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The Canadian *Living Tree Doctrine* as a Comparative Model of Evolutionary Constitutional Interpretation

by

Leonardo Pierdominici*

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Abstract

This paper starts with a general contextualisation of how Canadian constitutional law acquired an important role in global constitutional conversations in recent decades. It then considers, in particular, the well-known Canadian *Living tree doctrine* as a model of evolutionary constitutional interpretation, and argues that it is a relevant case study for our purposes since it is able to precisely link the 'history, evolution, influence and reform' of constitutional law in a comprehensive doctrine. The doctrine's comparative influence will be analysed in particular: the *Living tree* is especially relevant, since its comparative influence is traceable both in the work of courts that are historical participants in *transnational judicial conversations,* and courts that are new players in the game.

Keywords

Canada, constitutional law, constitutional interpretation, comparative influence

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1. Introduction

The symposium, and this special issue, are appropriately devoted to the history and evolution of Canadian constitutional law, and aim at exploring its comparative influence as a complementary dimension. These sought to examine the 'history, evolution, influence and reform' of the Canadian constitutional experience. I am sympathetic with this organic approach: after all, in an age of the renaissance of comparative constitutional law (Hirschl 2014), one could even argue that the comparative influence of a national constitutional law is actually part of its history and evolution, and can even have consequences at the internal level.

In this light, my reflections will start from a general contextualisation on how Canadian constitutional law acquired, over recent decades, an important role in global constitutional conversations. I will then consider in particular the well-known Canadian *Living tree doctrine* as a model of evolutionary constitutional interpretation (Waluchow 2007), and will argue that it is a relevant case study for our purposes since it is able to precisely link the 'history, evolution, influence and reform' of constitutional law in a comprehensive doctrine. I will then look in particular at the comparative influence of such a doctrine, especially relevant, I argue, since such an influence is traceable both in the work of courts that are historical participants of *transnational judicial conversations* (Slaughter 1994; McCrudden 2000) and courts that are new players in the game.

2. Contextualisation

Canadian constitutional law is widely discussed today: the organization of our symposium is an example of how Canadian constitutional law is studied and discussed beyond national boundaries. But a proper contextualization of our discussion is not simply that of an abstract comparative analysis. There is something more: in the current age of the global evolution of constitutionalism (Law and Versteeg 2011), when the migration of constitutional forms and ideas is at a historical peak (Choudhry 2006), Canada has become more and more a source of inspiration and a model in comparative terms.

This is true in general sense for Canadian constitutional sources.

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In this respect, anecdotally but quite significantly, we are reminded of a recent famous interview with Justice Ruth Baden Ginsburg on the Egyptian television 'Al-Hayat' on January 30th 2012.[I] In the middle of constitutional turmoil in Egypt, Justice Ginsburg delivered some basic suggestions on how to draft a new constitutional text, and on where to look for inspiration for such an endeavour. In this sense, she stated quite openly that she could not 'speak about what the Egyptian experience should be', since her experience was that of a judge 'operating under a rather old constitution [and] would not look to the US constitution [for] drafting a constitution in the year 2012'. Importantly, she referred in this respect to the examples of more recent and supposedly progressive constitutional documents, mentioning the examples of the South African constitution of 1996, of the European Convention on Human Rights, and of the Canadian Charter of Rights and Freedoms of 1982. This attracted several criticisms by US scholars, since it was considered as an exercise of rebuttal of 'the U.S. Constitution's relevance today' (Volokh 2012), made by an authoritative interpreter of it: and in a certain sense, it is precisely an example of how, today, the comparative influence of a national constitutional law is actually part of its history and evolution, also discussed at the internal level.

But the anecdote is an example of something that has been studied by scholars in a more comprehensive way; recent and very popular quantitative studies were devoted precisely to the effort of proving the 'declining influence of the United States constitution' (Law and Versteeg 2012). For the sake of our reflections, it is not relevant to discuss whether they succeeded or not: what is actually relevant, I think, is that in these articles the authors highlighted the influence, as comparative models, of other competitive 'transnational constitutional paradigms', and explicitly designated Canada as the first new 'constitutional superpower' (Law and Versteeg 2012: 809 et seq.). In this sense, again, the Canadian Charter of Rights and Freedoms, which was adopted in conjunction with the patriation of the Canadian Constitution in 1982, has been described as the leading influence on the drafting of the South African Bill of Rights, the Israeli Basic Laws, the New Zealand Bill of Rights, and the Hong Kong Bill of Rights, amongst others (Law and Versteeg 2012: 810; Choudhry 1999: 820-821). All in all, new codifications of human rights in the global arena proved to become more and more similar to the Canadian examples of the 1960 Bill of Rights (technically a statute, but constitutional in character) and of the

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1982 Charter, and less and less modelled after the US classic paradigm (Law and Versteeg 2012: 810-811).

