Federalism, Treaties, and International Human Rights Under the Canadian Constitution

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I. INTRODUCTION

Early last year, Canada chided Nigeria for publicly flogging a
teenage mother under the *sharia*, the Islamic code of law that governs in the state of Zamfara. President Obasanjo's rejoinder to Canada's interference in Nigerian matters was non-confrontational but firm: "We have a federal system. You come from a federal system of government. Why can't your Prime Minister stop something in Quebec?" For the benefit of the United States, he added, "There is the death penalty in some [American] states and no death penalty in others."

Not long after, on the eve of a well-publicized trade mission, Canada's Prime Minister Jean Chrétien faced intense pressure to denounce China's record in human rights. At the time, he abruptly remarked, "We're not running China. They are running China." Along similar lines, Mr. Chrétien had explained a few years earlier that he was "not allowed to tell the premier of Saskatchewan or Quebec what to do," and retorted, "So how am I supposed to tell the president of China what to do?" Examples abound which demonstrate that federalism provides a variety of reasons for not complying with international human rights law.

If it is obvious that federalism affects the observance of international rights laws, it is also apparent that international standards pose special problems for nation-states like Canada and the United States. Yet the International Covenant on Civil and Political Rights

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1. The woman, who claimed to have been raped, was found guilty of premarital sex and sentenced to 100 lashes. See Alan Freeman, *Nigerian Leader Deplores Girl's Caning*, THE GLOBE & MAIL, Jan. 29, 2001, at A7. Her plight provoked an outcry in Canada and a formal protest from the federal government. See id.
2. Id.
3. Id. More recently, a woman sentenced to death by stoning under the law of *sharia* for the offence of adultery won a reprieve pending her appeal. The case, which arose in Sokoto, Nigeria, has once more attracted international attention. In the meantime, another woman charged with adultery was acquitted on the grounds that a conviction requires four eyewitnesses to the adulterous act. See Rape Victim Appeals Death by Stoning, THE GLOBE & MAIL, Dec. 10, 2001, at A14; Sharia Ruling Leaves Hope for Women in Nigeria, THE GLOBE & MAIL, Jan. 25, 2002, at A15; Margaret Wente, *Raped, Therefore Guilty: Stone Her to Death*, THE GLOBE & MAIL, Jan. 26, 2002, at A17.
5. Id.
(ICCPR)\(^7\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^8\) maintain that their provisions apply without limitations or exceptions.\(^9\) Though unitary and federal states are not similarly situated for purposes of compliance, it would have been awkward for the Covenants to endorse a double standard for "universal" entitlements.\(^10\) Even so, domestic constitutional arrangements that divide authority between a national government and its provinces or states cannot be as easily displaced as the ICCPR and ICESCR suggest.

To this day, federalism remains a subject of vital concern in the United States and Canada. Although the 1937 court-packing crisis gave quietus to constraints on the expansion of federal authority under the Commerce Clause, the U.S. Supreme Court's jurisprudence of late has expressed a re-awakened interest in state autonomy.\(^11\) Meanwhile, it is

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9. Article 50 of the ICCPR, supra note 7, and Article 28 of the ICESCR, supra note 8, are identical and state that "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." ICCPR, supra note 7, art. 50 at 185; ICESCR, supra note 8, art. 28 at 11.

10. Whether the Covenants should include a clause relieving federal governments from responsibility for violations by their constituent states was controversial. Proponents of such a clause maintained that the central government in many federal states would lack the constitutional authority to force their constituent states to comply with international law. Opponents argued that a special rule for federal states would violate the principle of universality and create unequal status in relation to international obligations between federal and unitary states. See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 636-38 (1993) (discussing these tensions).

11. See, e.g., United States v. Morrison, 529 U.S. 598 (2000) (invalidating a federal civil remedy for the victims of gender-motivated violence); see also Printz v. United States, 521 U.S. 898 (1997) (holding that the Brady Act, which directed state law enforcement officers to temporarily participate in the administration of a federally enacted regulatory scheme, offended the very principle of separate state sovereignty); United States v. Lopez, 514 U.S. 549 (1995) (invalidating Congress's Gun-Free School Zones Act of 1990, marking the first time since 1937 that the U.S. Supreme Court invalidated federal legislation under the Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (holding that the federal government cannot compel the
doubtful that relations between the federal government and its provinces could be described as comfortable at any point in Canada's history. Under the smouldering threat of Quebec independence, the irritants of federal union are ever prone to flare. For reasons that might owe as much to the demographics and economic disparities of Confederation as to the special case of Quebec, Canadian federalism is volatile. North of the 49th parallel, the landscape on federal-provincial relations is in constant motion.

On the international front, Canada boasts a shining example in human rights, one that exceeds that of the United States. Yet shadows have darkened an image Canada would like to claim for herself; twice in recent years, international monitors have complained that her compliance with the Covenants has not met expectations. First, in its concluding observations, the Committee on Economic, Social and Cultural Rights (CESCR) expressed displeasure with Canada's lack of progress under the ICESCR. Not long thereafter, the Human Rights Committee (HRC), which oversees the ICCPR, stated dissatisfaction states to enact or administer a federal regulatory program for the disposal of waste generated within their borders).


13. In 1995, a referendum in the province of Quebec almost secured a majority in favour of “independence” from Canada. Not long thereafter, the federal government was concerned enough to pose a package of three questions to the Supreme Court of Canada on the legal status of a unilateral declaration of independence by the province. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (explaining that there is no legal right to secede under the Constitution, but that Quebec and the “rest of Canada” have a constitutional “duty to negotiate” the terms of independence in the event of a clear majority vote by Quebeckers in favour of independence on a clear referendum question). For an introduction to the role of advisory opinions, or “references,” in Canada’s constitutional tradition, see PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 224-29 (4th ed. 1997).

14. See Bell, supra note 6, at 256 (claiming that Canadian leadership contrasts with the United States’ “qualified adherence” to human rights treaties), 290 (arguing that Canada offers the United States a constructive model, which reconciles federalism with due respect for international human rights law).

FEDERALISM

with this country’s performance in a number of areas. At home, advocates of international human rights grumbled that “a combination of ignorance and apathy is probably an accurate description of the attitude of Canadian society as a whole to the international human rights treaty order’s relevance to Canada itself.” Put in muscular terms, this country has needed “a normative kick in the pants for some time,” and “that is exactly what the two committees have given us.”

Against that backdrop, this article explores the relationship between federalism, treaties, and international rights under the Canadian Constitution. A comment on comparative analysis precedes the introduction to that project. Recognizing that the similarities and differences that distinguish federal states offer a distinctive source of insight, the discussion draws American parallels when feasible. Even so, the article’s main objective is to explain how Canada ratified and implemented international instruments in the face of significant restrictions on the national government’s treaty power. In general terms, after analyzing a constitutional jurisprudence that subordinated sovereignty in foreign relations to principles of federalism, the article explores the process by which the constraints of doctrine were overcome. In more detail, then, the plan is as follows: First, it is imperative to outline Canada’s status, historically, as a member of the British Empire and then of the British Commonwealth. Far from serving as a quaint reminder of a bygone era, this account is vital, for it discloses that the Constitution neither granted nor intended Canada to exercise a treaty power in her own name. Continuing with the chronology, the next stage in constitutional history reveals the profound effect gaps in Canada’s sovereignty would have on the relationship between federalism and treaties. Though the analysis focuses on the Canadian jurisprudence, this part of the article closes with a comparison of Attorney-General for Canada v. Attorney-General for Ontario (the Labour


18. Id.

19. See infra note 185 and accompanying text (providing a list of the most significant human rights treaties ratified by Canada).
In each case, the question was whether principles of federalism should prevent the respective national governments from enacting domestic legislation to perform treaty obligations. The Privy Council, which was then Canada’s final court of appeal, and the U.S. Supreme Court, did not answer that question in the same way.

In Canada, constitutional limits on the federal government’s treaty power were answered by the process that is known in this country as “co-operative federalism.” The innovation is an example of the creative but pragmatic solutions that define Canada’s “organic” constitutional tradition. If the implications for international rights are of immediate interest, the broader point is that Canada has survived, often against significant odds, because its institutions of federalism, political as well as constitutional, have responded to exigency. In this context, through a spirit of co-operation between the federal government and the provinces, Canada has been able to ratify and implement a significant number of human rights treaties. To understand that dynamic, the second part of the article addresses two themes. The first introduces co-operative federalism and shows how principles of parliamentary government were adapted to meet the demands of Canadian federalism. The second returns to the concerns outlined above, that Canada has not met expectations in its compliance with international standards; albeit in schematic terms, the discussion considers whether federalism is to blame. At the end, the article offers its own “concluding observations” about the relationship between federalism and international human rights in Canada. Briefly, while conceding that the division of powers between the federal government and provinces is an element, it maintains that federalism is not the greatest hurdle to the enforcement of international entitlements in this country.

20. [1937] A.C. 326 (declaring federal legislation implementing treaty obligations an unconstitutional encroachment on the jurisdiction of the provinces) [hereinafter Labour Conventions Case].
22. See id.; see also Labour Conventions Case, [1937] A.C. 326.
23. See infra notes 214-16 and accompanying text (providing an explanation of the term).
24. See infra note 185.
II. FEDERALISM AND TREATIES UNDER THE CANADIAN CONSTITUTION

A. Revolution and Counter-Revolution

Both were under the auspices of the British Empire, yet America's thirteen colonies and Canada's four founding provinces attained independence at different times through different means. 25 Though much of that history is well-treaded, Seymour Martin Lipset's paradigm of American revolution and Canadian "counter-revolution" is useful because it draws attention to the distinction between a self-governing colony and an independent nation. 26 Two points bear particularly on the history of federalism and treaties: first, Canada did not attain formal independence until 1982, when the Constitution was "patriated," and second, as a result, there are critical omissions in Canada's first Constitution. 27 It might surprise Americans to learn, for instance, that to this day there is no domestic treaty power in the constitutional text. 28

The Dominion of Canada was created in 1867, when the United Kingdom enacted the British North America Act (B.N.A. Act). 29 In this

25. The British North America Act, 1867, 30 & 31 Vict., c. 3 (Eng.) [hereinafter B.N.A. Act] joined four provinces in Confederation: Upper and Lower Canada (which are, respectively, Ontario and Quebec), Nova Scotia and New Brunswick. See id. § 146 (confering the power to admit Newfoundland, Prince Edward Island, and British Columbia into the union); subsequently, federal legislation was enacted, in each case, to admit Manitoba, Saskatchewan and Alberta; Newfoundland was the last province to become a part of Canada in 1949. For a summary of the complex statutory history detailing the admission of provinces who joined after Confederation, see HOGG, supra note 13, at 39-44.

26. SEYMOUR MARTIN LIPSET, CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA 1-18 (Routledge, Chapman & Hall Inc. 1990) (identifying a variety of cultural social and political differences between the two countries, beginning with their distinctive origins in "revolution" and "counter-revolution").

27. Canada Act, 1982, c. 11 (Eng.); see infra notes 50-52 and accompanying text (explaining what "patriation" means and why it is a significant event in Canadian history).

28. But see infra notes 58-60 and accompanying text (describing section 132 of the 1867 Constitution, which is referred to in this paper as the "empire treaty power").

29. See B.N.A. Act, 1867, 30 & 31 Vict., c. 3 (Eng.). Note that the B.N.A. Act was renamed the Constitution Act, 1867 in the Canada Act, 1982, supra note 27, § 53(2). To avoid the awkwardness of employing 1982's official name in an historical analysis,
way, and by ordinary statute of the British Parliament, the colonies
which joined in union attained domestic powers of self-government
within the framework of the Empire. Albeit a key factor in this article,
the lack of authority to engage in foreign relations was not the only
aspect of the new nation's dependent status. For instance, imperial
supremacy permitted the British government to annul Canadian
legislation; such powers of reservation and disallowance, which were
infrequently exercised, nonetheless textualized the hierarchical
relationship between Canada and Great Britain.

Second, the Colonial Laws Validity Act (CLVA) expressly prohibited the colonies from
enacting laws that were repugnant to imperial statutes. In part owing
to this statute, the Judicial Committee of the Privy Council served as
Canada's final court of appeal until 1949. Third, as independence was
not within the contemplation of Britain or Canada at Confederation, the
1867 Constitution failed to provide for its own amendment. Until

this paper preserves references to the B.N.A. Act, where appropriate. For an
explanation of the term "Dominion," see infra note 36.

