is often complex and characterised by the constitutional convention of hearings (“*consultazioni*”) which involves also minority parties and even parties with no representation in Parliament (such as happened after the last General Election in 2013, due to very ambiguous electoral results). In this regard, it seems that, despite the significance of contextual elements such as electoral results and the political standing of the person in charge, within the Italian system the office which formally owns the power to nominate the Prime Minister (the President of the Republic) is vested with a wider margin of discretion in exercising its power. Here, three variables may play a decisive role: the nature of the form of state, parliamentary monarchy vs parliamentary republic; the nature of the rule, constitutional convention vs written constitutional provision; the model of electoral law.

⁷⁶ The proposal has been abandoned, see <https://www.theglobeandmail.com/news/politics/trudeau-abandons-electoral-reform/article33855925/>.

⁷⁷ L. Turnbull, *Political institutions in Canada in a new era*, cit., 176.

⁷⁸ P. Lagassé, *The Crown and Prime Minister Power*, cit., 18.

⁷⁹ D. E. Smith, *The Constitution in a Hall of Mirrors*, cit., 63.

⁸⁰ D. E. Smith, *The Invisible Crown. The First Principle of Canadian Government*, Toronto, 2013, 179.

⁸¹ P. Lagassé, *The Crown and Prime Minister Power*, cit., 19.

5. Informal (political) and formal (legal) powers: Written Constitution (and its checks) as the stabilising factor between the theory and the practice of responsible government?

There is a factual-political dimension of relation between the executive and legislative⁸², and a legal-constitutional one: both must find adequate coverage within the constitutional context, therefore also the concrete control of the executive over the Parliament is legitimate only if it is properly grounded in the written or conventional Constitution. Otherwise, constitutional mechanisms must react: the judiciary (whose main target according to Canadian scholars is the executive), but also the Governor General in the exercise of his/her prerogatives. In Baker's words⁸³, «informal power (executive domination of the legislature, for example) may well be the primary and regular vehicle for governance, but formal power (legislative control of the executive) both checks and, by providing rhetorical cover for its exercise, sustains informal rule».

This is perfectly in line with the theory that considers responsible government compatible with a system based on a written constitution, especially if we consider that responsible government is the «set of constitutional conventions that make Canada's parliamentary system a democracy»⁸⁴: the written constitution strengthens the resilience of the responsible government, also by including in it judicial review of legislation. In other words, the guarantees deriving from a written constitution can contribute to significantly reducing the distance between the theory and practice of responsible government conventions⁸⁵.

This trend paradigmatically illustrates one of the most significant features of Canadian constitutionalism when seen through the lens of a comparatist scholar: the “competitive game” between legal constitutionalism, which is expressed by the supremacy of the law of the Constitution, and political constitutionalism, which is reflected in the respect for constitutional conventions⁸⁶. Between these two constitutional dimensions, the latter being possibly in contrast with the former, must be found a balance, which shall be dynamic with regard to the specific context and matters at stake. In any case, it is worth highlighting that the paradigm shift that came about with the entry into force of the Constitution Act, 1982 (section 52), must be taken in due consideration and also orients the concrete relations among powers. In the Supreme Court's words, «The Constitution binds all governments, both federal and provincial, including the executive branch (...) their sole claim to exercise lawful authority

⁸² With regard to the relation and respective prevalence between majority and minority government, but according to a line of reasoning which can be referred to other issues linked to the executive-legislative axis, it has been recognised that «circumstances and personalities will do much to determine which form is more desirable», P. Malcolmson, R. Myers, G. Baier, T. Bateman, *The Canadian Regime. An Introduction to Parliamentary Government in Canada*, VI ed., Toronto, 2016, 50.

⁸³ D. Baker, *Not Quite Supreme*, cit., 114.

⁸⁴ L. Turnbull, *Political institutions in Canada in a new era*, cit., 173.

⁸⁵ *Ibid.*, 174.

⁸⁶ W. J. Newman, *The Rule of Law, the Separation of Powers and Judicial Independence in Canada*, cit., 1033.

rests in the powers allocated to them under the Constitution, and can come from no other source»⁸⁷.

Consistently with this line of reasoning, the guarantees of the written constitution can also be perceived as developing a blocking function with regard to the political will to introduce comprehensive institutional reforms, due to the presence of a special regime for constitutional amendment: worth recalling in this sense is the attempt to introduce the Senate reform, which was interrupted after the 2014 Senate Reference of the Supreme Court.