But, again, this is only part of the story. What I described could be labelled as a sort of 'material' influence of Canadian constitutionalism: it experienced a relatively recent codification, and this new material structure became influential for other subsequent codifications, and more than other older material. Indeed, the transplant of old paradigms forged by natural evolution in a liberal context, such as for instance the American presidential system, proved very dysfunctional in several settings (e.g. South America, Asia: see Sartori 2004: chapt. 5).

There is also another, less obvious, dimension of influence of Canadian constitutionalism that could be termed 'doctrinal'.

Let us consider again the words of famous scholars and Supreme Court judges.

Aharon Barak, the famous former president of the Israeli Supreme Court, wrote in 2002 a celebrated Foreword to the Harvard Law Review, titled 'A Judge on Judging: the Role of a Supreme Court in a Democracy' (Barak 2002). The reflections of the Author were, in that context, once again phrased in terms of the migration and influence of constitutional ideas. But here, the renowned scholar and judge did not focus in general on the structural forms of national constitutional texts to be replicated/transplanted elsewhere. In the Foreword, the focus was explicitly on judicial interpretative activity: Barak somehow replicated the critical remarks discussed above, on declining and rising comparative constitutional influences, but he did so by specifically discussing the importance of judicial interpretation provided by national apical courts, and its relevance in *transnational judicial conversations*. He was so explicit in this respect that he distinguished the two levels of discussion, and acknowledged that 'we foreign jurists all look to developments in the United States as a source of inspiration', but 'out of deep appreciation for the impressive accomplishments of United States constitutional law and of its Supreme Court in particular' in historical terms, critical remarks could be based on the fact that 'the American Supreme Court (…) is losing the central role it once had among courts in modern democracies' (Barak 2002: 27). In this context, the Canadian Supreme Court was praised by Barak in several senses: as 'a source of inspiration for many countries around the world'; for 'its frequent and fruitful use of comparative law'' (Barak 2002: 114); and as the first cited example of a court from one on the 'enlightened democratic legal systems' which

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extricate themselves from the heavy hands of intentionalism and originalism in interpreting the constitution and adopt a 'purposive interpretation of the constitution' (Barak 2002: 72-73). In this context, the words of several judges of the Canadian Supreme Court were cited *in extenso* (Barak 2002: 39, 42, 44, 51, 68, 114).

In the same vein, Anne Marie Slaughter, one of the first and more renowned scholars to describe and discuss *transjudicial communications* through which judges are 'building a global community of law', singled out the South African Constitutional Court and the 'Canadian Constitutional Court' (sic) as 'disproportionately influential' and 'highly influential, apparently more so than the U.S. Supreme Court and other older and more established constitutional courts' (Slaughter 2004: 74). Other scholars working on transnational judicial dialogue identified, accordingly, the Canadian Supreme Court as 'one of the most influential domestic courts worldwide on human rights issues' (Waters 2005: 558). Newspapers commentators spread this debate among a non-specialist public noting again that 'many legal scholars singled out the Canadian Supreme Court and the Constitutional Court of South Africa as increasingly influential' (Liptak 2008).

So in a certain sense one could take for granted the comparative relevance not only of Canadian constitutionalism in general, but also of the Canadian Supreme Court as its authoritative interpreter in particular. As said, its influence is recognized and traced by scholars and even in non-specialist publications. And here as well, quantitative studies confirm such an impression, and show that at least in certain relevant jurisdictions Canadian decisions are cited abundantly. For instance, in a study of 2007, Allan, Huscroft and Lynch demonstrated that in another common law jurisdiction, New Zealand, judges cite Canadian precedents far more often than those of any other nation from 1990 to 2006 (the United States comes next but with just over half as many citations) (Allan, Huscroft, Lynch 2007). A recent study by Navot shows that in the case of the Israeli Supreme Court an average of more than one fourth of the constitutional cases decided between 1994 and 2010 included foreign citations, and 64% of all foreign law citations in constitutional cases (both institutional and human rights related) were from American cases, 13% from Canadian, 9% from English and 5% from German cases (Navot 2013: 141 et seq.).

Such a success of the Canadian Supreme Court in comparative influence comes for many interrelated reasons.