30. See Hogg, supra note 13, at 47-48 (identifying other elements of dependency,
including Britain's authority to enact statutes extending to Canada, its power to appoint
Canada's Governor General, who is the monarch's representative in Canada, and
Canada's incapacity to legislate with extra-territorial effect).

31. See B.N.A. Act, 1867, 30 & 31 Vict., c. 3, §§ 55-57. In brief, section 56's power
of disallowance authorized the British Parliament to annul Canada's statutes;
meanwhile, reservation under section 55 contemplated that the "Queen's Assent" to
a Bill could be withheld and the legislation "reserved for the 'Signification of the
Queen's Pleasure'". Professor Hogg reports that disallowance only occurred once in
1873, that reservation was invoked twenty-one times but not once after 1878, and that
only six bills were denied the royal assent. See Hogg, supra note 13, at 48 n.4.
Moreover, by 1930 Great Britain expressly agreed not to exercise these powers. See id.

32. 1865, 28 & 29 Vict., c. 63 (Eng.) [hereinafter CLVA]. The CLVA had two
purposes: one was to acknowledge that the self-governing colonies were autonomous
on matters relating to received statute law and common law; a second, though, was to
establish the doctrine of repugnancy, which prohibited local legislatures from enacting
laws that were inconsistent with any imperial statute directly applicable to that
particular colony. See infra notes 45-46 and accompanying text.

33. See infra note 47 and accompanying text.

34. Canada's first Prime Minister and one of its key "Fathers of Confederation,"
Sir John A. Macdonald, stated:

No one can look into futurity and say what will be the destiny of this
country. Changes come over nations and peoples in the course of ages. But,
so far as we can legislate, we provide that for all time to come, the sovereign of Great
Britain shall be the sovereign of British North America.
1982, Canada's Constitution was amended the same way it was created—by ordinary statute of the British parliament. 35

As the world changed and the empire’s lights began to dim, Britain’s “dominions” began to press for sovereign status. 36 In 1926, the Balfour Declaration announced that the United Kingdom and the dominions are “autonomous communities within the British Empire, equal in status” and “in no way subordinate to one another in any aspect of their domestic or external affairs.” 37 Enacted in 1931, the Statute of Westminster 38 granted those countries independence by conferring sovereign power in foreign relations, repealing the CLVA, and declaring that no British statute would apply to a dominion except by express adoption. 39 Oddly, though at her request, a key aspect of Canada's independence was withheld. Repealing the CLVA and declaring that Canada was no longer bound by imperial legislation created an anomaly. The 1867 Constitution was a curiosity because it functioned as a constitutional instrument but was an ordinary statute, subject to amendment as such. 40 By terminating the British Parliament’s authority to legislate for Canada, the Statute of Westminster empowered any or all of the parties to

35. As Hogg indicates, there is no explanation for the text’s failure to include an amending formula. He regards it as an “inescapable conclusion” that Canada’s framers were content for the imperial Parliament to play a role in amending the Constitution. See HOGG, supra note 13, at 5.

36. Section 3 of the 1867 Constitution created “one Dominion in the name of Canada.” B.N.A. Act, 1867, 30 & 31 Vict., c. 3, § 3 (Eng.). As a descriptor, the term “dominion” gained broader currency in the early 1900s to identify self-governing members of the Empire which enjoyed a substantial degree of independence. When the British Empire evolved into the British Commonwealth, those countries became members of the Commonwealth. See HOGG, supra note 13, at 110-11.

37. HOGG, supra note 13, at 51 (emphasis added).

38. 1931, 22 & 23 Geo. 5, c. 4, §§ 2, 4 (Eng.).

39. See id. Those colonies named as “Dominions” under this legislation included Canada, Australia, New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland. See id.

40. But see Chief Justice Marshall’s remarks many years earlier, in comparing a written constitution and an ordinary statute: “Between these alternatives there is no middle ground. The constitution [sic] is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.” Marbury v. Madison, 5 U.S. 137, 177 (1803).
confederation to amend the Constitution unilaterally. To preserve its status as a constitutional text, the Statute of Westminster exempted the 1867 Act from the grant of domestic sovereign status. Though the United Kingdom was prepared to release Canada from the colonial yoke, the federal government and provinces could not agree on an amending formula, with the result that Canada continued to change its Constitution through the British Parliament until 1982.

It is also notable that appeals to the Privy Council were not abolished before 1949. Though imperial judicial jurisdiction predated the 1867 Constitution, nowhere did its written text authorize judicial review to enforce the terms of federal union. If institutional review might have evolved in any case, the CLVA explains why Canada's Constitution was interpreted by the Privy Council. Under section 2 of the CLVA, domestic legislation which infringed the written terms of federalism was ultra vires and subject to invalidation under the doctrine of repugnancy. Despite earlier efforts to abolish Privy Council appeals,

41. In the absence of an amending formula, the 1867 Constitution was protected from alteration by the CLVA, which prohibited Canada's legislatures from enacting statutes inconsistent with applicable British laws, including the 1867 Constitution. The effect of the Statute of Westminster was to destroy the status of imperial statutes, including the B.N.A. Act. See HOGG, supra note 13, at 48.

42. Statute of Westminster, 1931, 22 & 23 Geo. 5, c. 4, § 7(1) (Eng.). Section 7(1) stipulated that "[n]othing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or to any order, rule or regulation made thereunder." Id.

43. At the imperial conference of 1930, which predated the Statute of Westminster, the Prime Ministers of the United Kingdom and all the dominions agreed that the U.K. Parliament would not enact any statute applying to a dominion except at its express request and with its consent. This agreement created a constitutional convention which, in Canada's case, meant that the 1867 Constitution would only be amended by the U.K. Parliament at Canada's request. That process for amending the Constitution prevailed until 1982. See HOGG, supra note 13, at 62.

44. See, e.g., infra notes 76-77 and accompanying text (explaining that the Constitution conferred exclusive powers on the federal and provincial legislatures, and that the federal government was authorized to disallow provincial legislation).

45. Though the Judicial Committee of the Privy Council is, in formal terms, an advisory committee rather than a court, it served as the final court of appeal from colonial courts, including Canada; as such, it decided the constitutionality of federal and provincial legislation under the B.N.A. Act, an imperial statute subject to the CLVA and its doctrine of repugnancy. See infra note 46 and accompanying text.

46. Section 2 of the CLVA, reads, in part: "Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which
the Supreme Court of Canada did not become master of its own house, and its own Constitution, until 1949. In the circumstances, it is of little surprise that the Privy Council's contributions have been hotly debated. Suffice to say, without joining issue on the point, that certain principles were entrenched by the early 1930s, when Canada's newly acquired sovereignty in foreign relations forced the courts to consider the status of treaties under the Constitution's division of powers between the federal government and the provinces.

The fourth and final stage in progress toward independence did not occur until 1982, the year Canada's Constitution was patriated and the Charter of Rights and Freedoms was added. Patriation, or repatriation, is an incident of the first Constitution's failure to set a formula for its own amendment; however, agreeing on and entrenching such a formula at times appeared to pose an impossible challenge for the partners of Canada's federal union. To pare a long story down, the impasse was broken in 1982, when nine of ten provinces agreed to a patriation package, and the federal government proceeded over Quebec's objection. Since then, two attempts to remove that taint on its such law may relate . . . shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." CLVA, 1865, 28 & 29 Vict., c. 3, § 2 (Eng.).

47. See generally HOGG, supra note 13, at 212-14 (providing a brief overview of the history of Privy Council jurisdiction and the process which led to the abolition of appeals in 1949).

48. See, e.g., Alan Cairns, The Judicial Committee and its Critics, 4 CAN. J. OF POL. SC. 301 (1971); see also infra note 164 and accompanying text.

49. See infra notes 121-65 and accompanying text.

50. See Canada Act, 1982, c. 11 (Eng.). The Charter is cited as Part I of the Constitution Act, 1982, and Schedule B to the Canada Act 1982. As for independence though, the British monarch remains Canada's head of state by choice. See B.N.A. Act, 1867, 30 & 31 Vict., c. 3, § 9 (declaring that “[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen”) and Canada Act, 1982, c. 11, § 41 (a) (Eng.) (requiring the unanimous consent of the federal government and all provinces for any constitutional amendment relating to “the office of the Queen”).

51. For a summary of the protracted search for an amending formula, together with an overview of the amending formulae which are now entrenched in the Constitution see HOGG, supra note 13, at 61-101.

52. Former Prime Minister Trudeau's proposal to patriate the Constitution unilaterally was opposed by eight of ten provinces, and was tested in the Supreme Court of Canada. See Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 [hereinafter Patriation Reference] (holding that unilateral patriation was legal but
legitimacy by amending the Constitution domestically failed miserably.\(^\text{53}\) For obvious reasons, patriation and the entrenchment of constitutional rights mark a milestone in Canadian constitutional history.

B. Clothing the Bones of the Constitution\(^\text{54}\)

Whatever disagreements may erupt over its interpretation, there can be no doubt of the treaty power's significance in the U.S. Constitution.\(^\text{55}\) Canada's 1867 text, by contrast, made no provision for a treaty power because neither the British Empire nor its Dominion foresaw the need for one.\(^\text{56}\) The subject of treaties is addressed but once, in a group of sections collected under the heading "Miscellaneous Provisions."\(^\text{57}\) There, section 132 granted the federal government the authority to perform obligations undertaken in treaties between Great Britain and other countries.\(^\text{58}\) In specific terms, the "empire treaty power" authorized the Parliament and Government of Canada to exercise "all unconstitutional in the conventional sense). Subsequent negotiations produced a consensus that excluded the province of Quebec, and that was tested in the courts too. See Re: Objection by Quebec to Resolution to Amend the Constitution, [1982] S.C.R. 793 [hereinafter Quebec Veto Reference] (rejecting Quebec's claim of veto over constitutional amendments). Two well known books documenting this momentous episode in Canadian history are ROY J. ROMANOW ET. AL., CANADA . . . NOTWITHSTANDING: THE MAKING OF THE CONSTITUTION, 1976-1982 (1984) and AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT (Keith G. Banting and Richard Simeon, eds., 1983).

53. See generally PATRICK MONAHAN, MEECH LAKE: THE INSIDE STORY (1991) (providing an insider's account of the Meech Lake Accord's failed attempt to bring Quebec back into Canada's constitutional family); THE CHARLOTTETOWN ACCORD, THE REFERENDUM, AND THE FUTURE OF CANADA (Kenneth McRoberts and Patrick Monahan, eds., 1993) (essay collection discussing the Charlottetown Accord, a comprehensive package of constitutional reforms which were submitted to Canadians in a nationwide referendum).

54. See infra note 112 and accompanying text (citing Lord Haldane's approval of Lord Watson's defence of provincial autonomy).

55. See U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to make treaties, by and with the advice of the Senate, provided two thirds of the Senators present concur); and U.S. CONST. art. VI, cl. 2 (declaring all treaties made under the authority of the United States to be the supreme law of the land).

56. See supra note 27 and accompanying text (explaining that Canada lacked authority over foreign relations and could not enter into treaties in her own name).

57. See Appendix.

58. See id.
Powers necessary or proper for performing the Obligations of [Canada] or of any Province thereof, as Part of the British [Empire], towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.  

On its face, section 132 did not empower the federal government to make treaties in its own name, or to implement such treaties domestically. As a result, when the Statute of Westminster rendered the empire treaty power moribund, Canada was left with yet another textual gap in its Constitution.

Canada's Constitution might be thought of as a hybrid or "mongrel," which borrowed elements from the British and American traditions and then adapted each to local circumstances. Evidence of this ambivalence can be found in the preamble, which states the desire of its founding provinces to be "federally united...under the Crown of the United Kingdom of [Great Britain] and [Ireland], with a Constitution similar in Principle to that of the United Kingdom." Canada adopted Britain's system of parliamentary democracy which is based, in the main, on the unwritten principles and conventions of responsible government.