The same dynamic could affect also the prospective reform of the electoral system, even if, according to some authors, in the case of a reform of the Electoral Law a constitutional amendment will not be necessary, as Parliament deserves a broad margin of political discretion in implementing an electoral system⁸⁸. It seems that, even if legal scholars are divided on the way in which the right to vote of individuals must be guaranteed *vis a vis* an electoral law reform⁸⁹, the risk of “preventive block” effect produced by the risk of the electoral law being subsequently quashed by courts is low, in the light of the current case law on electoral matters. Confronted with the highly controversial issue of the compatibility between a specific electoral system and the protection of the right to vote⁹⁰, the Quebec Court of Appeal has stated that «effective representation is not dependent on the electoral system» and thus that an electoral system can be considered valid when it is structured in a way that can «confer on the electorate or assure it of a minimal, albeit significant, degree of representation»⁹¹.

Therefore, any electoral reform will be challenged on the grounds of section 3, interpreted in the light of section 1 under the application of the proportionality scrutiny⁹². Also with regard to electoral law, the interpretation given by courts determines in which direction Parliament exercises its own discretionary power, as recently happened in Italy, where the Italian Constitutional Court declared the illegitimacy of electoral law, where the latter unreasonably limits the constitutionally guaranteed equality of vote together with the principle of fair representation of voters within the Chambers. In this case, the reasoning of the Italian Court must be taken in due consideration by Parliament, in order to avoid the risk of a new invalidation, as already happened with the electoral law approved after the Court’s judgment⁹³.

⁸⁷ Reference re Secession of Quebec, 1998, para. 72.

⁸⁸ E. McFarlane, *Constitutional Constraints on Electoral Reform in Canada: Why Parliament is (Mostly) Free to Implement a New Voting System*, in *Supreme Court Law Review*, 76, 2016, 414, recalling J Iacobucci.

⁸⁹ *Ibid.*, 415.

⁹⁰ Section 3 of the Charter, which is significantly outside the scope of application of section 33.

⁹¹ *Daoust v. Quebec (Chief Electoral Officer)*, [2011] Q.J. No. 12526, 2011 QCCA 1634 (Que. C.A.); see McFarlane, 2016, 415, who refers also to equivalent Supreme Court’s case law.

⁹² It is worth recalling that section 1 is one of the features of the Charter dialogue theory, see P. W. Hogg, A. A. Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)*, cit.; see also P. Malcolmson, R. Myers, G. Baier, T. Bateman, *The Canadian Regime. An Introduction to Parliamentary Government in Canada*, cit., 95.

⁹³ See judgments n. 1/2014 and 35/2017, C. Caruso, M. Goldoni, *Halving the “Italicum”: The Italian Constitutional Court and the Reform of the Electoral System*, *VerfBlog*, 2017/2/28,

Turning back to Bognetti, it can be said that the contemporary division of powers, is characterised by a plurality of institutional centres⁹⁴. Therefore, although this type of separation of power is mostly grounded in and dominated by the full authority of the Executive power, the executive is embedded within an effective system of separated powers, in which other powers are guaranteed independence: They act as powerful virtual “checks” against the Executive’s action and – when the existing concrete legal and political circumstances require a more proactive role – they can convert themselves in effective “brakes”⁹⁵.

6. The role of the Senate as a “chamber of sober second thought”: Its performance and possible reform. Which lessons for comparative law?

When referring to the Canadian form of government, it is worth developing also some thoughts on the Senate, which is the Upper House of the Canadian Parliament and expresses some distinctive features from its UK counterpart (the House of Lords) and also from the “traditional” second chamber within a federalist State⁹⁶. Without any pretence of exhaustiveness, we will limit ourselves to highlighting some characteristics which can be of interest from a comparative perspective, as well as some recent proposals aimed at reforming the Senate’s structure, appointment and function⁹⁷.

The idea can be summarised with a very simple question: bearing in mind its concrete performance and political, social and legal debates surrounding this institution, should the Canadian Senate act in the future as a *de facto* counter-majoritarian agent within the Canadian constitutional form of government?