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It is of course a by-product of the success in structural influence of Canadian constitutional sources. As many foreign legal texts are modeled on Canadian ones, it is natural for their interpreters to look at what the authoritative interpreter of the original model has done in the past. This is true in particular for the aforementioned case of Israel: as well known, the local Basic Laws on human rights enacted in 1992 are drafted according to the Canadian example, and contain similar notwithstanding clauses, so that the Israeli Supreme Court in adjudicating on those has made reference to the Canadian Supreme Court's jurisprudence on the same matter.[II]

The success of the Canadian Supreme Court comes also from the specific nature of an apical court of a common law jurisdiction in which a prototypical bill of rights was enacted. This proved decisive, for instance, in the aforementioned case of New Zealand, which is a perfectly comparable environment: the same study of 2007 by Allan, Huscroft and Lynch traces back the influence of Canada since its 'judges are, by most accounts, the most judicially activist in the common law world – the most willing to second-guess the decisions of the elected legislatures' (Allan, Huscroft, Lynch 2007: 5).

Moreover, Canada is a young state with a stratified tradition of sources and, given the presence of Quebec, includes a mixed private legal system (Walton 1899: 282; Palmer 2007): in this respect, a former Canadian Supreme Court Justice, Gérard V. La Forest, for example, wrote that Canadians use foreign legal materials because they are naturally and 'genuinely interested in the comparative approach, in learning how other traditions have dealt with the problems with which we are wrestling', in a sort of exercise of inherent legal cosmopolitanism that is also a valuable source of both 'effectiveness and sophistication' (La Forest 1994: 217-218).

In fact, in this vein, it is well known that the Canadian Supreme Court championed the use of comparative law and international law in performing its interpretative tasks. Important studies noted that this was the case in the extensive use of comparative law in constitutional or human rights cases (La Forest 1994; Lefler 2001), but also in statutory interpretation (Neudorf 2017), and in the blossoming use of international law in defining the guarantees found in the Canadian Charter of Rights and Freedoms (Warner La Forest 2004; Arbour, Lafontaine 2007; Oliphant 2014). Much could be said on this: but suffice is to say that the Canadian Supreme Court is clearly a well-recognised participant in *transnational judicial conversations* as both a borrower and a recipient of comparative influence.

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After all, since *transnational judicial conversations* comprise not only formal citations among judicial bodies, but also cross-fertilization in general (Teitel 2004), it must be noted that a remarkably large number of Supreme Court members also engaged in personal terms in such an endeavour. Important works published – during their mandate – by Justices Claire L'Heureux-Dube (L'Heureux-Dube 1998), Gérard V. La Forest (La Forest 1994), Michel Bastarache (Bastarache 1998), Beverley McLachlin (McLachlin 1998), among the others, expressly preached the comparative role of the Canadian Court and its openness towards the global legal arena.

3. The *Living Tree doctrine* as a distinctive model of evolutionary interpretation

So, we have a background of general openness of Canadian constitutionalism - in material/structural terms - and the Canadian Supreme Court in particular - in doctrinal terms - towards global legal conversation. Several interrelated dynamics concurred in shaping such an influential position.

Here, I would like to focus my attention on one of the specific judicial doctrines which proved successful in determining the influence of the Canadian Supreme Court and of its much discussed interpretative work in the comparative 'market of ideas' (Goldman 1999).

Funnily enough, I am talking of a very famous interpretative doctrine that was not forged, originally, by the Supreme Court and in relation to current Canadian constitutional sources. The *Living Tree doctrine* was first conceived of in a 1929 decision, *Edwards vs Canada* otherwise known as the 'Persons Case',[III] issued by the Canada's highest court at the time, the Judicial Committee of the Privy Council (JCPC) in Britain. After analyzing the Constitution's use of the term 'persons', which had always referred to men, the JCPC decided that both men and women were now 'persons', and therefore could be equally called to sit in the Canadian senate. According to the historically celebrated words of Justice Sankey, while constitutional stability and integrity are of crucial importance, the Constitution 'also planted in Canada a living tree capable of growth and expansion within its natural limits'. Women may not have been able to vote or hold office in 1867, but times had changed and so had to change constitutional interpretation: the decision led women to gain a measure of equality to men in the political arena.

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Such a *Living Tree doctrine* has since been endorsed multiple times by the Supreme Court of Canada when analyzing constitutional rights;[IV] it has become the Court's preferred method of constitutional interpretation when dealing with division of powers provisions.[V] Moreover, it was associated not only with a progressive but also a purposive/teleological construction of the Charter of Rights and Freedoms provisions (Tremblay 1995; Karazivan 2017: 631).