59. Id. (providing the full text of section 132) (emphasis added).
60. Note that although the Statute of Westminster is part of Canada's Constitution, it conferred independence in foreign relations without creating a treaty power.  See Canada Act, 1982, c. 11, § 52(2)(b) (Eng.).
61. The following exchange during the Parliamentary debates on Confederation illustrates the point:
   Hon. Mr. Seymour—Among all the wild republican theories of our neighbours, they have never proposed to change the Constitution in this manner.
   My hon. friends will say that this proposed change is neither American nor English.
   Several Hon. Members—It is Canadian. (Hear, hear).
   Hon. Mr. Seymour—No, it is neither one nor the other; it is a mongrel Constitution. (Laughter)
Confederation Debates, supra note 34, at 205.
62. Appendix (providing the full text of the Preamble) (emphasis added). The ambivalence is that Canada chose federal union and a written constitution which claimed to emulate that of the United Kingdom, a unitary state with an unwritten constitution.
63. The rules and principles of responsible government represent another gap in the 1867 Constitution. In this, Canada simply adopted the British practice, which is to treat the rules which define relations between the executive and legislative branches as part of the unwritten conventions of government. Other conventions, which relate to principles of federalism, are distinctively Canadian. For a brief description of conventions, see HOGG, supra note 13, at 19-27.
Parliamentary supremacy is the fundamental principle of British constitutionalism, and it meant, historically, that the legislature had the right "to make or unmake any law whatever." As Chief Justice Holt once quipped, "An Act of Parliament can do no wrong, though it may do several things that look pretty odd." In Canada's case, parliamentary sovereignty was diluted, of necessity, by local circumstances; neither imperial supremacy nor a plan for divided jurisdiction could be squared with the concept of one source of legislative sovereignty. Moreover, judicial review of statutes is a contradiction in terms with the principle that Parliament can do no legal wrong. Owing, as well, to the preamble's "similar in Principle" declaration, there is no structured separation of powers as provided in the U.S. Constitution's first three articles, and little in Canada's Constitution about the executive power or the judicial branch. As discussed below, however, the relationship between the executive and legislative branches has immense implications both for the treaty power and the advent of co-operative federalism.

64. For a classic statement of the principle, see A.V. Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-40 (10th ed. 1959) (stating that Parliament may make or unmake any law whatever, and that no body or person is recognized by the law of England as having a right to override or set aside the legislation of Parliament).


66. For a discussion of Imperial oversight, see supra note 31 and accompanying text. As well, under Canada's division of powers between the federal government and the provinces, neither government is supreme because the powers of each are limited by the powers given the other.

67. Though the notion that courts can review and invalidate the actions of the legislature is incompatible with the concept of parliamentary supremacy, judicial review evolved early in Canada's history. See HOGG, supra note 13, at 256. Otherwise, however, legislative sovereignty described relations between individuals and the state; with limited exceptions for language and the status of denominational schools, the 1867 Constitution failed to create constitutional rights. See B.N.A. Act, 1867, 30 & 31 Vict., c. 3, §§ 93, 133 (Eng.).

68. See generally B.N.A. Act 1867, 30 & 31, Vict., c.3, §§ 9-16 (dealing with executive powers and, primarily, with the office of the Governor General, the Queen's representative in Canada); see also B.N.A. Act 1867, 30 & 31 Vict., c.3, §§ 96-101 (addressing the appointment and tenure of judges, and authorizing the establishment of a "General Court of Appeal"). This resulted in the creation of a statutory Supreme Court of Canada in 1875. Supreme and Exchequer Courts Act, 1875, ch. 11, 1875 S.C. (Can.).

69. See the discussion infra on pages 34-43.
The most important provisions in the 1867 Constitution are sections 91 and 92, which divide legislative authority between the federal government and the provinces. There, Canada adopted the American ideas of a written constitution and a federal union, though not without considerable forethought. In doing so, the “Fathers of Confederation” were especially influenced by two historical forces: first and foremost was the existence of significant cultural, religious, and linguistic diversity among the four founding provinces, and second was the U.S. Civil War. As to the latter, a recurring theme in the Confederation Debates was the Fathers’ determination to avoid the glaring defect of the American Constitution—states’ rights or state sovereignty. Though challenged over the years, the dominant vision of Canadian federalism favoured a strong central government with paramount powers, and provinces that would enjoy autonomy, but only on matters of purely local interest. To clarify those arrangements, appease minority populations, and avert the conflicts that had almost torn the United States apart, the framers created two lists of constitutional authority: section 91 of the 1867 Constitution defining the federal government’s legislative powers, and section 92 defining the authority granted to the

70. See Appendix (setting out the texts of sections 91 and 92 in full).
71. See Confederation Debates, supra note 34, at 28 (declaring, per Sir John A. Macdonald, that “[i]t is the fashion now to enlarge on the defects of the Constitution of the United States,” but that Canada had avoided “the defects which time and events have shown to exist in the American Constitution”).
72. See id. (explaining, per Sir John A. Macdonald, that a legislative union or unitary state was rejected in favour of a federal union in order to respect and secure the local autonomy of Quebec’s French-Canadian minority, as well as to alleviate the concerns of the maritime provinces).
73. See id. at 33. The U.S. Constitution was a negative model, because state rights were seen as a “great source of weakness” and “the cause of the disruption of the United States.” Id. As Sir John A. Macdonald explained:

Ever since the [American] union was formed the difficulty of what is called ‘State Rights’ has existed, and this has had much to do in bringing on the present unhappy war in the U.S. . . . They declared by their Constitution that each state was a sovereignty in itself . . . . Here we have adopted a different system.

Id.
74. Thus, Sir John A. Macdonald added, “we have strengthened the General Government. We have given the General legislature all the great subjects of legislation . . . . We have thus avoided the great source of weakness which has been the cause of the disruption of the U.S.” Id.
provinces. In an attempt to foreclose jurisdictional disputes, the texts of sections 91 and 92 specify that each level of government enjoys and exercises exclusive powers.

Even so, the text signals the intent to create a hierarchical relationship between the federal government and the provinces. For instance, somewhat parallel to the imperial power of disallowance discussed above, section 90 granted the federal government the authority to disallow provincial legislation. As for the division of powers, section 91 confers general and enumerated powers on the national government. Separate from and introductory to the powers expressly granted to the federal government is a clause known as the Pogg Clause, which grants Parliament the authority to legislate for the “peace, order, and good government” of Canada. This remarkable source of authority is qualified only by the competing “Classes of Subjects” assigned exclusively to the provinces under section 92 and appears, therefore, to be residuary in nature. In addition, section 91 declares that “for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this section,” the federal government’s authority extends to twenty-nine enumerated headings of power. To conclude, section 91(29), which is also known as the

75. See Appendix (providing the full text of sections 91-92).
76. See id. Thus, the introductory clause of section 91 states that Canada can legislate on “all Matters not coming within the... subjects assigned... exclusively to the... provinces;... [and that] the exclusive [l]egislative [a]uthority of the [federal] Parliament... extends” to certain subjects which are then listed. Appendix (providing text of section 91) (emphasis added). By the same token, the heading which introduces section 92 identifies the exclusive powers of provincial legislatures. See Appendix (providing text of section 2). The section declares that each legislature may “exclusively make [l]aws in relation to” the then listed enumerated categories. Id. (emphasis added).
77. See B.N.A. Act, 1867, 30 & 31 Vict., c. 3 (Eng.). Though the federal government disallowed provincial legislation with some frequency in the early years of Confederation, the power has not been invoked since 1943 and would, today, be viewed as highly inappropriate and perhaps even unconstitutional in the conventional sense. For a brief description see HOGG, supra note 13, at 120-21.
78. See Appendix.
79. Id. The Pogg Clause is also referred to as the Pogg Power and as the general power.
80. See id.
81. Id. Three of section 91’s most significant enumerated powers are: section 91(2) The Regulation of Trade and Commerce; section 91(15) Banking, Incorporation of Banks and the Issue of Paper Money; and section 91(27) The Criminal Law, except the
Deeming Clause, states that any “Matter” included in the enumerated “Classes of Subjects” is deemed not to fall within section 92(16), which grants the provinces jurisdiction over “all Matters of a merely local or private Nature in the Province.”

Canada’s 1867 Constitution is not only a hybrid, but an agreement forged of compromise. As a result, the textual indicia of federal paramountcy are complicated by section 92, which creates a competing list of the exclusive powers allocated to the provinces. While section 92 was intended to prescribe and limit their powers, the list has protected and enhanced the constitutional status of the provinces over time. Albeit considerably shorter and without a direct analogue to the Pogg Clause, section 92’s catalogue of powers offset section 91’s list, and generated a jurisprudence which, over the years, searched to find and maintain equilibrium between the two levels of government. A comparative pause might illustrate the textual significance of the Constitution’s two lists. From a Canadian perspective, it is curious that the U.S. Constitution failed to juxtapose federal and state powers in a way that resembles sections 91 and 92. As the American Constitution’s purpose was to establish national institutions that would be functional as well as legitimate, only those powers expressly delegated to national institutions were removed from the states, with the residue remaining within their jurisdiction.

As with the thirteen U.S. states, the provinces predated Confederation, but federal union likely could not have been achieved without textual assurances of local autonomy. French-speaking and Atlantic Canada sought written promises as a form of self-defence against the populous English-speaking province of Upper Canada,

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Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. See id.

82. Id. at §§ 91(29), 92(16).

83. The two most important headings of power are section 92(13) Property and Civil Rights in the Province, and section 92(16) Generally all Matters of a merely local or private Nature in the Province. See id.

84. See infra notes 95-120 and accompanying text.

85. See Appendix.

86. The Tenth Amendment confirms that: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend X (emphasis added).

87. See supra note 71-72.
which was expected to dominate the national government. In any case, given the Dominion's status within the Empire, the terms of union also needed to prescribe the powers of the provinces. Over time, however, a Constitution that was designed to remedy the perceived defects of the U.S. model would be transformed by a jurisprudence that effectively treated the provinces and federal government as co-equals. Meanwhile, national institutions rose in the United States; in hindsight, the "invisible radiations from the general terms of the Tenth Amendment" provided less protection for state autonomy than section 92's list of exclusive powers has for Canada's provinces.

It could not have been easy for the Privy Council to interpret the 1867 Constitution. Section 91 failed to define the relationship between the federal government's general and enumerated powers. As a matter of statutory construction, interpreting the Pogg Clause literally was impossible, because to read it as a grant of general, unlimited power

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88. See, e.g., B.N.A. Act, 1867, 30 & 31 Vict., c. 3, § 92 (granting the provinces exclusive jurisdiction over sixteen enumerated subjects), § 93 (protecting the status of denominational schools), § 133 (guaranteeing certain language rights) (Eng.); see also B.N.A. Act, 1867, 30 & 31 Vict., c.3, §§ 21-36 (Eng.) (establishing Canada's Senate). Though it has never functioned as such, the Senate was intended to represent and protect the interests of Canada's regions, smaller provinces, and minority populations. See PATRICK MONAHAN, CONSTITUTIONAL LAW 83 (1997).

89. The purpose of the 1867 Constitution was dual—to grant Canada significant powers of self-government within the framework of the Empire and to establish the terms of union of the confederating colonies. From an imperial perspective, the provinces were British colonies too, and their powers and status in relation to Britain also required definition.

90. See infra notes 101-05 and accompanying text.

91. The point is intuitive and arises from this line of reasoning. In Canada, the federal government was intended to be paramount, but the constitutional text generated a significant list of provincial powers which were directly juxtaposed with those granted the federal government. By contrast, as the American text only granted the federal government those powers expressly delegated to it, state powers did not require delineation, for all other authority remained with them. Under the Canadian Constitution, the powers of the federal government and provinces are more symmetrical, and that has given the provinces a stronger textual claim for challenging federal jurisdiction than their American state counterparts can make. See infra notes 183-84 and accompanying text (analyzing this aspect of Missouri v. Holland, 525 U.S. 416 (1920)).

92. Missouri v. Holland, 525 U.S. at 434 (Holmes, J.). But see supra note 11 (acknowledging the rise of antifederalism, both under the Commerce Clause and the Tenth Amendment, in the U.S. Supreme Court's recent jurisprudence).
would render pointless the enumerated clauses which followed. In turn, 
treating the twenty-nine headings as the primary source of federal 
jurisdiction would obfuscate the scope and content of the general 
clause. To complicate the task of constitutional interpretation, reading 
section 91 against section 92 was also problematic, because the two lists, 
which were supposed to grant each level of government exclusive 
jurisdiction, contained substantial elements of overlap. Nor was it 
helpful that the Privy Council treated the Constitution as an ordinary 
statute, which meant that the intent of the framers played little or no 
role in the text’s interpretation.