If we consider the Supreme Court’s Senate Reference (2014), we can derive a set of elements which help to qualify the Canadian Senate as a relevant model at the comparative level. However, it must be clarified that not even the Senate is immune to strong concerns with regard to its functioning. Among other things, it has been constantly criticised for its lack of direct representation, as its Members are appointed by the Prime Minister; consequently, the form of appointment has produced a “Partisanisation” of the Senate, which is often very “mild” in rapidly approving executive legislative proposals⁹⁸.

Notwithstanding, and considering the “stasis” surrounding proposals for reforming this institution, the model of a Senate designed and acting as a complementary legislative body of sober second thought calls the attention, especially from a country like Italy where recently the path of the constitutional

<http://verfassungsblog.de/halving-the-italicum-the-italian-constitutional-court-and-the-reform-of-the-electoral-system/>).

⁹⁴ G. Bognetti, *La divisione dei poteri: saggio di diritto comparato*, cit., 92.

⁹⁵ *Ibid.*, 94.

⁹⁶ F. Palermo, M. Nicolini, *Il bicameralismo. Pluralismo e limiti della rappresentanza in prospettiva comparata*, Napoli, 2013, 248.

⁹⁷ We refer to the so-called “Three E” Senate, equal, elected and effective; see for further analysis J. Webber, *Constitution of Canada. Contextual Analysis*, cit., 87, according to whom «the current Senate has virtually no defenders». It must be specified that Senate reform is a never-ending debate within Canadian politics, with some similarity with the Italian political debate on the reform of the Italian Senate of the Republic.

⁹⁸ See D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 156.

reform of the Senate has been drastically interrupted by a popular referendum. It is worth noting that the rejected reform of the Italian Senate will have changed the nature of that institution from a directly elected to an indirectly elected body (second-level elections), as its Members will be elected by the representatives of regional and local institutions, in order to increase the representation (as well as the political force and influence) of sub-national level of government at the central level.

Therefore, the notion – ideally speaking – of a Chamber which is not intended to be a «perennial rival of the House of Commons in the legislative process»⁹⁹, while at the same time it aims to represent different regional (provincial) realities, is worth specific analysis. According to many Canadian authors, with regard to the Senate’s “destiny” there is a “before” and an “after” the Senate Reference of 2014¹⁰⁰. While before the Reference the Canadian Senate did not find a very “good audience” – and it still does not have one, frankly speaking – the Supreme Court seems to have provided fresh energy to this institution, in terms of both constitutional legitimisation and political and social trustworthiness.

On the one hand, in order to determine that the proposed reform must be approved through the constitutional amendment formula, the Supreme Court stated that its abolition (which will have required the consent of all provinces) and the consultative election at the provincial level (at least seven provinces representing as an aggregate at least half of the Canadian population) will both have the effect of fundamentally changing Canada’s constitutional architecture¹⁰¹. Therefore, the Supreme Court explicitly qualifies the Senate as an essential element of constitutional structure, the alteration of which is going to produce a significant impact on the Constitution as a whole.

At the same time, in terms of social and political trustworthiness, the Reference seems to have tried to bypass the main weakness of the Senate – the lack of democratic legitimisation – by giving it a specific constitutional meaning. In the Court’s reasoning, the undemocratic (or rather, unrepresentative) nature of the Senate is in a certain way ‘constitutionally consistent’ and even ‘due’, as it is perfectly consistent with the function that this institution has been called to develop as part of the Parliament. The Senate was designed to be independent from the electoral process and therefore “dependent” from the executive’s appointment, in order to remove it from the partisan political arena¹⁰², while at the same time confining itself to a role as «a body mainly conducting legislative review, rather than as a coequal of the House of Commons»¹⁰³, in the absence of a

⁹⁹ Senate Reference, para. 58.

¹⁰⁰ A. Dodek, *The Politics of the Senate Reform Reference: Fidelity, Frustration and Federal Unilateralism*, in *McGill Law Journal*, 60, 4, 623 ff. It tells us much on the very proactive role in terms of constitutional interpretation that the advisory function of the Supreme Court plays within the Canadian constitutional and political framework; this is another reason of distinction with the “traditional” centralised constitutional courts, which are generally not charged with this kind of function.

¹⁰¹ Senate Reference, paras. 13 and 30.

¹⁰² Senate Reference, para. 28.