The Supreme Court adopted the doctrine, and therefore a method of constitutional interpretation that openly aims at allowing the Canada's constitution to change and evolve over time (' a living tree capable of growth and expansion (...)'), while still acknowledging its original intentions ('(…) within its natural limits') (Hogg 2007: 36.8(a)). In doing so the doctrine shapes a balance between two seemingly contradictory, but ultimately complementary, goals: predictability and flexibility. It was already clear in the words of Justice Sankey in *Edwards*: to be effective, the constitution must consist of a set of predictable rules, in order to let citizens know how their activities are treated, and the federal government and the provinces can be overseen in a consistent matter. Still, on the other hand, the necessity of a flexible interpretation is acknowledged (and it was acknowledged already in 1929!), to accommodate the realities and the challenges of changing modern life. The Supreme Court explicitly stated that this is, ultimately, to preserve the vitality of the constitution: unless interpreted in this way, it would be frozen in time and become more obsolete than useful (Hogg 2007: 36.8(a)).[VI]

The approach consists of identifying the purposes or goals of the constitutional provisions in order to provide them with meaning: by constructing them according to those purposes or goals. Such a technique of interpretation is also adopted when there is no clear guidance as to the nature or the meaning of the protected interest at stake (Tremblay 1995: 473), which is in any case researched by the Supreme Court, not necessarily in an historical light, but also in a 'contemporaneous' one (Tremblay 2006: 86; Karazivan 2017: 631).

To give some well-known examples, such an approach led the Court in 2004 to include same-sex marriage in the capacity to enter into marriage provided by Section 91(26) of the Constitution Act 1867, even though such a provision probably did not include it in terms on unspecified intentions at the time in which it was enacted, since it deemed impossible to infer, in looking at the constitutional goals implied, 'natural limits' to the definition of

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marriage.[VII] Seemingly, it led the Court in 2005 to include maternity leave in the competence transferred to the federal parliament in 1940 on 'unemployment insurance', even though such a provision probably did not include it in terms on unspecified intentions at the time in which it was enacted. In looking at the constitutional goals implied, the Court highlighted that Parliament considered unemployment to be an historical urgent national problem, and 'over the years, numerous amendments were made to the original Act, generally to expand qualifying conditions, increase benefits and eliminate inequities', and therefore, given the social transformation occurred, this has to include maternity leave nowadays.[VIII] Again, such an approach led the Court in 2007, when dealing with the historical division-of-powers provisions of Sections 91 and 92 of the Constitution Act 1867 vis-à-vis the competence to rule on licensing scheme governing the promotion of modern insurance products, to state that the meaning those provisions had in 1867 does not reflect judicial practice. Here, 'the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society' (and, in looking at the constitutional goals implied, the promotion of authorized insurance 'is not part of the core of banking because it is not essential to the function of banking').[IX]

It must also be noted that, here again, the Living tree as an interpretative doctrine was formally endorsed not only by the Supreme Court, but also by its Justices in a personal academic capacity (L'Heureux-Dube 1998; Binnie 2004), and by major Canadian scholars (Hogg 2007: 15; Tremblay 2006; Cyr 2014); it became an orthodoxy.[X]

For our purposes, in any case, it is important to evaluate the *Living tree doctrine* in a comparative perspective. And in this sense, I argue, the doctrine has something specific and distinctive that fed its success in a comparative perspective, as a model of constitutional interpretation with an important comparative influence.

As has been already said (Jackson 2006), the *Living tree doctrine* could be considered as just one of the many metaphors used in different legal settings to describe the classic claim that, in a judicial pragmatic perspective, a constitution has a dynamic meaning, or that it has the properties of animate being or other object capable of change.[XI] The idea, as well-known, is associated with views that contemporaneous society should be taken into account when interpreting key constitutional phrases.

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In this respect, the best known example of a similar metaphor can be found in the United States, where doctrines of constitutional interpretation have been intensely discussed for decades and decades. Interestingly, the American idea of a 'Living constitution' also derives from the 1920's, probably from the title of a 1927 book by Professor Howard Lee McBain (McBain 1927). Efforts at developing such a concept have been credited to both judicial and political figures such as Oliver Wendell Holmes Jr., Louis D. Brandeis, and Woodrow Wilson. The latter famously argued, in his 1908 book *Constitutional Government in the United States*, that 'living political constitutions must be Darwinian in structure and in practice' (Wilson 1908). Such a trend gained more and more success also a tool of constitutional interpretation (Kammen 1987: 325), starting from the assumption that the old American constitution was deliberately written to be broad and flexible to accommodate social or technological change over time. A famous historical explicit application of such a framework is evident, for instance, in the Supreme Court's reference to 'evolving standards of decency' under the Eighth Amendment; in 1958 in the famous case Trop v. Dulles[XII] the Court stated that '[T]he words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'. As also well-known, such an interpretative framework is opposed to other conservative ones, again phrased in metaphorical terms, such as the various forms of originalist interpretations, which aim to stick to the original meaning of the constitutional text or to the historical intent of the legislator (Strauss 2010).