Three themes in Canada’s history of constitutional jurisprudence 
bear particularly on the fate of a post-Westminster treaty power, and 
each favoured the rise of provincial authority against the federal 
government. First, from the outset, the Privy Council interpreted the 
text in a way that avoided or minimized conflicts between the terms of 
 sections 91 and 92. Though true to the principle of exclusive powers, 
this method of interpretation necessarily compromised the concept of 
paramountcy. The reason is that in cases of overlap, it was impossible 
for federal paramountcy to co-exist with the principle of exclusive 
provincial power. In an early and leading decision, Citizens Insurance Co. 
of Canada v Parsons, Sir Montague Smith pondered a number of 
conflicts between the two lists, and concluded that section 92’s headings 
of authority could not be absorbed in those granted the federal 
government. Far wiser, he decided, that the “two sections be read

93. See, e.g., Citizens Ins. Co. of Can. v. Parsons, [1881-1882] 7 A.C. 96, 108-09 (Sir 
Montague Smith) (providing concrete examples of the text’s failure to create exclusive 
compartments of legislative authority).

94. See, e.g., Bank of Toronto v. Lambe, [1887] A.C. 575, 579 (stating that the 
Lords “must treat the provisions of the Act in question by the same methods of 
construction and exposition they apply to other statutes”). But see Edwards v. Att’y 
in Canada a living tree capable of growth and expansion within its natural limits”).

95. Examples of conflict or overlap include section 91(26) (granting exclusive 
authority over “Marriages and Divorce”), and section 92(12) (granting the provinces 
exclusive jurisdiction over “The Solemnization of Marriage in the Province”); section 
91(3) (authorizing the federal government to raise money “by any mode or system of 
taxation”) and section 91(2) (empowering the provinces to raise revenue through 
“direct Taxation within the Province”). See Appendix.


97. See id. Smith stated that:
together, and the language of one interpreted, and, where necessary, modified by that of the other.\textsuperscript{98} In that way, the Privy Council offered a "reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them."\textsuperscript{99} In principle then, \textit{Citizens Insurance Co. of Canada} held that the integrity of section 92's exclusive powers could only be preserved by reading section 91 restrictively, thereby tempering the principle of paramountcy.\textsuperscript{100}

A second point is that gaps in legislative authority were impossible, both institutionally and ideologically, under the British principle of parliamentary supremacy. Although Canada's sovereignty was qualified by its status within the Empire, the Privy Council made it clear that its domestic legislative authority was unlimited.\textsuperscript{101} Not only was Canada supreme under the terms of the 1867 Constitution, the provinces were as sovereign in their areas of jurisdiction under section 92 as the federal government was under section 91. For instance, in \textit{Hodge v. The Queen},\textsuperscript{102} Sir Barnes Peacock explained that the Constitution conferred powers on the provinces "as plenary and as ample within the limits prescribed by

\textsuperscript{[N]otwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislatures should be absorbed in those given to the dominion parliament.}

\textit{Id.} at 108.
98. \textit{Id.} at 109.
99. \textit{Id.}
100. The precise question to answer in \textit{Citizens Insurance Co. of Canada} was whether provincial insurance legislation was invalid as an encroachment on any one of several enumerated headings in section 91. \textit{See id.} To invalidate provincial legislation that regulated contracts, which were entirely intra-provincial, would have been quite unreasonable on any view of federalism. By the same token, the U.S. government's authority under the Commerce Clause does not extend to purely local matters and is limited to the regulation of interstate commerce or activities having a substantial relation to interstate commerce. \textit{See United States v. Lopez}, 514 U.S. 549 (1995).
101. In \textit{Att'y Gen. of Ontario v. Att'y Gen. for Canada}, [1912] A.C. 571, Earl Loreburn, L.C., stated that under the 1867 Constitution "the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada." \textit{Id.} at 581. Moreover, he added that "[i]t would be subversive of the entire scheme and policy of the Act to assume any point of internal self-government was withheld from Canada." \textit{Id.}
section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.”103 Within section 92, he continued, “the local legislature is supreme.”104 This is significant because far from being subject to the federal government’s paramount powers, the provinces began to emerge in the jurisprudence as its co-equal.105

Provincial autonomy is the third key principle of interpretation to emerge in the period leading up to Canada’s independence in foreign relations. This principle is most frequently associated with Lord Watson and his judgment in the Local Prohibition Case.106 In the ongoing squabbles between the federal government and provinces over jurisdiction to regulate the trade and traffic in liquor, the Local Prohibition Case gave exceptional credence to the vulnerability of provincial autonomy, were the Pogg Clause to be granted an expansive interpretation. There, Lord Watson stressed that the federal government’s general power “ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon [valid] provincial legislation . . . [under] section 92.”107 He continued by indicating that “[t]o attach any other construction to the general power which, in supplement of [the federal government’s] enumerated powers, would . . . not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces.”108 If the language of “peace, order, and good government” is sufficient to transfer matters of local interest to the Dominion, he declared, “there is hardly a subject enumerated in [section] 92” that would be safe from expropriation by section 91.109

103. Id. at 132.
104. Id.
105. See also Liquidators of the Maritime Bank of Can. v. Receiver Gen. of New Brunswick, [1892] A.C. 437 (Lord Watson) (stating that:

[T]he object of the [British North America] Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

Id. at 441 (emphasis added)).
107. Id. at 360.
108. Id. (emphasis added).
109. Id. at 361.
The reality of interpretation under Canada's division of powers is that granting authority to one level of government subtracts it from the other.\textsuperscript{110} Necessarily, then, by enhancing the status of the provinces, the Privy Council constrained the federal government's powers under section 91. Not only did the \textit{Local Prohibition Case} signal that the general power should be strictly confined—Lord Watson also suggested that the Pogg Clause lacked independent substantive content and was, at best, a helpmate to section 91's enumerated powers.\textsuperscript{111}

Lord Haldane, who figured prominently in the next line of Pogg cases, would eulogize that "Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh . . . [that] the provinces were recognized as of equal authority co-ordinate with the Dominion."\textsuperscript{112} In his own right as a Privy Council judge, Lord Haldane had the opportunity, in a 1920s trilogy of cases, to advance the novel proposition that the Pogg Clause only applies in national emergencies.\textsuperscript{113} In each case, the federal government's regulation included activities that were \textit{intra}-provincial in nature.\textsuperscript{114} Speaking through Lord Haldane, the

\textsuperscript{110} This follows from the principles of \textit{exhaustiveness} and \textit{exclusiveness}. As seen above, \textit{exhaustiveness} means either the federal government or the provinces are empowered to legislate. \textit{See supra} text accompanying note 99. Under the theory of \textit{exclusiveness}, either level of government can encroach on the jurisdiction of the other. \textit{See supra} note 76 and accompanying text. In cases of overlap, the courts must choose between the federal government and the provinces; once one level of government is empowered to legislate, the other is precluded, except in cases where a form of concurrent power applies.

\textsuperscript{111} \textit{Local Prohibition Case}, [1896] A.C. at 360-61. At the same time, the \textit{Local Prohibition Case} introduced the concept of "national dimensions," which describes subjects of legislation which, "in their origin local and provincial," subsequently attain "such dimensions as to affect the body politic of the Dominion" as to justify legislation under the general power. \textit{Id. See infra} note 181 and accompanying text.

\textsuperscript{112} Lord Haldane, \textit{The Judicial Committee of the Privy Council}, 1 CAMBRIDGE L. J. 143, 150 (1921-1922) (emphasis added).


\textsuperscript{114} \textit{In Board of Commerce Act}, for instance, by prohibiting hoarding and profiteering from the "necessaries of life" beyond an amount reasonably required for household consumption or business purposes, the federal government attempted to regulate activities that were indisputably local. \textit{See Bd. of Commerce Act}, [1922] 1 A.C. at
Privy Council responded that short of war, pestilence, nationwide intemperance or other forms of dire peril, the Pogg Power was unavailable to the federal government; otherwise section 91’s general clause could swallow up the powers allocated to the provinces. Under this view, the enumerated headings of sections 91 and 92 are exhaustive of federal jurisdiction, except “in a sufficiently great emergency arising out of war”; in such circumstances, the Pogg Clause implies a temporary power “to deal adequately with that emergency for the safety of the Dominion as a whole.” Though it lacks grounding in the opening words of section 91, Lord Haldane’s emergency doctrine persists in Canada’s division of powers jurisprudence.

As noted above, Canada’s Constitution did not equip her, textually, for independence in foreign relations. By 1931, the year the Statute of Westminster was enacted, the Privy Council had established that the provinces were sovereign under section 92, and that section 91 should be read restrictively to protect provincial autonomy. At the time, the status of the Pogg Clause was unclear, because the emergency doctrine sat alongside earlier precedent suggesting that the general power authorized Parliament to fill gaps in the division of powers, and even to address issues which had attained national dimensions. Once the

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248-49. Subsequently, the statute challenged in *Fort Frances* controlled the price and supply of newsprint paper throughout the country and, in doing so, affected activities that were likewise and ordinarily within provincial jurisdiction. See *Fort Frances Pulp & Paper Co.*, [1923] A.C. at 310-11. Finally, the legislation at issue in *Toronto Electric Commissioners* regulated labour disputes, whether the industry was inter- or intra-provincial. See *Toronto Elec. Comm'rs*, [1925] A.C. at 398-401.

115. Compare Bd. of Commerce Act, [1922] A.C. at 200 (suggesting that war or famine would constitute an emergency) with *Toronto Elec. Comm'rs*, [1925] A.C. at 412 (citing the evil of intemperance and an epidemic of pestilence as sufficient to ground the general power).


118. See supra notes 56-60 and accompanying text.

119. See supra note 37 and accompanying text.

120. The gap case is *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (upholding federal authority to regulate federal corporations, in the absence of any enumerated power, under the Pogg Clause); *see also* Russell v. The Queen, [1881] A.C. 829, 841
Statute of Westminster granted Canada independence in foreign relations, the question was whether and where a treaty power would be situated in the division of powers.

C. The Ship of State's Watertight Compartments

Absent an amending formula, it was problematic for Canada simply to add a provision to the Constitution which would create a treaty power. At the same time, there was some logic in devolving the empire treaty power to the federal government, as section 132 authorized the Parliament and government of Canada to perform the treaty obligations, not only of the federal government, but of the provinces as well. But that is not what happened. As with the Pogg Clause's emergency doctrine, the constitutional status of treaties evolved in a trilogy of cases decided in the 1930s: the Aeronautics Reference, the Radio Reference, and the Labour Conventions Case.

Air travel did not exist at the time of Confederation, and therefore constituted a true "gap" in the text's exhaustive allocation of powers between the federal government and the provinces. In the Aeronautics Reference, the Privy Council did not rely on the general power, but chose a different reason for granting legislative authority over aerial navigation to the federal government. Following World War I, a Convention relating to the Regulation of Aerial Navigation was presented at the Paris Peace Conference of 1919, and was duly signed and ratified by the federal government alone.

(suggesting that the federal government alone can deal with questions of general concern on which uniformity of legislation is desirable); Local Prohibition Case, [1896] A.C. 348, 361 (restricting the scope of the Pogg Clause, but also allowing it to encompass matters which are provincial in origin and later attain national dimensions).

122. See B.N.A. Act, 1867, 30 & 31 Vict., c. 3, § 132 (Eng.).
123. Parliamentary democracies in the British tradition draw a distinction between making treaties and performing treaty obligations. See infra notes 204-08 and accompanying text.
allied and associated powers, including Canada. Subsequently, His Majesty ratified the Convention on behalf of the British Empire on June 1, 1922. Pursuant to the Convention, the federal government enacted the Air Board Act, which provided for the general and comprehensive regulation of aerial navigation nationwide. Though the statute appeared to fall within the terms of section 132, its constitutionality was tested in a reference which was ultimately heard by the Privy Council.