¹⁰³ *Ibid.*, para. 58.

popular mandate (according to critics, it has been substituted by the executive mandate). Paradoxically enough, but only when interpreted from a political instead of a purely constitutional perspective, giving it democratic legitimacy would convert the Senate's role within the Canadian constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy¹⁰⁴. The traditional weakness of the Senate may have been unexpectedly converted into a constitutional strength. Therefore, one may agree with those scholars arguing that the Senate Reference has promoted the Senate as a critical ally of responsible government, by restoring – at least partially and potentially – a sense of constitutional consistency with regard to its composition and operation¹⁰⁵.

If we consider the Senate Reference a possible turning point for the constitutional role of the Senate, it is important to stress that it could contribute to overcoming the assumption of a Canadian «ineffective bicameralism»¹⁰⁶, in favour of a newly established theory of bicameralism as the essential character of the legislative process¹⁰⁷: a “dormant” bicameralism should have been “awoken” – at least potentially – by the Supreme Court intervention, by exercising one of the many distinctive features of Canadian constitutionalism, its advisory function.

In this case, by exercising its own interpretative prerogative on the Constitution, even if shared with other branches (legislative), the Court effectively enters into the responsible government dynamics. It does it in a temperate way, as it leaves to the Parliament the last word with regard to the opportunity to continue along the direction of the reform of the Senate¹⁰⁸. At the same time, the Supreme Court plainly draws the required procedural path (constitutional amendment), calling on Parliament to take action and assuming its own responsibilities. This approach seems to be in line with one of the core assumptions of the Charter dialogue theory, providing incentives to Parliament for not simply delegating responsibility for considering matters of principle to the courts, even if the original reference is to the protection of fundamental rights.

By restoring a fully functioning bicameralism, the Senate will perform more properly and effectively those functions which should have defined its nature and composition: To improve legislation through the legislative review function¹⁰⁹; and to take an active role within the dynamics of the responsible government conventions. Even if it does not play any role in the confidence convention, nevertheless the «Senate is better equipped to hold government accountable for its policies and conduct than is the House of Commons», for example by exercising

¹⁰⁴ Senate Reference, para. 63.

¹⁰⁵ D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 67.

¹⁰⁶ According to D. Baker, *Not Quite Supreme*, cit., 129, «While the Senate can use its formidable legislative powers, it only rarely uses them because of its substantial informal weaknesses relative to the elected House of Commons».

¹⁰⁷ D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 63.

¹⁰⁸ According to the Supreme Court, «the desirability of changes is not a question for the Court; it is an issue for Canadians and their legislatures» (Senate Reference, para. 4).

¹⁰⁹ The definition of “sober second thought” Chamber; see D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 93.

in a less deferential attitude its veto power on governmental Bills passed by the House of Commons¹¹⁰.

At the theoretical level this idea seems to be quite well grounded, in practice it rarely and hardly finds effective implementation, main reason of which being – according to Canadian scholars¹¹¹ – the appointment method (Prime Minister) which favours, as already mentioned, partisanship among Senators. In this regard, it is worth mentioning a recent reform by Trudeau, establishing an Independent Advisory Board for Senate Appointments that receives applications from qualified Canadians when a Senate position becomes available, thus providing the Prime Minister with non-binding recommendations on potential candidates to the senatorial office based on merit¹¹². This measure, together with the not merely symbolic decision to exclude Senators from the Liberal caucus¹¹³, may favour a more independent exercise of Senate prerogatives, within the limits stemming from its nature (non-representative sober second thought chamber) and functions (essentially legislative). The case of the dialogue between the two Chambers on occasion of the approval of the Government Bill on doctor-assisted death, where the Senate proposed to the House of Commons amendments to the original text, may testify to the inception of a new phase in Parliament and thus in the constitutional structure as a whole¹¹⁴, within the limits of the conventions of responsible government.

Thus, «Under a system of parliamentary government, the Senate must never replace the Commons and hold government responsible but it may make government more responsive – and responsible»¹¹⁵. More than conducting a «rebellion», the attitude of the Senate seems to have brought «new life to Parliament»¹¹⁶, and therefore to the entire Canadian form of government.

7. The evolution of the form of government: Is Canada still a constitutional laboratory?

The *fil rouge* of this paper has been to understand how the Canadian system of government succeeds in balancing the historically rooted parliamentary sovereignty with the “newly” established constitutional supremacy, within a framework based on the convention of responsible government. Canada seems to express some of the typical trends within contemporary parliamentary systems, along the axes of the relations between the executive and the legislative, and the judiciary and other branches of government. However, the consolidation of a “hybrid” or mixed constitutional framework, especially after the 1982 reform, can provide innovative solutions (even when deeply criticised within Canadian legal scholarship) which have traditionally drawn the attention of both foreign scholars

¹¹⁰ D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 87.