Similar approaches can be seen in continental Europe as well. For instance, scholars look at the decisions of the Federal Constitutional Court of Germany as examples of eclecticism, in which judges 'employ a set of arguments and analytical techniques that go beyond the text and typically involve resort to prior decisions (even in systems not formally built on judicial precedent), as well as constitutional purpose, and, on occasion, the likely consequences of alternative interpretations or the experience of other democracies'. They also recognize in any case that the principal approach adopted by the Federal Constitutional Court is a 'value-oriented' one, 'involving an "objective ordering of values"' and often beginning 'with a statement of the fundamental constitutional principle at stake', so that such a principled interpretation cannot but depart from the plain text, and thus make the constitution a living instrument (Jackson 2006: 929). Such an approach is even

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more explicitly theorized in Italian constitutional law and adjudication, where a similar interpretation is adopted; both scholars and the Constitutional Court talk of Article 2 of the Italian Constitution as a 'page left open' by the Framers in the specification of constitutional basic principles and values, to be filled by interpretative means in a broad and flexible way to accommodate social and technological change over time (Mortati 1969: 949 et seq.; Barbera 1975: 50-53).[XIII]

Again, similarly, even is settings where a sort of moderate originalist model of interpretation is in vogue, such as Australia (Goldsworthy 2000), famous doctrinal calls for interpreting the constitution as a 'living force' have been issued (Kirby 2000), again framed in the same metaphorical terms and therefore using 'life' as an idea to express a capacity for dynamic change through interpretation.

In terms of metaphors, it is relevant to notice in comparative perspective that the opposite idea of a 'petrification' of the constitution, and of its text and meaning, was used in different contexts to oppose such an idea of interpretative dynamic change.[XIV] This is relevant because the Canadian Supreme Court itself, in cases like *Reference Re SameSex Marriage* in which the *Living tree doctrine* was adopted and updated, explicitly confronted and refused the idea of a static nature of constitutional concepts: Chief Justice McLachlin introduced a very similar metaphor to that of 'petrification', stating that the '(T)he "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life'.

I stress the point, since I argue that therein lies the distinctiveness of the *Living tree doctrine*, precisely as refined and updated by the Supreme Court of Canada throughout the decades: in constructing predictability and flexibility as complementary dimensions, in requiring adherence to the roots, while paying attention to nurturing the fruits of constitutional interpretation at the same time.

Metaphors are widely employed in law since they are, after all, necessary: they *reveal* what technical language might not convey (Ricœur 1975). Still, because of their ultimately undetermined nature, they can nonetheless obscure as much as they illuminate (Jackson 2006: 926).

Nonetheless, I agree with the idea that the *Living tree doctrine* is distinct from 'the less tethered 'living constitution" metaphor, or the others we briefly described: it captures not

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only the idea of progressive interpretation, but the multi-dimensional idea of a purposive/teleological interpretation 'constrained by the past, but not entirely', in which both 'the idea of constraint, the role of text and original understanding in the roots of the constitutional tree and the role of precedent and new developments in its growth' are crucial, in which 'the multiple modalities - text, original intentions, structure and purpose, precedent and doctrine, values and ethos, prudential or consequentialist concerns - of contemporary constitutional interpretation' are distinctively embraced (Jackson 2006: 926).

And in this sense, I argue that such a precise and distinctive nature of the Living tree doctrine as a model of constitutional interpretation proved crucial for its comparative influence and thus also for the comparative influence of the Supreme Court of Canada.

To support my argument, I will look at a sample of relevant cases from different jurisdictions.

4. The *Living Tree doctrine* as a distinctive model of evolutionary constitutional interpretation

We will look at three cases from different jurisdictions where comparative arguments based on reliance of the Canadian Supreme Court's precedents were put forward.

I argue that they are relevant for several reasons. It is noteworthy that, in their chronological order, they show a progressive comparative influence of the Canadian Supreme Court's model of constitutional interpretation: it was firstly cited by well-known participants of *transnational judicial conversations* such as the South African Constitutional Court and the Israeli Supreme Court, but ultimately it also influenced a rather traditional judicial body such as the Spanish Tribunal Constitucional. Moreover, I argue that in the cases selected the reliance on the model is not random, and is not interchangeable with the reliance on other 'metaphorical' but less specific models of interpretation: quite the opposite, it was carefully chosen because it was important to express that precise idea of both constraint and dynamic development, with 'the role of text and original understanding in the roots of the constitutional tree and the role of precedent and new developments in its growth'.