In allowing the appeal and upholding federal authority, Lord Sankey noted that "while the Court should be jealous in upholding the Charter of the Provinces," the "real object" of the 1867 Constitution was to give the central government "those high functions and almost sovereign powers by which uniformity of legislation might be secured" on all issues of common concern to the provinces "as members of a constituent whole." Consequently, he rejected the submission, which had been urged on the Privy Council, to carve the subject of air transport up between sections 91 and 92. Instead, he concluded, "[I]t is proper to take a broader view of the matter than to rely on forced analogies or piecemeal analysis." Although the federal government could claim the authority to perform Canada's obligations under the Convention by "piecing together" its enumerated powers under section 91, this was unnecessary because section 132 confers "the full power to do all that is legislatively necessary" for that purpose. Moreover, as to any aspects of air travel not covered by the empire treaty power, Lord Sankey held that the legislative authority "must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada." In his view, aerial navigation was a "class of

129. See id. at 62-64 (explaining the genesis of the Aerial Navigation Convention and the federal government's legislative response).
130. See id. at 63.
131. See id.
132. See id. at 62 (explaining that the Supreme Court of Canada had held that, as enacted, the legislation was unconstitutional); id. at 64 (explaining how the challenge arose).
133. Id. at 71 (emphasis added).
134. See id. at 74.
135. Id.
136. Id. at 77 (mentioning the federal government's exclusive authority under section 91 over (2) The Regulation of Trade and Commerce, (5) Postal Service, and (7) Militia, Military and Naval Service, and Defence); see also Appendix.
subject which has attained such dimensions as to affect the body politic of the Dominion,” and therefore fell within federal jurisdiction.\textsuperscript{138}

The Radio Reference,\textsuperscript{139} which was decided later the same year, added a new wrinkle.\textsuperscript{140} As with air travel, radio communications did not exist in 1867, and likewise, could be regarded as a true gap in the division of powers.\textsuperscript{141} In this case, however, federal jurisdiction could not be claimed under section 132 because Canada attended the International Radiotelegraph Convention of 1927 in her own right, and the Canadian Parliament ratified the resulting Convention in her own name on July 12, 1928.\textsuperscript{142} As a result, the federal government lacked the authority under section 132 to enact legislation implementing its international obligations. Once again however, the Privy Council rejected the suggestion that the power to regulate could be divided up between the federal government and the provinces.\textsuperscript{143}

In upholding federal regulatory authority over radio communications, Viscount Dunedin remarked that the idea that Canada might ever enter into agreements with a foreign power was “quite unthought of in 1867,” and it could hardly be expected, in such a situation, that “such a matter should be dealt with in explicit words either in section 91 or section 92.”\textsuperscript{144} As a matter of logic, he then stated that, “Being, therefore, not mentioned explicitly in either section 91 or section 92, such legislation falls within the general words at the opening of section 91.”\textsuperscript{145} “In fine,” he continued, although the Convention was not a section 132 treaty, “their Lordships think that it comes to the same thing.”\textsuperscript{146} As far as the Privy Council was concerned, the result in the Radio Reference was based on “what may be called the pre-eminent
claims of section 91." Canada as a whole would be answerable to its co-signatories for implementing the obligations undertaken, and it follows that "the Dominion should pass legislation which should apply to all the dwellers in Canada." If the *Aeronautics Reference* rested on section 132 and echoed concerns about the implications for section 92 of enhancing the general power, the *Radio Reference* was remarkably sure-footed in its conclusion that treaties made by Canada in her own name are analogous to empire treaties, and that the power to implement their obligations domestically must belong to the federal government. In combination, the *Aeronautics* and *Radio References* decisions indicated that the Privy Council was prepared to convert section 132's anachronistic terms into a general power, held by the federal government, to make treaties and implement their obligations domestically. In such circumstances, it remains unsettled whether the *Labour Conventions Case*, the third of the treaty decisions, represented a sea change in the Privy Council's conception of Canada's post section 132 status, or is better understood as a retrenchment of principles of federalism. There, in striking federal legislation implementing obligations Canada had undertaken pursuant to the International Labour Organization, Lord Atkin dreamily remarked that, "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure." Shortly put, the *Labour Conventions Case* held that the federal government could not usurp the authority of the provinces by purporting to implement treaty obligations that would otherwise violate the division of powers set out in sections 91 and 92.

To be sure, there was an important distinction between aeronautics and radio, on the one hand, and labour legislation on the other. While each of the former revealed a gap in the division of powers, issues relating to labour and employment fell within the uncontested

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147. *Id.* at 317.

148. *Id.* at 313.

149. *See supra* note 123 (signaling the distinction between the power to enter into a treaty and the power to implement or enforce its terms as a matter of domestic law).


151. *See id.*
jurisdiction of the provinces under section 92(13). Still, to conclude otherwise, Lord Atkin needed to distinguish the Privy Council's earlier, friendly overtures toward a federal treaty power. As for the Aeronautics Reference, he stated that section 132 had been dispositive there, and went on to dismiss Lord Sankey's further remarks about the general power as obiter. Conceding that the Radio Reference "appears to present more difficulty," Lord Atkin claimed that the true ground of the decision was that communications fell under a heading that was expressly excluded from provincial jurisdiction. In summary, he held that "neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusive within the Dominion legislative power."

As a matter of constitutional interpretation, Lord Atkin vigorously rejected the suggestion that an unlimited source of authority under the Pogg Clause could be derived from the empire treaty power. In doing so, he noted that although it was never contemplated that the Dominion might have treaty-making powers, still it was "impossible" to strain section 132 "so as to cover [that] uncontemplated event." For purposes of sections 91 and 92, Lord Atkin went on, "there is no such thing as treaty legislation." Observing that the division of powers is "probably the most essential condition" of Canada's "inter-provincial compact," he concluded that it would "undermine the constitutional safeguards of Provincial constitutional autonomy" were the federal government able to circumvent its conditions by entering into agreements with foreign governments. It followed, in his mind, that

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152. Section 92(13), which grants the provinces jurisdiction over property and civil rights, is roughly analogous to the state police power, in American constitutional jurisprudence, with a subtraction for criminal law which, in Canada, is allocated to the federal government under section 91(27) of the 1867 Constitution. See Appendix (providing full text of section 92).

153. See Labour Conventions Case, [1937] A.C. at 351 (stating that "but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion").

154. See id. (referencing section 92(10)(a) and the Radio Reference's conclusion that federal jurisdiction over broadcasting rested on section 92(10)(a), as well as the Pogg Clause).

155. Id. at 351.

156. Id. at 350.

157. Id.

158. Id. at 351-52.
“no further legislative competence is obtained by Canada from its accession to international status, and the consequent increase in the scope of its executive functions.”\(^\text{159}\) Otherwise, and “merely by making promises to foreign countries,” the Dominion could “clothe itself with legislative authority inconsistent with the constitution which gave it birth.”\(^\text{160}\)

In conclusion, the Privy Council softened the blow to the federal government’s newly acquired foreign relations power by explaining that “[i]t must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations.”\(^\text{161}\) To the contrary, Lord Atkin confirmed that “in totality of its legislative powers... she is fully equipped.”\(^\text{162}\) In fact, he saw little reason why the ship of state could not sail on, exercising its watertight powers through “co-operation between the Dominion and the Provinces.”\(^\text{163}\) Yet what he meant by co-operation was unclear, and from this side of the Atlantic, the \textit{Labour Conventions Case} smacked of paternalism. At least one critic was provoked to declare that “[s]o long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties,” but “once she became a nation in her own right, impotence descended.”\(^\text{164}\)

Despite the passage of time, the \textit{Labour Conventions Case} remains good law.\(^\text{165}\) Unlike radio communications or aeronautics, treaty implementation is not regarded as a gap in the division of powers,\(^\text{166}\)

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\(^{159}\) Id.

\(^{160}\) Id.

\(^{161}\) Id. at 353.

\(^{162}\) Id. at 353-54.

\(^{163}\) Id. at 354.


which confers authority on the federal government under the Pogg Clause. As a result, courts must consider the subject matter of treaties on a case-by-case basis, to determine whether domestic implementation falls under federal or provincial jurisdiction. Today, there are two formal constraints on the treaty power: the first, as discussed in this section, arises from federalism and the division of powers; the second, which concerns relations between the executive and legislative branches in systems of parliamentary democracy, figures prominently in the next part of the article on co-operative federalism. Before introducing that concept, it is worth taking a moment to discuss Missouri v. Holland.\textsuperscript{166}

D. The Tenth Amendment’s Invisible Radiations\textsuperscript{167}

The question of limits on a nation’s treaty powers is bound to arise in federal systems which reserve certain powers to coordinate or subordinate levels of government. It is hardly remarkable, then, to find an analogy to the Labour Conventions Case in the American constitutional jurisprudence. Less predictable, though, is the result in Missouri v. Holland. There, the U.S. Supreme Court’s conclusion that the national government could bind the states to international obligations in areas of state autonomy\textsuperscript{168} is a shock to Canadian sensibilities. This brief comment draws attention to three points in the opinion of Justice Holmes, each of which stands in contrast to Lord Atkin’s reasoning in the Labour Conventions Case.

First, as noted above, the Privy Council resisted the proposition that Canada’s federal government could expand its legislative authority vis-a-vis the provinces by making pacts with other countries.\textsuperscript{169} The issue in Missouri v. Holland, which was decided several years before the Labour Conventions Case, was whether the U.S. Congress could enact legislation to protect migratory birds passing through and present in the territorial jurisdiction of the states.\textsuperscript{170} Mirroring the submission in the Labour Conventions Case that labour relations is within provincial jurisdiction, Missouri based its challenge to the Migratory Birds Treaty Act on the

\begin{itemize}
\item \textsuperscript{166} 252 U.S. 416 (1920).
\item \textsuperscript{167} See id. at 434.
\item \textsuperscript{168} See id. at 419.
\item \textsuperscript{169} See supra notes 158-60 and accompanying text.
\item \textsuperscript{170} See Missouri, 252 U.S. 416.
\end{itemize}
claim that ownership and control of the wild game within its borders was a necessary incident of state sovereignty. Thus, the state maintained that "what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty likewise cannot do." Though the Labour Conventions Case found for the provinces on that point, Justice Holmes had little difficulty rejecting Missouri's submission. In his view, Article VI of the Constitution, and the distinction it draws between federal statutes and treaties, provided a complete answer. Whereas acts of Congress are the supreme law of the land "only when made in pursuance of the Constitution," treaties have that status "when made under the authority of the United States." It followed, then, that "if the treaty is valid, there can be no dispute about the validity of the statute under Article 1, Section 8."

Second, in the Labour Conventions Case, the Privy Council responded cautiously to the suggestion that Canada's federal government should have the authority to address issues of national concern or dimensions. Here too, the U.S. Supreme Court's remarks provide a contrast. On this point, Justice Holmes stated that it should not lightly be assumed that "in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found." Claiming that a "national interest of very nearly the first magnitude is involved," he held that the powers of the nations are especially compelling "in cases where the states individually are incompetent to act"; "but for the treaties and the statute," Justice Holmes concluded, "there might be no birds for any power to deal with." It is worth noting, in passing, that Canada's federal government

171. See id. at 432.
172. Id.
173. See id. at 433.
174. See id.
175. Id. (emphasis added) (stating, also, that "[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way").
176. Id. at 432 (emphasis added).
177. Lord Atkin's response to the argument that Canada would be incompetent to conduct foreign relations was "co-operation" with the provinces. See supra notes 161-63 and accompanying text.
178. Missouri, 252 U.S. at 433 (emphasis added).
179. Id.
180. Id. at 435 (emphasizing the point by remarking, additionally, that "[t]he whole
can legislate on issues of national concern when the provinces are unable to regulate on their own.\textsuperscript{181} At the same time, legislation which seeks to implement treaty obligations does not, for that reason alone, satisfy the national concern criterion.\textsuperscript{182}

Third, support for Missouri’s position could not be found in any textual powers explicitly granted or reserved to the states. Once again, the Court found it significant that the Migratory Birds Treaty Act did not contravene “any prohibitory words to be found in the Constitution.”\textsuperscript{183} In effect, the state had attempted to set “some invisible radiation” from the general terms of the Tenth Amendment up against an Article VI treaty.\textsuperscript{184} Against a founding tradition of state autonomy, \textit{Missouri v. Holland} authorized the U.S. government to enter into treaties that would compromise the powers of the states. Some years later, and against the intent to create a strong federal government, the \textit{Labour Conventions Case} invalidated legislation which implemented treaty obligations, because it violated Canada’s division of powers. Nor does the irony end there. Notwithstanding the \textit{Labour Conventions Case}, Canada has signed, ratified, and implemented an impressive number of international human rights treaties.\textsuperscript{185} Meanwhile, and despite \textit{Missouri

\textit{foundation of the state’s rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state, and in one week a thousand miles away”}.