¹¹¹ *Ibid.*

¹¹² L. Turnbull, *Political institutions in Canada in a new era*, in *Oxford Handbook of Canadian Constitution*, cit., 182.

¹¹³ *Ibid.*, 181.

¹¹⁴ *Ibid.*, 183.

¹¹⁵ D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 102.

¹¹⁶ *Ibid.*

and decision-makers. The most significant issues have been thoroughly analysed in the paper.

According to Albert¹¹⁷, Canada can be considered a paradigmatic example of «constrained parliamentarism»¹¹⁸, as responsible government conventions are embedded into, and thus oriented by, a written constitution (Bill of Rights, constitutional review). One of the main features of constrained parliamentarism is precisely the presence of a judiciary playing «a central role in monitoring the actions of the fused executive and legislative departments»¹¹⁹. Therefore, according to Albert, «Canada straddles the boundary dividing British parliamentarism and American presidentialism»¹²⁰. Significantly enough, the judiciary – especially when exercising the function of judicial review of legislation – represents a key tool in guaranteeing a physiological coexistence between parliamentary sovereignty and constitutional supremacy. It can be said that, given the “fusion” between executive and legislative branches¹²¹, counter-majoritarian power represented by the judiciary contributes to restoring a more appropriate balance between powers. At the same time, the judiciary is counter-balanced by specific “majoritarian-friendly” measures, such as sections 1 and 33 of the Charter. Within this landscape, prospectively also institutions traditionally conceived as “weak”, such as the Governor General in exercising royal prerogatives, may play a more proactive stabilising function when confronted with the dynamics between powers. Especially – even if we saw that this outcome is far from been achievable in the near future – whether electoral reform in the direction of the proportional system will be achieved, facing a more “nuanced” (in terms of electoral results) political context the governor general shall exercise in a more autonomous (from the Prime Minister’s advice) way his/her prerogatives, both at the time of the designation of the Prime Minister and if the House is prorogued or dissolved. According to Smith¹²², it may possibly strengthen the role of Governor General as «guardian of the Constitution», as he/she «may well come to determine both the strength and reputation of Parliamentary government in Canada».

A recent book has suggested that the second decade of the 21st Century has established the preconditions for «a new political beginning» for Canada¹²³: a more independent Senate; a more proportional electoral system; a Governor General who is more responsive and central to the daily operation of government, as a consequence of the change in the electoral law for the House of Commons. The author suggests that public debate, and thus political confrontation, will shift from

¹¹⁷ R. Albert, *Presidential values in Parliamentary Democracy*, in *International Journal of Constitutional Law*, 8, 2, 2010, 222-223; see also R. Albert, *The Fusion of Presidentialism and Parliamentarism*, in *The American Journal of Comparative Law*, 57, 2009, 536

¹¹⁸ Reference goes to B. Ackerman, *The New Separation of Powers*, in *Harvard Law Review*, 113, 3, 200, 664 ff.

¹¹⁹ R. Albert, *Presidential values in Parliamentary Democracy*, cit., 222.

¹²⁰ *Ibid.*, 223.

¹²¹ See also J. Webber, *Constitution of Canada. Contextual Analysis*, cit., 67; even if *de iure* legal limitations and guarantees exist.

¹²² D. E. Smith, *The Constitution in a Hall of Mirrors. Canada at 150*, cit., 65.

¹²³ *Ibid.*, 131.

federalism, which dominated discussion in the last decades, to institutional change¹²⁴.

It remains to be seen whether political leaders charged with executive functions will assume in an accountable and responsive way the responsibility to govern, design and then implement this time of expected and “mainstreaming” institutional reforms. According to a constitutionalism based also on pluralism, there is no predetermined political path for this process: if it is largely true for every constitutional democracy, this is intrinsically enshrined in an «agonistic constitutionalism» such as the Canadian one, «a constitutionalism in which contending positions are seen to be essential to the society, animating it, and where these positions are not neatly contained within a comprehensive, overarching theory»¹²⁵.

Will this new *political* beginning contribute to a more effective empowerment of the existing *constitutional* agenda?

¹²⁴ *Ibid.*

¹²⁵ J. Webber, *Constitution of Canada. Contextual Analysis*, cit., 25.