The first case comes from South Africa: it is the well-known *Makwanyane* case.[XV] It was one of the first cases decided by the local Constitutional Court once established by the

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Interim constitution of 1993 and after beginning its first session in 1995. In its landmark decision, the Court investigated the constitutionality of a provision of the 1977 Criminal Procedure Act on capital punishment in relation to section 8 (equality before the law), 9 (right to life), 10 (protection of human dignity), and 11 (unlawfulness of cruel, inhuman and degrading treatment and punishment) of the new Interim constitution of 1993. The Court went through a critical assessment of various countries' constitutional jurisprudence on death penalty, discarded the usefulness of American and Indian precedents in this respect, and turned its attention mainly to Canadian case law. The Canadian Supreme Court faced, from 1991 to 2001, an important set of cases on the question of whether it would violate the Charter of Rights and Freedoms to permit the extradition of a person to the United States to face a possible death sentence. In *Kindler v. Canada*,[XVI] the Supreme Court of Canada rejected a claim that section 7 of the Charter (prohibiting deprivations of liberty inconsistent with fundamental principles of justice) prohibited the extradition of the defendant, who had already been sentenced to death, to the United States; three of the seven judges nonetheless dissented with strong arguments, based upon 'the historical reluctance displayed by jurors over the centuries to impose the death penalty, the provisions of s. 12 of the Charter and the decisions of this Court pertaining to that section. It is also built on the pronouncements of the Canadian Court which emphasised the fundamental importance of human dignity, and on international statements and commitments made by Canada stressing the importance of the dignity of the individual and urging the abolition of the death penalty', and therefore on arguments based precisely on that blend of tradition and development which is typical of Canadian constitutional interpretation. Those dissenting arguments proved successful internally, since *Kindler v. Canada* was basically overturned in 2001 with United States v Burns,[XVII] and again with diachronic arguments: the Court explained its change of position in light of intervening developments, including international initiatives, change in other state practices, and accelerating concern in Canada over wrongful convictions in Canada and the United States. Although 'the basic tenets of [Canada's] legal system.., have not changed since 1991 when *Kindler* and *Reference re Ng Extradition* were decided (...) their application in particular cases (the 'balancing process') must take note of factual developments in Canada and in relevant foreign jurisdictions (...) [The] balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome'. But

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in particular, those dissenting arguments were relevant for the South African Court's decision in *Makwanyane*, which relied on the Canadian Supreme Court's idea that 'a right or freedom guaranteed' is 'to be ascertained by an analysis of the purpose of such a guarantee' and 'in other words, in the light of the interests it was meant to protect', 'and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated', to state that '(T)he death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity'.

The second relevant comparative case comes from Israel. I already hinted at how the Canadian example is 'materially'/'structurally' relevant for Israeli constitutional law and adjudication, since the drafting style of the local Basic Laws on human rights of 1992 is modelled after the Canadian charter of rights. I also touched on how Canadian precedents have been quantitatively important in shaping the Israeli jurisprudence.

But there is also a qualitative doctrinal relevance of the Canadian model to be appreciated. This comes from the times in which the 'constitutional revolution' founded on the Israeli Basic Laws on human rights of 1992 had not yet been sanctioned by the Israeli Supreme Court,[XVIII] and the Court was shaping its own judicial-made bill of rights through mere interpretative activity (Barak-Erez 1995). In a famous case on free speech, *Station Film Co. Ltd. v. The Film Review Board*,[XIX] the problem of censorship on pornography was discussed. The classic question at stake was whether freedom of expression should be extended to pornography, and under what limits: should a work's artistic value be examined as a whole when the pornographic parts are seen as part of the entire work? The case heavily relied on a Canadian precedent, *R v. Butler*, and decisively: 'a work's artistic value is evaluated on the basis of the work as a whole. Thus, the artistic value of individual sections per se is not examined. This approach is also accepted in Canada. In *Butler*, Justice Sopinka wrote: 'The "internal necessities" test, or what has been referred to as the "artistic defence", has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent "dirt for dirt's sake" but has a legitimate role when measured by the

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internal necessities of the work itself'. Thus, the Israeli Court relied here on a case in which the Canadian Supreme Court was evaluating the constitutionality of provisions of the Criminal Code dealing with obscenity, and specifically the phrase 'undue exploitation', by acknowledging that the concept meant different things at different times, appealing far more to conceptions of morality than to law, and is therefore inherently subjective. The Canadian Court implicitly argued that Parliament intended for the term to reflect evolving standards, since the term 'undue' invariably requires a fact specific inquiry that, like the term 'reasonable', cannot be divorced from modern standards and conceptions. In the face of an ambiguous meaning, the Court rightly adopted the less intrusive option: this was based on the argument according to which the overriding objective of the Charter (s. 163) was not moral disapprobation but the avoidance of harm to society, and therefore the constitutional interpretation was based on a specific quest for the constitutional goal or purpose to be compared with the legislative decision of the Parliament: a move that the Israeli Supreme Court effectively replicated in *Station Film Co. Ltd. v. The Film Review Board*, arguing that the respondent's order to delete the pornographic parts of the film was invalid, except for the portions which the petitioner had agreed to delete.