\textsuperscript{181.} See, e.g., \textit{R. v. Crown Zellerbach of Can.,} [1988] 1 S.C.R. 401 (upholding federal marine pollution legislation, despite its application to provincial waters, in part, because of the “provincial inability” to regulate effectively); see also \textit{Gen. Motors v. City Nat’l Leasing,} [1989] 1 S.C.R. 641 (upholding a federal civil remedy for anti-competitive behaviour, under section 91(2)’s regulation of trade and commerce, in part, because of the need for the national regulation of competition, in the face of the provinces’ inability to regulate effectively).

\textsuperscript{182.} See \textit{van Ert, supra} note 165, at 76.

\textsuperscript{183.} \textit{Missouri,} 252 U.S. at 433.

\textsuperscript{184.} \textit{Id.} at 434.

The record of participation in international human rights treaties is disappointing. Two factors are vital in explaining this point of divergence between Canada and the United States. First is the different status of the two countries at the time their respective constitutions were written, and second, are fundamental distinctions in the texts themselves. In Canada's case, lack of sovereign status on foreign relations enabled principles of federalism favourable to provincial autonomy to be established before the text's failure to create a treaty power became a question of constitutional interpretation. As for the United States, and perhaps only from a Canadian perspective, Missouri v. Holland can be explained by the importance the American constitutional text attaches to the treaty power, in combination with the lack of any express list to specify or concretize the claims of state autonomy. As it stands, and though not without ongoing controversy, the U.S. Supreme Court "authoritatively resolved" the relationship between federalism and treaties in Missouri v. Holland, and "has never shown any inclination, even in recent decisions, to reconsider that landmark decision."


E. Conclusion

This analysis of Canadian constitutionalism has illustrated the enduring impact of dominion status and related it, in the context of treaty-making, to the evolution of federalism. What independence in foreign relations the Statute of Westminster granted, the Privy Council arguably took away through its concept of watertight compartments. How Canada managed to participate in international rights treaties, without violating the sacrosanct compartments of federalism, is the subject of the next section.

III. CO-OPERATIVE FEDERALISM AND HUMAN RIGHTS TREATIES

A. In Totality of Canada’s Legislative Powers

International entitlements arrived in Canada before domestic constitutional rights. Over the years this country has signed and ratified no less than thirty-eight principal human rights treaties and instruments containing significant human rights components. Pursuant to many of those agreements, Canada has submitted compliance reports which catalogue the country’s record under each and every article, in unabridged detail. In addition, Canada has signed the Optional Protocol under the ICCPR which recognizes the HRC’s jurisdiction to receive and consider “communications” from individuals who claim that their country is in violation of their rights under the Covenant.


188. Labour Conventions Case, [1937] A.C. 326, 353-54 (suggesting that federalism is not a constraint on the implementation of treaty obligations, providing the Dominion and provinces co-operated to exercise the totality of Canada’s legislative powers); see also supra note 162 and accompanying text.

189. See supra note 185.

190. Reports are required under the ICCPR, supra note 7, art. 40 at 172, 181, and the ICESCR, supra note 8, art.16-17 at 4, 9. See also, CRC, supra note 185, art. 44 at 59; CAT, supra note 185, art. 24 at 121; CEDAW, supra note 185, art. 18 at 22; CERD, supra note 185, art. 13 at 230.

While its record of compliance with the decisions of such bodies is uneven, Canada has been an active participant in this process.\textsuperscript{192}

On the domestic front, constitutional rights, much like Canada's system of government, also took the form of a hybrid. Modeled partly on the American Bill of Rights, Canada's Charter of Rights and Freedoms also followed the patterns of international and other transnational instruments.\textsuperscript{193} Against that background, international law has played a significant role in the Charter jurisprudence to date.\textsuperscript{194} Far from diminishing as the Charter evolves, the Supreme Court of Canada's reliance on international entitlements continues to rise.\textsuperscript{195}

This section explains how Canada exercised the totality of its legislative powers, in making and implementing rights treaties through a process of cooperation between the federal government and provinces. In this regard, it might appear on first impression that Canada has more than met the expectations of Articles 50 of the ICCPR and 28 of the ISESCR, respectively, which maintain that international entitlements are indifferent to the obstacles of federalism.\textsuperscript{196} As noted in the Introduction, however, her performance under these Covenants is imperfect, and dissatisfaction persists. Without promising


\textsuperscript{193} See BAYESKY, supra note 185, at 33-49 (providing a short account of the ways international sources influenced the Charter's drafting); and WILLIAM A. SCHABAS, INTERNATIONAL HUMAN RIGHTS LAW AND THE CANADIAN CHARTER 11 (2d ed. 1996) (claiming that the "rich influence of international sources in the final version of the Canadian Charter is uncontested").

\textsuperscript{194} In 1996, Schabas reported that Canadian courts had cited international agreements more than 400 times in decisions interpreting the Charter. See SCHABAS, supra note 193, at 13; see also Appendix (providing a list).

\textsuperscript{195} See, e.g., Suresh v. Canada, [2002] 4 D.L.R. 208 (relying on international law in proceedings to deport an alleged terrorist to conclude that refoulement to face a risk of torture violated the Charter's principle of fundamental justice); Spraytech, Société d'arrosage v. Town of Hudson, [2001] 2 S.C.R. 241 (invoking international law's "precautionary principle" to uphold a municipality's pesticide law); Baker v. Minister of Citizenship & Immigration, [1999] 2 S.C.R. 817 (concluding that an administrative decision-maker unlawfully exercised the Minister's discretion in deportation proceedings by failing to consider Canada's unimplemented treaty obligations under the CRC).

\textsuperscript{196} See ICCPR, supra note 7, and ISESCR, supra note 8.
conclusions, this section considers whether, and to what extent, this shortfall can be attributed to federalism.

B. The Most Innovative Dimension of the Confederation Settlement

Co-operative federalism did not have its genesis in the Labour Conventions Case and the constraints it placed on the federal government's treaty power. Albeit in other forms, this process predated the kind of co-operation between levels of government that Lord Atkin called for as Canada’s ship of state sailed into the foreign waters of independent status. By the time international rights treaties emerged many years later, the mechanism which is known as co-operative federalism had evolved. Through a process of co-operation or dialogue between the federal government and the provinces, Canada overcame the Labour Conventions Case constraint and undertook treaty obligations which bridged the constitutional division of powers.

Like so much else in Canadian constitutionalism, co-operative federalism adapted basic principles of parliamentary government to local circumstances. An understanding of this form of co-operation begins with the relationship between the executive and legislative branches in parliamentary democracies. Far from being separated, as in the United States, the two branches are “fused” in such systems of government. In a departure from America’s model of republican government, the political party with a majority of seats in the legislature forms the government in parliamentary systems; meantime, the Prime Minister and Cabinet, who comprise the executive, are elected members of the legislature. More generally, parliamentary government operates under the principles of “responsible government,” two of which are of particular interest here. One is that the Prime Minister and Cabinet control the legislature, as long as that branch expresses “confidence” in

197. See infra note 216 and accompanying text.
198. See Kathy Brock, The End of Executive Federalism?, in NEW TRENDS IN CANADIAN FEDERALISM 95-102 (Françoise Rocher & Miriam Catherine Smith eds., 1995) (organizing the history of co-operative or "executive" federalism into four periods of evolution).
199. See supra note 163 and accompanying text.
200. See generally MONAHAN, supra note 88, at 56-84 (describing the 1867 Constitution's framework of executive and legislative power).
201. See generally id. at 68-76 (discussing responsible government).
the executive by enacting its measures and supporting its policies. The other is that the Prime Minister and Cabinet are in turn responsible, or accountable, to the legislative branch, and can be defeated by a motion of “no confidence.”

In a British system of parliamentary government, the executive and legislative branches perform distinct functions in relation to treaties. Thus there are no constraints on the executive’s power to enter into agreements with foreign countries; the authority to do so is a Crown prerogative which does not require legislative approval for its exercise. Consequently, treaties entered into by the executive bind the state, whether or not the legislature thereafter enacts implementing legislation. As Lord Atkin explained in the Labour Conventions Case, “Parliament will either fulfil or not treaty obligations imposed upon the State by its executive.” To put it another way, while obligations signed by the executive “bind the State as against other contracting parties, Parliament may refuse to perform them and so leave the State in default.”

These principles of parliamentary government apply to Canada, with the qualifications that were necessary to accommodate the division of powers. Because she lacked independence in foreign relations, section 132 of the 1867 Constitution did not empower Canada either to enter into or to implement treaties domestically in her own name. Though the Labour Conventions Case declined to consider whether Canada could claim the authority to make treaties, it is now settled that Parliament can enter into international agreements, as an aspect of the Crown

202. See id.
203. See id. at 71-73.
204. Parliamentary systems do not draw a distinction between executing and non-self-executing treaties, because treaties are not incorporated into domestic law without legislative implementation. See infra notes 205-06 and accompanying text.
205. See van Ert, supra note 165, at 10-12.
206. See id. at 12-13.
207. Labour Conventions Case, [1937] A.C. 326, 348. See van Ert, supra note 165, at 13 (explaining that to treat international conventions as binding domestic law, without legislative implementation, would confer a power to make law on the Crown, contrary to the principles of self-government).
208. Id. See generally ALLAN GOTLIEB, CANADIAN TREATY-MAKING (1968) (providing an overview of treaty powers), and HOGG, supra note 13, at 289-306 (discussing treaties).
209. See supra note 58.
prerogative. As for their implementation, the Privy Council held that the federal government only has the legislative authority to implement treaty obligations that fall within its constitutional jurisdiction. By way of example, covenants and agreements that depend for their implementation on any of section 91's sources of authority, including the Pogg Clause, can be addressed by Parliament, without consultation or negotiation with the provinces.

What the federal legislature cannot do is unilaterally implement international obligations that fall within provincial jurisdiction. As Lord Atkin noted in the Labour Conventions Case, under Canada's scheme of parliamentary federalism the obligations imposed by the treaty would "have to be performed if at all, by several Legislatures," and that meant the federal executive would have to secure the "legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation." For purposes of human rights treaties, the problem is that Canada's provinces are granted exclusive jurisdiction in key areas including health, education, housing, and most aspects of social welfare, which are the subject of many international entitlements. Under Canada's division of powers, their implementation might require federal legislation, provincial action, or some combination of the two. From the perspective of the federal government, there may be little point entering into international agreements that cannot be performed. At the same time, the provinces may choose to comply with international norms, but are not obligated to do so as a matter of domestic constitutional law.

Accordingly, Canada was only able to exercise the "totality" of her sovereign powers in human rights through a process of consultation, co-operation, and negotiation between the federal government and the

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210. See Hogg, supra note 13, at 290 (detailing the instrument that delegated Britain's prerogative powers over foreign affairs to the Governor General of Canada).

211. See, e.g., with reference to section 91(27)'s criminal law power, Criminal Code, R.S.C. ch. 10, § 269.1 (3rd Supp.), § 2 (1980) (Can.) (implementing CAT by making torture a criminal offence in Canada); Criminal Code, R.S.C., ch. 11, §§ 318-19 (1st Supp.), § 1 (Can.) (complying with CERD by criminalizing hate propaganda).

212. Hogg, supra note 13, at 348-49.

213. See, e.g., ICESCR, supra note 8 (guaranteeing the right to work (art. 6); the right to form trade unions (art. 8); rights pertaining to the family (art. 10); the right to an adequate standard of living (art. 11); the right to the highest attainable standard of health (art. 12); the right to education (art. 13); and the right to participate in cultural and other activities (art. 15)).
provinces. More generally, this process describes a relationship between the executive branches of the two levels of government and is also referred to as "executive federalism." The relationship is one of direct negotiation between the "First Ministers" of the federal government and the provinces, and its object is to forge agreement on issues over which neither level of government has exclusive control or jurisdiction. Co-operation attained such importance in Canadian federalism that Donald Smiley was prompted to declare that, "[t]he most innovative dimension of the Confederation settlement was the combination of federalism . . . [and] the Westminster mode of parliamentary responsible government." The synergy between federalism and parliamentary government has two parts. The first, which addressed the demands of federalism, recognized that federal-provincial consultation is necessary, not only because of the interdependence of Canada's two levels of government, but also, because of the "legacy of the provincial rights movement."