The third relevant comparative case comes from Spain. It is a very well-known one, and, here as well, the *Tribunal constitucional* had to deal with the classic problem of a possible change in meaning of a legislative provision. The Spanish Court in the famous case n. 198/2012 of November 28th 2012 upheld Law n. 13/2005 which guarantees same-sex marriage in Spain. The Tribunal explicitly referred to the model of the *Living tree doctrine* of the Canadian Supreme Court, and, as said, this alone is relevant, as the tradition of quoting foreign law in Spanish constitutional adjudication was scarce, and on the decline (after a first period of ample use in the 1980's: Santana Herrera 2010). It made explicit reference to both the *Edwards* and the *Reference re Same Sex Marriage* cases. But what is more relevant is that the reliance of the Tribunal on the cited *Living tree doctrine* was not generic, as one of the many metaphors one can use to suggest a dynamic constitutional interpretation; quite the opposite, it was carefully planned. The Tribunal emphasized the need to guarantee full equality in marriage regardless of sexual orientation because of the constitutional protection of dignity and personality, and openly declared its adoption of a non-originalist interpretation of the constitutional text, which was to be interpreted as an evolving document in the perspective of its historical origins and within the limits of those, and

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therefore precisely as intended by the Supreme Court of Canada. The Tribunal looked, in fact, precisely at the *historical purpose* served in 1978 by Article 32, paragraph 1 in establishing legal equality between men and women, and recognized that the institution of marriage have developed in a different and more liberal framework precisely because of the *natural evolution* of that *historical purpose*. The Court explored the evolution of the social concept of marriage, its detachment from the right to create a family, and the parallel legislative acknowledgement of same-sex marriage in the vast majority of European legal orders: it stated that all required a changed interpretation of the Spanish Constitution, which should not be considered 'frozen' in time.[XX] As the concurrent opinion of Justice Aragón Reyes made clear, the decision was based on the argument that, given the evolution of the historical purpose of equality, the principle of heterosexuality was no longer an essential element of the guarantee of marriage based on the current social conscience and legal culture of Spain. The Tribunal established the need for a new, evolutive interpretation of the Spanish Constitution, to make of it an 'árbol vivo' and not 'letra muerta', as an exercise of continuous legitimation. The adherence to the Canadian model was therefore explicit, both in principle and in the jargon employed.

5. Some tentative conclusions

What I have tried to demonstrate in the paper is, in short, the multi-faceted influence of Canadian constitutionalism, for reasons ranging from the general to the particular.

It is widely discussed and influential in comparative terms in a sort of material/structural sense: it has experienced a relatively recent exercise of codification, a fruitful one, and this was then adopted elsewhere as a model, and much discussed by scholars, even attracting controversy.

The Supreme Court of Canada is, then, the paradigmatic example of a modern judicial institution open to the influences of global constitutionalism, and much present in today's *transnational judicial conversations*. It makes frequent use of comparative and international law; it is much cited in foreign jurisdictions; its members do not shy away from theorising such an endeavour.

But there is something more: a specific comparative influence of the *Living Tree doctrine*, as a distinctive model of constitutional interpretation which is assonant, but not identical,

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to other progressive/purposive forms of interpretation. This is becoming more and more relevant in the comparative 'market of ideas': it was adopted as an inspiration firstly by other classic *transnational judicial conversations*' participants, but it is today also used, with theoretical attention and precision, in the activity of a jurisdiction of a consolidated democracy like the Spanish *Tribunal constitucional*. The distinctive nature of the *Living Tree doctrine* in comparison with other models of constitutional interpretation is the basis of its comparative influence.

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* Postdoctoral researcher at Alma Mater Studiorum – Università di Bologna. Leonardo.Pierdominici@eui.eu.
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I The interview is available at the website https://www.memri.org/tv/us-supreme-court-justice-ruth-bader-ginsburg-egyptians-look-constitutions-south-africa-or-canada.

II See as a prototypical example the case HCJ *4676/94 Meatreal* Ltd v. Knesset [1996] IsrSC. 50(5) 15. [30].

III Edwards v Canada (Attorney General) [1930] AC 124 at 124, 1929 UKPC 86.

IV See for instance the cases Mounted Police Ass'n Ont. v. AG of Canada, 2015, SCC 1, (2015) 1 S.C.R. 3; Figueroa v. AG for Canada, 2003 SCC 37 (2003) 1 S.C.R. 912; H.M. R. v. Big M Drug Mart Ltd. (1985) 1 S.C.R. 295.

V See among the others Reference re Same-sex marriage, 2004 SCC 79 (2004) 3 S.C.R. 698, in particular at paragraphs 22-30.

VI See for a judicial assertion on this Reference re Same-sex marriage, 2004 SCC 79 (2004) 3 S.C.R. 698

VII Reference re Same-sex marriage, 2004 SCC 79 (2004) 3 S.C.R. 698.

VIII Reference re Employement Insurance Act, 2005 SCC 56, (2005) 2 S.C.R. 669.

IX Canadian W. Bank v. Alberta, 2007 SCC 22 (2007) 2 S.C.R. 3.

X Even though sometimes put into question: see Karazivan 2017.

XI See on the use of metaphors in the legal realms the special issue of the journal Pólemos - Journal of Law, Literature and Culture VI 2012.

XII Trop v. Dulles, 356 U.S. 86 (1958).

XIII See in this respect Corte costituzionale sentenze n. 11/1956 and 98/1979.

XIV Of course the reference is to Versteinerungstheorie in Austrian constitutional doctrine: see on this Douin 1977 at 49-52, Gamper 2005 at 15-16, Taylor 2006 at 98-103, Grimm 2011 at 24 in particular.

XV S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

XVI Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779.

XVII United States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7.

XVIII With the foundational and well-known case CA 6821/93, 1908/94, 3363/94 United Hamizrahi Bank v. Migdal Cooperative Village [1995] IsrSC 49(4) 221.

XIX HCJ 4804/94 Station Film Ltd v. Film and Plays Review Board [1997] IsrSC 50(5) 661.

XX Par. 9: 'Para avanzar en el razonamiento es preciso dar un paso más en la interpretación del precepto. Se hace necesario partir de un presupuesto inicial, basado en la idea, expuesta como hemos visto por el Abogado del Estado en sus alegaciones, de que la Constitución es un 'árbol vivo', —en expresión de la sentencia Privy Council, Edwards c. Attorney General for Canada de 1930 retomada por la Corte Suprema de Canadá en la sentencia de 9 de diciembre de 2004 sobre el matrimonio entre personas del mismo sexo— que, a través de una interpretación evolutiva, se acomoda a las realidades de la vida moderna como medio para asegurar su propia relevancia y legitimidad, y no sólo porque se trate de un texto cuyos grandes principios son de aplicación a supuestos que sus redactores no imaginaron, sino también porque los poderes públicos, y particularmente el legislador, van actualizando esos principios paulatinamente y porque el Tribunal Constitucional, cuando controla el ajuste constitucional de esas actualizaciones, dota a las normas de un contenido que permita leer el texto constitucional a la luz de los problemas contemporáneos, y de las exigencias de la sociedad actual a que debe dar respuesta la norma fundamental del ordenamiento jurídico a riesgo, en caso contrario, de convertirse en letra muerta. Esa lectura evolutiva de la Constitución, que se

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proyecta en especial a la categoría de la garantía institucional, nos lleva a desarrollar la noción de cultura jurídica, que hace pensar en el Derecho como un fenómeno social vinculado a la realidad en que se desarrolla y que ya ha sido evocada en nuestra jurisprudencia previa (SSTC 17/1985, de 9 de febrero, FJ 4; 89/1993, de 12 de marzo, FJ 3; 341/1993, de 18 de noviembre, FJ 3; 29/1995, de 6 de febrero, FJ 3; y 298/2000, de 11 de diciembre, FJ 11) . Pues bien, la cultura jurídica no se construye sólo desde la interpretación literal, sistemática u originalista de los textos jurídicos, sino que también contribuyen a su configuración la observación de la realidad social jurídicamente relevante, sin que esto signifique otorgar fuerza normativa directa a lo fáctico, las opiniones de la doctrina jurídica y de los órganos consultivos previstos en el propio ordenamiento, el Derecho comparado que se da en un entorno socio-cultural próximo y, en materia de la construcción de la cultura jurídica de los derechos, la actividad internacional de los Estados manifestada en los tratados internacionales, en la jurisprudencia de los órganos internacionales que los interpretan, y en las opiniones y dictámenes elaboradas por los órganos competentes del sistema de Naciones Unidas, así como por otros organismos internacionales de reconocida posición.'

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