The recent history of constitutional reform and patriation provides a compelling example of that dynamic. At the time Canada's federal government threatened to patriate the Constitution unilaterally, eight objecting provinces invoked a "convention" to challenge then Prime Minister Trudeau's proposed plan of action. As seen above, Great Britain had promised not to amend the Constitution without Canada's consent, and by the same token, the domestic practice was that the federal government would not seek amendments to the Constitution without the consent of the provinces. The Patriation Reference asked the

214. Kathy Brock provides a good summary:
[E]xecutive federalism refers to the arrangements used to negotiate agreements between the two levels of government for the provision of programs, services, and the coordination of policies. The results vary from agreements on fiscal arrangements and transfers from the federal government to the provincial governments to the harmonization and similar provision of health services within the provinces, to the reduction of interprovincial trade barriers, to constitutional amendments, and more.

Brock, supra note 198, at 93.

215. HOGG, supra note 13, at 136-42 (describing the process of intergovernmental relations).


217. Brock, supra note 198, at 93.


219. See supra note 43 and accompanying text. While the convention that Great
Supreme Court of Canada to decide whether provincial consent was required, either by law or by constitutional convention, for amendments to the Constitution. Enigmatically, a majority held that the federal government had the formal legal authority to proceed unilaterally, and also, though by a differently constituted majority, that it would be unconstitutional, in the conventional but legally unenforceable sense, for Canada to seek amendments without provincial consent. In the event, negotiations resumed until all provinces but Quebec accepted the patriation package. For purposes of this article, two lessons emerge from the Patriation Reference’s example. The first is that, absent an amending formula, changes to the Constitution required co-operation and near unanimous agreement between the two levels of government. The second is that even though the federal government’s unilateral reforms were “legal,” it was problematic, as a matter of legitimacy, to proceed without the consent of the provinces.

The second element of co-operative federalism, which made it viable as a solution to the obstacles of federalism, is parliamentary government’s fusing of the executive and legislative branches. In effect, the Prime Minister and his provincial counterparts, the Premiers, have “the power and capacity to execute agreements through their legislative assemblies.” According to Smiley, “[t]he most elemental and persisting tradition of the Canadian constitutional system is executive dominance,” both at the center and in the provinces. Because the executive controls the Legislature until the confidence of that branch is lost, the First Ministers could consult and negotiate agreements in the expectation that any accords reached would be approved and

Britain would not amend without Canada’s consent was accepted, any further convention of Canadian federalism on the question of whether provincial consent was constitutionally required, was more controversial.


221. See supra note 218. The Court failed to indicate what degree of provincial consent was constitutionally required and, more specifically, whether the requirement was one of unanimity.

222. See supra note 52.

223. See supra note 53 and accompanying text (explaining subsequent attempts at constitutional reform, which were intended to remedy Quebec’s perceived conclusion, and which failed).

224. Brock, supra note 198, at 94.

225. SMILEY, supra note 216, at 59.
implemented by their respective legislatures. Co-operative federalism evolved, in part, because of the “executive dominance” Smiley identified above.\textsuperscript{226}

Though it belongs to the political realm and is not legally enforceable, the practice of co-operative federalism is ingrained in the Canadian tradition. It describes an ongoing process which runs the gamut from constitutional reform to fiscal arrangements to health care, and can encompass practically any issue of mutual interest to the federal government and the provinces, including the ratification and implementation of human rights treaties.\textsuperscript{227} Hence the declaration that “[i]n 1966, there were almost as many formally scheduled federal-provincial conferences of some kind or other as there were days in the year.”\textsuperscript{228} It is said that “more than any other federation,” Canada relies on intergovernmental negotiation to solve differences between its two levels of government.\textsuperscript{229} A mechanism that can falter has nonetheless been effective in breaking the deadlock of divided jurisdiction under the constitutional text.\textsuperscript{230}

At the level of comparison, it is difficult to imagine how co-operation could work in the United States. Without suggesting that co-operation between the U.S. government and the states is an impossibility, negotiating the terms of federalism works in Canada because the numbers involved, while cumbersome, are at least

\begin{quote}
\textsuperscript{226} But see infra note 230.
\end{quote}

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\textsuperscript{227} If the federal government has the power to set conditions on the expenditure of its money at the local level, the strength of provincial autonomy as a dynamic of Canadian federalism cannot be forgotten. Despite the central government’s power of the purse, the terms of “fiscal federalism” are regularly discussed and negotiated by the federal and provincial parties. See generally, HOGG, supra note 13, at 143-66 (explaining the financial arrangements of Confederation and federal-provincial interdependence).
\end{quote}

\begin{quote}
\textsuperscript{228} WILLIAM R. LEDERMAN, CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS: ESSAYS ON THE CONSTITUTIONAL HISTORY, PUBLIC LAW AND FEDERAL SYSTEM OF CANADA 335 (1981).
\end{quote}

\begin{quote}
\textsuperscript{229} See SMILEY, supra note 216, at 83 (quoting Michael Jenkins).
\end{quote}

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\textsuperscript{230} The Meech Lake Accord (MLA) may be yet the most poignant example of failure. There, the institution of executive federalism negotiated amendments to the Constitution which were intended to ameliorate Quebec’s grievances arising from the 1982 patriation exercise. Adopted unanimously in 1987 by all First Ministers, the MLA failed for want of legislative ratification within the three year period the document prescribed for ratification. See generally, MONAHAN, MEECH LAKE ACCORD: THE INSIDE STORY, supra note 53, at 6 (explaining that one of the reasons for its failure was that “the ‘executive federalism’ model of constitutional change is no longer viable”).
\end{quote}
manageable. As well, there are significant differences in the relationships between executive and legislative power in the two systems of government. In success and in failure, Canada has found ways to maneuver around the constraints of its textual division of powers, including the lack of a treaty power.\textsuperscript{231}

There, the doctrine of watertight compartments between sections 91 and 92 placed constitutional restrictions on the federal government’s authority to undertake international and transnational obligations. Without co-operation and negotiation between the two levels of government, Canada’s participation in human rights treaties would have been severely circumscribed.\textsuperscript{232} Joint participation in international human rights began with the Federal-Provincial Ministerial Conference on Human Rights in 1975, and was followed by the establishment of a permanent mechanism for federal, provincial, and territorial consultation on human rights.\textsuperscript{233} As a result, Canada’s ratification of human rights agreements carries the express agreement of the provinces, as well as of the federal government.\textsuperscript{234} More a byproduct than a primary purpose of co-operative federalism, treaty implementation is an important and a beneficial aspect of it just the same. It is also significant that the spirit of co-operation is not limited to the ratification decision but extends to the requirements of compliance reporting.\textsuperscript{235} There, it is Canada’s practice to submit lengthy reports with submissions, not only from the federal government but the

\begin{footnotes}
\item[231.] See Brock, supra note 198, at 103 (claiming that “[e]xecutive federalism as the engine of the machinery to resolve conflicts between the federal and provincial governments in Canada has sputtered, coughed, and stalled at times, but it has generally seen Canada through turbulent periods”).
\item[232.] See supra notes 211-13 and accompanying text (explaining that the federal government can enter into treaties, but can only implement such treaties in areas of exclusive federal jurisdiction).
\item[233.] See Bell, supra note 6, at 266-70 (explaining the mandate of the Federal-Provincial-Territorial Continuing Committee on Human Rights).
\item[234.] See BAYEFSKY, supra note 185, at 50-53 (describing the process of federal-provincial consultation leading up to the ratification of human rights treaties). For example, Canada acceded to the ICCPR and ICESCR in 1976 “after consulting all the provinces and getting their undertaking to implement the covenants to the extent that they would be within [provincial] jurisdiction.” \textit{Id}. at 51.
\item[235.] See Bell, supra note 6, at 268 (stating that Canada’s reports have been the most complete of any member state, and that the United Nations has referred to them as models for the international community). But see infra note 225 and accompanying text.
\end{footnotes}
provinces and territories as well.236

C. More than Mere Professions of Noble Sentiments237

In many ways, Canada is a model for the ICCPR and ICESCR’s direction that the Covenants’ provisions apply without adjustments for federalism.238 Its leadership is evident in Canada’s record of ratifying human rights agreements and its earnest compliance with reporting requirements. On the positive side, when all levels of government prepare a formal report, there is upward pressure on the protection of rights.239 Few governments want to be singled out as a transgressor of international human rights in a report that will be publicized and evaluated internationally. Still, the question is whether these cooperative efforts amount to “more than mere professions of noble sentiments.”240

Its Fourth Report would have the HRC believe that Canada takes its obligations under the ICCPR very seriously, and that “Canada strives to meet and exceed the human rights standards” of the ICCPR.241 In all modesty, the Report went on in its conclusion to admit that the protection of human rights “demands continuing vigilance and determination” and that, “[a]s much as we have done,” there is “undoubtedly more that could and should be done.”242 Despite Canada’s declarations of respect for the Covenant and its process of review, the HRC did not hesitate to provide a list of deficiencies in her

236. See Bell, supra note 6, at 267 (explaining that the Committee’s mandate provides that each provincial and territorial government is entitled to prepare its own report and to send a representative to meeting’s discussing Canada’s reports).

237. See Schabas, supra note 191, at 8 (commenting that when the ICCPR and ICESCR were entered into force, the obligations Canada had undertaken were “more than mere professions of noble sentiments”).

238. See supra note 9.

239. See Bell, supra note 6, at 286-87 (suggesting that Canada’s “dialectical federalism” grants the provinces a share of the responsibility for human rights, engages them in the creative process of negotiation, adoption, and implementation, and gives than a “meaningful role” in Canada’s human rights leadership).

240. Schabas, supra note 193.

241. Canada’s Fourth Report Under the International Covenant of Civil and Political Rights, on file at THE WAYNE LAW REVIEW.

242. Id.
performance.\footnote{Concluding Observations of HRC, \textit{supra} note 16, at 7-20 (specifying "principal areas of concern and recommendations").} As one commentator remarked, the \textit{Concluding Observations} "broke new ground by focusing on the extent to which increasing poverty among disadvantaged groups in so affluent a country as Canada engages not only social and economic but civil and political rights."\footnote{Bruce Porter, \textit{Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights}, 15 J.L. & SOC. POL'Y 117, 134 (2000).}

The CESCR's review of Canada's third periodic report was yet more negative.\footnote{See Scott, \textit{supra} note 17, at 101-04 (arranging the "common findings," by the HRC and CESCR, of Canada's non-compliance under these headings: inadequacy of remedies in Canada's legal system for violations of rights in the Covenants; indigenous rights; homelessness and poverty in general; and violation of rights to freedom of association of "workfare" recipients; in addition, he provides examples of other findings of non-compliance, respectively, under the ICCPR and the ICESCR).} After complaining that "too many questions failed to receive detailed or specific answers," the CESCR noted a handful of "Positive Aspects" before outlining more than two dozen "Principal Subjects of Concern."\footnote{Concluding Observations of CESCR, \textit{supra} note 15, paras. 2, 14-39.} In its list of "Suggestions and Recommendations," the CESCR stated that "since there is generally in Canada a lack of public awareness about human rights treaty obligations, the general public, public institutions and officers at all levels of Government should be made aware [of the State Party's obligations]."\footnote{Id. para. 58 (emphasis added).}

The CESCR review commanded "considerable attention internationally as well as domestically" because it indicated a "new resolve . . . to hold affluent countries accountable to standards of progressive realization."\footnote{Porter, \textit{supra} note 244, at 130.} At home, the government's reaction, or lack thereof, infuriated advocates of international human rights. According to some, the problem is that Canada refuses to see itself as a violator of rights.\footnote{See id. at 119.} After promoting the treaty monitoring system and urging other countries to comply, Canada responded to criticism by questioning "the credibility of the review."\footnote{Id. at 132.} It is an attitude that for others to condemn Canada for failing to maximize social and economic entitlements is unfair, especially when those who sit in judgment represent countries

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\footnote{243. Concluding Observations of HRC, \textit{supra} note 16, at 7-20 (specifying "principal areas of concern and recommendations").}


\footnote{245. See Scott, \textit{supra} note 17, at 101-04 (arranging the "common findings," by the HRC and CESCR, of Canada's non-compliance under these headings: inadequacy of remedies in Canada's legal system for violations of rights in the Covenants; indigenous rights; homelessness and poverty in general; and violation of rights to freedom of association of "workfare" recipients; in addition, he provides examples of other findings of non-compliance, respectively, under the ICCPR and the ICESCR).}

\footnote{246. Concluding Observations of CESCR, \textit{supra} note 15, paras. 2, 14-39.}

\footnote{247. Id. para. 58 (emphasis added).}

\footnote{248. Porter, \textit{supra} note 244, at 130.}

\footnote{249. See \textit{id.} at 119.}

\footnote{250. \textit{Id.} at 132.}
where dire poverty, or other social ills, are an extreme problem. In blunt terms, "How dare upstart UN bodies (which include, by the way, experts from states with truly bad human rights records) compromise our sovereignty by challenging our self-image of purity on the human rights front?" For Craig Scott, Canada's lack of commitment to the international rule of law can be described as a "mix of disingenuous complacency, inconsistency and hypocrisy." In this he may be right that Canada is quick to trumpet its contributions to the international order, and then to ignore on scrutiny of its own record of compliance. Scott maintains that international rights law has "lived a life outside the spotlight of both legal scrutiny and political debate," which matches "the near invisibility and powerlessness of those members of society who would most benefit from having those rights taken more seriously by our legal and political orders."

It remains unclear whether and to what extent the shortfall, and the bitter disappointment it has generated, can be attributed to federalism. At the level of process, it stands to reason that compliance reporting will be more complicated in federal states. For instance, as noted above, when the provinces included their own reports, the CEDAW complained that the format made Canada's level of compliance difficult to analyze and evaluate. Meanwhile, the HRC expressed its concern that "the delegation was not able to give up-to-date answers or information about compliance with the Covenant by the provincial authorities." If it is difficult to include all levels of government in the compliance process, it would be impossible for the federal government to submit a single report which purported to speak for all of Canada, including its provinces and territories.

As for the substance of compliance, the CESCR's most recent Concluding Observations once again pointed to the problems associated

251. See id.
252. Scott, supra note 17, at 104.
253. Id.
254. Id.
255. See BAYESKY, supra note 185; see also Concluding Observations of the Committee on the Elimination of Discrimination Against Women, 29 Feb. 1007, A/52/38/Rev. 1, para. 318 (complaining that the format of Canada's reports, broken down by provinces, was difficult to analyze and evaluate), para. 338 (suggesting that the next report from Canada integrate the information from federal and provincial levels, article by article).
256. Concluding Observations of HRC, supra note 16, para. 2.
with federalism. There, the Committee stated that, as a matter of record, it heard “ample evidence” that Canada’s “complex federal system presents obstacles to implementing the Covenant in areas of provincial jurisdiction.” Undeterred by those submissions, the CESCR stated its “regret” that unless a Covenant right is protected by the Charter, embodied in federal-provincial agreements, “or incorporated directly into provincial law,” relief would be unavailable where provinces failed to implement the Covenant. In other words, the CESCR was unimpressed by the excuses made in the name of federalism. Accordingly, after noting that Canada’s delegation had emphasized the importance of “political processes” which “were often complex,” the Committee urged the federal government to take “concrete steps” “to ensure that the provinces and territories are” aware of their “obligations under the Covenant” and to ensure that such obligations and entitlements “are enforceable within the provinces and territories.” To emphasize the point, the Committee’s suggestions and recommendations were addressed to all levels of government of Canada.

Because many of the subjects of concern identified and addressed by the HRC and CESCR fall within provincial jurisdiction, the federal government can deflect criticism of Canada’s failure to meet expectations by pointing the finger at the provinces. If Canada’s commitment to the protection of international human rights is imperfect, it is unavoidable that at least some of the deficiencies can be attributed to the Constitution’s division of powers. However, there is more to it than that, and it remains open to question what Canada’s performance would look like under a unitary system, where its progress would not be impeded by the obstacles arising from federalism.

Questions of legitimacy, which are inherent in any implementation or enforcement of international standards, have yet to be fully ventilated in Canada. The fact of ratification binds the signatory to the obligations set out in the treaty. Yet whether those obligations have been performed and can be enforced against a party in breach is another matter. Resistance to international law’s imposition of limits on a

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257. See generally Concluding Observations of CESC, supra note 15, para. 12.
258. Id.
259. Id.
260. Id. at para. 52.
nation's sovereignty is as old as international law itself. In Canada, the question of legitimacy has dual contexts.

As explained above, the executive branch in parliamentary systems has the authority to conclude international agreements without the legislature's participation. Although the Prime Minister and Cabinet can normally count on Parliament to enact whatever laws are necessary to incorporate treaty obligations into domestic law, it is the legislature's choice, as a matter of democratic prerogative, to do so or not. The complication in Canada's case, is the federal system and its division of powers. There, co-operative federalism facilitated a process of consultation with the provinces and territories, which overcame the constitutional obstacles of treaty-making and implementation in the area of human rights, and avoided the prospect of the federal government undertaking obligations without a mandate to do so from the provinces. Even so, the shortfall between Canada's obligations and its performance remains.

A second context for the legitimacy issue has opened up under Canada's Charter of Rights and Freedoms. In interpreting constitutional rights, the Supreme Court of Canada has relied freely on international human rights law. The difficulty, however, is that the jurisprudence does not clearly distinguish between those obligations which are incorporated into domestic law and those which are not. Yet is it risky for the Court to proceed as though ratification is sufficient, in and of itself, to align rights entitlements with Canadian values. It is

261. See supra notes 205-06 and accompanying text.
262. See supra notes 207-08 and accompanying text.
263. See supra notes 243-47 and accompanying text.
264. See supra notes 193-95 and accompanying text.
265. See, e.g., Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, 1051 (suggesting that “[t]he content of Canada’s international human rights obligations is . . . an important indicia of the meaning of the ‘full benefit of the Charter’s protection,’” and suggesting that the Charter should “generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified” (emphasis added)).
266. See, e.g., Baker v. Minister of Citizenship & Immigration, [1999] 2 S.C.R. 817 (invoking the CRC, an unincorporated treaty, in defining the scope of a statutory discretion), and van Ert, supra note 165, at 46-61 (discussing Baker), 48 (stating that “[w]hile the majority denied that they had set aside the implementation requirement, they did not deny having recognized domestic legal consequences arising from the unimplemented treaty”).
problematic for the Court to ratchet a statutory provision or Charter provision up, in reliance on an unincorporated treaty obligation. First, the process of translating an international entitlement, whose content may be general or aspirational, by means that are vetted through the parliamentary process, is bypassed. Second, in doing so, the Court appropriates to itself an authority that it has not exercised traditionally and which is not explicit in the text of the Charter: the power to determine when, how, to what extent and by what means, international obligations will be implemented domestically.

Like the Charter itself, which recently celebrated its twentieth anniversary, the literature on judicial review is as yet young. One aspect of the Supreme Court of Canada’s mandate to enforce the Charter deserves greater attention, and that is its use of international human rights law. It is an element of Charter interpretation, and of the emerging debate about relations between the courts and the legislatures, that should neither be taken for granted nor ignored.

267. As Justice Iacobucci noted in his dissent on this point in Baker, the courts should proceed with caution, lest they “adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch.” Baker, [1999] 2 S.C.R. at 865-66. The risk is that the party invoking international law would be able to achieve indirectly what could not be achieved directly, namely, “to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.”

268. But see id. (stating that in Justice Iacobucci’s view Baker might not have been the same had the case fallen under the Charter and Slights’s interpretive assumption that administrative discretion involving Charter rights must be exercised in accordance with Canada’s international obligations).


270. But see van Ert, supra note 165, at 79-85 (urging an exception to legislative implementation for human rights treaties, on grounds of their universality, suggesting that Canadian courts should forcefully apply the treaty presumption to ratified, but unimplemented, treaties, and claiming that, for Canadian courts not to incorporate conceptions of humanity that are recognized as universal in international law “comes close to saying that Canada is a pariah among nations”).
Canada's record of performance in ratifying and implementing international human rights instruments may not be perfect, but it is at least enviable. Not only has Canada become a State Party to key agreements, she has accepted Optional Protocols which permit her own nationals to seek recourse in international forums, and has been in earnest compliance with the reporting requirements of various instruments. The declaration that Canada “does take her obligations very seriously” can be taken at face value.

The record that has been briefly described above would be noteworthy without the complication of federalism. Yet, the 1867 Constitution failed to create a treaty power, and when Canada achieved sovereignty in foreign relations, the division of powers and Lord Atkin’s “watertight compartments” metaphor almost immediately compromised the federal government's ability to function effectively. Fortunately though, by the time international human rights agreements emerged, Canadian constitutionalism had discovered the need for flexible and pragmatic solutions to overlapping jurisdiction between the federal and provincial governments. In due course, Canada ratified a number of human rights treaties through the process of co-operative federalism. Not only did she overcome the constraints of federalism, her ratification exemplified a spirit of co-operation which meant that all provinces were given an opportunity to participate actively in treaty-making, implementation, and compliance reporting.

Still, Canada cannot claim that she has achieved the goals of the ICCPR and ICESCR. This is why human rights advocates complain about the lack of commitment, both federal and provincial, to the obligations Canada undertook in ratifying these agreements. As noted above, however, there are questions of legitimacy and accountability regarding any contention that Canada has absolute obligations under treaties which are monitored by bodies that are not in any way accountable to the Canadian electorate. Few democracies would ratify agreements that derogated the authority to decide questions of entitlement to an extra-territorial body that is not representative of or accountable to the electorate.

There can be no doubt that federalism continues to affect treaty implementation in Canada. While the provinces may all have agreed to the ICESCR, implementation raises a host of questions that must be
addressed and resolved as a matter of political or democratic choice. At least in Canada, questions about the kind and level of social and economic entitlements provided by the state is a matter of democratic prerogative. It is not surprising to learn, in such circumstances, that different provinces adopt different policies on any number of questions.

Therefore, federalism cuts both ways for international human rights in Canada. Though the division of powers restricted the federal government’s authority, over time the result has been positive because human rights treaties, when signed by Canada, carry the authority and commitment of the provinces as well. Ratification takes place only after federal-provincial consultation, and the provinces also participate in Canada’s periodic reports. Not only does this create upward pressure on the protection of human rights, it generates a process or dialogue which seeks to reconcile international entitlements with the local circumstances of Canadian democracy. If federalism can be blame for Canada’s failure to do better, it is arguable that the division of powers has contributed to a stronger awareness of, and commitment to, the aspirations of international human rights.
THE BRITISH NORTH AMERICA ACT
30 & 31 Vict., c. 3 (Eng.)
(Renamed The Constitution Act, 1867
1982, c. 11, § 53(2) (Eng.))

PREAMBLE

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith.

(29th March, 1867.)

WHEREAS the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Be it therefore enacted and declared by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:
VI. DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects herein-after enumerated; that is to say—

1. Repealed.
2. The Public Debt and Property.
3. The Regulation of Trade and Commerce.
4. Unemployment insurance.
5. The raising of Money by any Mode or System of Taxation.
6. The borrowing of Money on the Public Credit.
7. Postal Service.
8. The Census and Statistics.
13. Quarantine and the Establishment and Maintenance of Marine Hospitals.
14. Sea Coast and Inland Fisheries.
15. Ferries between a Province and any British or Foreign Country, or between Two Provinces.
19. Interest.
20. Legal Tender.
22. Patents of Invention and Discovery.
23. Copyrights.
26. Marriage and Divorce.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures

92. In each Province the Legislature may exclusively make Laws in relation to matters coming within the Classes of Subjects next herein-after enumerated; that is to say—

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals,
Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes—

   a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

   b. Lines of Steam Ships between the Province and any British or Foreign Country:

   c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.
IX. - MISCELLANEOUS PROVISIONS

General.

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.